ORAL ARGUMENT SCHEDULED FOR APRIL 17, 2012

United States Court of Appeals for the District of Columbia Circuit

No. 11-7097

CHEVRON CORPORATION,

Petitioner-Appellee,

vs.

WEINBERG GROUP,

Respondent-Appellant.

On Appeal from the United States District Court for the District of Columbia in Case No.1:11-mc-00409-JMF (Hon. John M. Facciola, U.S. Magistrate Judge)

BRIEF ON BEHALF OF RESPONDENT-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

1. District Court: Petitioner was Chevron Corporation ("Chevron"). Respondent was The Weinberg Group Inc. ("The Weinberg Group"). Interested Parties were Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje.

2. Court of Appeals: Appellants are The Weinberg Group and Interested Parties Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje. Appellee is Chevron. Appellants are not aware of any *amici* or intervenors at this time.

B. Rulings Under Review

The Weinberg Group and Interested Parties Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje appeal from the September 8 and 13, 2011 Orders (A-13 and A-23, respectively) entered by the lower court (Honorable John M. Facciola, U.S.M.J.) compelling The Weinberg Group to produce more than one thousand privileged documents. These final orders concluded the action in the district court.

C. Related Cases

This case has not previously been before this Court. This action arises from a subpoena issued from the district court in connection with the underlying action of *Chevron Corp. v. Donziger*, No. 11-cv-691 (LAK) (S.D.N.Y.), which was subsequently severed to create *Chevron Corp. v. Salazar*, 11-cv-3718 (LAK) (S.D.N.Y.). On September 19, 2011, the U.S. Court of Appeals for the Second Circuit vacated a preliminary injunction entered by the district court in the *Donziger* action and stayed the *Salazar* action pending issuance of a written opinion. *Chevron Corp. v. Naranjo*, Nos. 11-1150-cv(L) & 11-1264-cv(CON), Dkt. 600 (2d Cir. Sept. 19, 2011).

In January 2011, Chevron filed an action in the U.S. District Court for the District of Columbia pursuant to 28 U.S.C. § 1782 seeking much of the same discovery it sought in this action. *In re Application of Chevron Corp.*, No. 11-mc-030 (CKK) (D.D.C.). That action remains pending.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1, The Weinberg Group has no parent companies and no publicly held company has a 10% or greater ownership interest in The Weinberg Group. The Weinberg Group is an international scientific and regulatory consulting firm that assists its clients in the resolution of complex issues surrounding science, management, law, and regulation.

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UA	Addendum of Unpublished Dispositions and Court Filings
Ecuadorian Court	Provincial Court of Justice of Sucumbios, Nueva Loja, Ecuador
Ecuadorian Judgment	Judgment entered by the Ecuadorian Court in *Aguinda v. Chevron Corp.*, No. 002-2003, on February 14, 2011
Francis Order	*Chevron Corp. v. Salazar*, 275 F.R.D. 437 (S.D.N.Y. 2011) (Francis, M.J.).
Injunction Order	*Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011) (Kaplan, J.).

Appellants The Weinberg Group Inc. ("The Weinberg Group") and Interested Parties Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje (the "Ecuadorian Plaintiffs"), two plaintiffs in a related civil action against Chevron Corporation ("Chevron")[1] pending in Lago Agrio, Ecuador (the "Lago Agrio Litigation"), submit this Brief in support of their appeal from the lower court's final Orders compelling the production of more than one thousand privileged and confidential documents on the ground that the crime-fraud exception vitiated any claim of privilege over those documents.

INTRODUCTION

This appeal is but one chapter in Chevron's long-running effort to evade liability for the company's deliberate dumping of billions of gallons of toxic waste into the land and waters of the Ecuadorian Amazon basin. Desperate to avoid paying a multi-billion dollar judgment entered against it by an Ecuadorian trial court in February 2011—a court that Chevron previously argued was the most proper and convenient forum to adjudicate the Ecuadorian Plaintiffs' claims—Chevron is waging a fierce battle on multiple fronts (and multiple continents) to

[1] Chevron merged with Texaco, Inc. in 2001, changed its name to "ChevronTexaco" and, in 2005, changed its name back to "Chevron Corporation." For ease of reference, the various iterations of the company will be referred to herein as "Chevron." *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 390 n.3 (2d Cir. 2011).

extinguish that still non-final judgment. The current locus of Chevron's effort is the U.S. District Court for the Southern District of New York ("S.D.N.Y.").

Two weeks before the Ecuadorian Court entered judgment, Chevron filed suit in the S.D.N.Y. (the "*Salazar* action") seeking a preemptive declaration that any Ecuadorian judgment would be unenforceable anywhere in the world on the grounds that it was rendered by a system that does not provide due process or impartial tribunals and was procured by fraud. Even after the Ecuadorian Court entered judgment, the Ecuadorian Judgment was (and still is) unenforceable pending a hotly contested *de novo* appeal in Ecuador. Nevertheless, the S.D.N.Y. hastily granted Chevron an unprecedented preliminary anti-foreign-suit injunction (the "Injunction") barring any effort to enforce the Ecuadorian Judgment anywhere in the world. On September 19, 2011, however, the U.S. Court of Appeals for the Second Circuit vacated the Injunction "in its entirety" and stayed the *Salazar* action pending issuance of its written opinion.[2]

Before the Second Circuit stayed the *Salazar* action, Chevron engaged in what is best described as a discovery feeding frenzy, serving broad and burdensome subpoenas on twenty-nine non-parties, often seeking the same discovery that it previously sought from those parties pursuant to 28 U.S.C. § 1782 (authorizing discovery in aid of foreign litigation). Following a standard playbook

[2] The Second Circuit has not yet issued its written opinion.

in which it argued that the respondents and the Ecuadorian Plaintiffs waived all claims of privilege on multiple grounds, including the crime-fraud exception, Chevron filed actions in district courts around the country seeking to compel the production of the Ecuadorian Plaintiffs' privileged documents.[3]

Among the many non-parties Chevron targeted for discovery in the *Salazar* action was The Weinberg Group—a well-respected international scientific and regulatory consulting firm headquartered in Washington, D.C.—that served as a non-testifying consulting expert for the Ecuadorian Plaintiffs in the Ecuadorian litigation. The lower court ordered the wholesale disclosure of more than one thousand privileged documents from The Weinberg Group pursuant to the crime-fraud exception. The lower court reached this remarkable conclusion without performing an independent analysis of the record evidence, conducting an *in camera* review of a single document, or making any determination as to whether the privileged documents withheld by The Weinberg Group were created or used "in furtherance of" a crime or fraud. Instead, the lower court erroneously concluded that it was "bound" to apply the crime-fraud exception by the purported "findings" in the S.D.N.Y.'s now-vacated order granting the Injunction ("the

[3] Chevron's aggressive, no-holds-barred approach to discovery recently led a district judge in Oregon to sanction Chevron more than $32,000 for harassing a non-party with discovery demands. *Chevron Corp. v. Salazar*, No. 11-691 (D. Or. Nov. 30, 2011) (opinion provided at UA-182).

Injunction Order"). Even if the Injunction Order was not vacated by the Second Circuit, the lower court's ruling was plainly wrong as a matter of law and fact. The lower court was not "bound" by the Injunction Order and its findings are wholly unsupported by the record. The court's conclusions on the crime-fraud exception also directly conflict with the decisions reached by the Ecuadorian Court (the purported victim of the alleged "fraud on the court") and six district courts that considered and rejected the identical arguments raised by Chevron in this action.

While the history underlying this dispute is long and complex, this appeal is simple and straightforward. Because the lower court improperly applied the law concerning the crime-fraud exception and based its decision on clearly erroneous findings of fact, the lower court's decision must be reversed.

JURISDICTIONAL STATEMENT

This action arises from a subpoena issued from the district court in connection with the underlying action of *Chevron Corp. v. Salazar*, No. 11-cv-691 pending in the S.D.N.Y. Chevron brought this action to compel discovery from The Weinberg Group. The Ecuadorian Plaintiffs and The Weinberg Group appeal from the lower court's September 8 and 13, 2011 Orders compelling The Weinberg Group to produce more than one thousand privileged documents. These orders concluded the action in the lower court. Federal subject matter jurisdiction exists over the underlying action pursuant to 28 U.S.C. § 1332. The Weinberg Group

and the Ecuadorian Plaintiffs timely filed a Notice of Appeal on September 14, 2011. (A-11.) This Court has jurisdiction under 28 U.S.C. § 1291.[4]

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the lower court erred in compelling The Weinberg Group to produce every document it withheld on the basis of privilege on the ground that all claims of privilege were subject to the crime-fraud exception.
    a. Whether the lower court erred in concluding that Chevron had met its burden of establishing a *prima facie* case of a crime or fraud sufficient to pierce the privilege.
    b. Whether the lower court erred in failing to conduct an *in camera* review or otherwise address whether the documents at issue were created or used "in furtherance of" a crime or fraud.
2. Whether the lower court erred as a matter of law or otherwise abused its discretion in ordering the wholesale disclosure of every document that The Weinberg Group had redacted (and logged) to protect confidential information, including social security numbers and other client confidences unrelated to the underlying litigation.

[4] *See In re Sealed Case*, 141 F.3d 337, 339–40 (D.C. Cir. 1998); *see also Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992).

STATEMENT OF THE CASE

On February 1, 2011, two weeks before the Ecuadorian Court entered judgment on the merits of this decades-long saga, Chevron filed suit in the S.D.N.Y. asserting numerous federal and state law causes of action against more than fifty defendants, including the Ecuadorian Plaintiffs and certain of their counsel. Chevron's complaint demands, *inter alia*, (1) a declaration that any Ecuadorian judgment is unenforceable under New York law, and (2) a permanent anti-foreign-suit injunction prohibiting any attempt to enforce the anticipated Ecuadorian judgment anywhere in the world. On February 8, the Honorable Lewis A. Kaplan, U.S.D.J. (S.D.N.Y.) entered temporary restraints and ordered that opposition to Chevron's preliminary injunction motion be submitted by February 11.

On March 7, Judge Kaplan entered a preliminary injunction without first holding an evidentiary hearing, enjoining the Ecuadorian Plaintiffs and others from taking any action anywhere in the world to enforce the Ecuadorian Judgment, and issued an opinion and order (the "Injunction Order") in support of same.[5] Thereafter, Judge Kaplan bifurcated, and ultimately severed, Chevron's declaratory judgment claim (creating the *Salazar* action) and set an aggressive schedule

[5] *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011). The Injunction Order is also included within the Joint Appendix at A-960.

allowing a mere five months for discovery (concluding on September 15), and anticipated trial commencing on November 14. The Ecuadorian Plaintiffs timely appealed the Injunction Order. The Second Circuit stayed certain portions of the Injunction,[6] expedited the appeal, and scheduled oral argument for September 16, 2011.

Chevron served a subpoena *duces tecum* on The Weinberg Group on May 23, 2011. The subpoena was issued from the U.S. District Court for the District of Columbia in connection with the *Salazar* action. The Weinberg Group timely served objections and began a rolling production of documents. On July 15, Chevron initiated this action to compel The Weinberg Group to produce additional documents, including all privileged documents. Thereafter, The Weinberg Group completed its production and also produced its final privilege and redaction logs. On August 8, Chevron again sought to compel the production of documents from The Weinberg Group on several grounds, including that the privileged documents fell within the crime-fraud exception.

[6] On May 12, 2011, the Second Circuit stayed the Injunction insofar as it "restrain[ed] activities other than commencing, prosecuting, or receiving benefit from recognition, enforcement, or pre-judgment seizure or attachment proceedings." (UA-193.)

On September 8, 2011, the district court[7] entered an Order granting Chevron's motion to compel the production of documents from The Weinberg Group, holding that the crime-fraud exception vitiated all privileges and protections over the documents on The Weinberg Group's privilege and redaction logs. (A-13.) The lower court reached this conclusion without an independent analysis of the evidence submitted by the parties and without an *in camera* review of the documents at issue. Instead, the lower court based its decision entirely on (1) the purported "findings" of fraud set forth in the now-vacated Injunction Order and (2) the August 3 decision of Magistrate Judge James C. Francis IV (S.D.N.Y.) (the "Francis Order"), which also relied exclusively on Judge Kaplan's alleged "findings" of fraud in the Injunction Order. The lower court denied The Weinberg Group's and the Ecuadorian Plaintiffs' motion to reconsider this Order on September 13. (A-23.)

On September 14, The Weinberg Group and the Ecuadorian Plaintiffs timely appealed the September 8 and September 13 Orders (A-11) and moved in both the district court and this Court for an emergency stay pending appeal. The lower court denied the motion on September 15. (A-29.) Later that day, this Court also

[7] The parties consented to the assignment of this case to a magistrate judge for all purposes, with any appeal to be taken directly to this Court in the same manner as an appeal from any other judgment of the district court. *Chevron Corp. v. Weinberg Group*, No. 11-mc-409, Dkt. 14 (D.D.C. Aug. 4, 2011).

declined to stay the matter, but instead entered a protective order requiring that Chevron's "use of the assertedly privileged documents be restricted to the underlying litigation pending before [Judge Kaplan in the S.D.N.Y.]." (Dkt. 1329886.) On September 19, 2011, the Second Circuit vacated the Injunction "in its entirety" and stayed the *Salazar* action indefinitely. (A-1648 to A-1649.)

STATEMENT OF FACTS

I. THE *AGUINDA* LITIGATION

A. Chevron's Destruction of the Amazonian Rainforest

From 1964 to 1992, Chevron owned an interest in an approximately 1,500 square-mile concession in Ecuador containing numerous oil fields and hundreds of well-sites.[8] During that time, Chevron carved many hundreds of unlined waste pits into the jungle floor and filled them with toxic drilling muds and other waste. (A-857, A-902 to A-903, A-909 to A-910.) Chevron also deliberately discharged billions of gallons of toxic production water directly into the surface waters of the Amazon basin—four million gallons per day at its height. (A-910 to A-911.) Chevron's reckless operations violated Ecuadorian law and left poison and pollution across a large swath of the Ecuadorian Amazon. (A-805 to A-812, A-909 to A-910.) Toxic chemicals continue to lace the waters that thousands of

[8] *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 285 (S.D.N.Y. 2010).

indigenous persons and farmers depend on for every facet of their lives. (A-850 to A-854, A-910.)

B. Chevron Fights to Litigate in Ecuador

In 1993, the affected communities of the Ecuadorian Amazon brought suit against Chevron in the S.D.N.Y. (the "*Aguinda* Litigation") seeking money damages and "extensive equitable relief to redress contamination of the water supplies and environment."[9] Chevron fought for nine years to dismiss the *Aguinda* Litigation on *forum non conveniens* grounds in favor of litigating in Ecuador. To that end, Chevron made numerous promises to the district court to secure dismissal, including, *inter alia*, consenting to personal jurisdiction in Ecuador and agreeing to satisfy any Ecuadorian judgment subject only to certain defenses to enforcement or recognition.[10] Chevron lauded the fairness and impartiality of the Ecuadorian judicial system—the same system it now claims is corrupt and fails to provide due process. Chevron succeeded in assuaging the district court's concerns

[9] *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002).

[10] *See Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated sub nom.*, *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470, 476 (2d Cir. 2002). "[I]n seeking affirmance of the district court's *forum non conveniens* dismissal, lawyers from ChevronTexaco appeared in [the Second Circuit] and reaffirmed the concessions that Texaco had made in order to secure dismissal of Plaintiffs' complaint. In so doing, ChevronTexaco bound itself to those concessions." *Republic of Ecuador*, 638 F.3d at 390 n.3. Almost immediately after the action was filed in Ecuador, Chevron reneged on its promise and contested jurisdiction in Ecuador. (*See* A-747.)

regarding the impartiality of Ecuador's courts.[11] Indeed, in dismissing the case in favor of litigating in Ecuador, the S.D.N.Y. stated that certain unique features of the Ecuadorian judicial system rendered that forum "more, not less, adequate to the fair determination of justice" and that any implication that the civil law system employed by Ecuador was somehow "'inadequate' . . . is insulting to [Ecuador] and absurd on its face."[12]

II. THE LAGO AGRIO LITIGATION

A. The Litigation Reveals Overwhelming Evidence of Chevron's Liability

In 2003, after dismissal of the *Aguinda* Litigation, the Amazon communities re-filed their claims in the Provincial Court of Justice of Sucumbios, Nueva Loja, Ecuador (the "Ecuadorian Court").[13] Over the next eight years, a vast record evidencing Chevron's contamination was developed in the Lago Agrio Litigation—approximately 215,000 pages of documentary evidence, testimony from dozens of witnesses, roughly 63,000 chemical sampling results produced by laboratories contracted by both parties and court experts, and dozens of judicial

[11] *Aguinda v. Texaco, Inc.*, No. 93-cv-5727, 2000 U.S. Dist. LEXIS 745, at *9 (S.D.N.Y. Jan. 31, 2000).

[12] *Aguinda*, 142 F. Supp. 2d at 543–44 ("[T]he courts of the United States are properly reluctant to assume that the courts of a sister democracy are unable to dispense justice.") (internal citation and quotation marks omitted).

[13] *Republic of Ecuador v. ChevronTexaco Corp.,* 499 F. Supp. 2d 452, 456 (S.D.N.Y. 2007).

field inspections of former Chevron wells and production sites conducted under the oversight of the Ecuadorian Court. (*See* A-620 to A-621.) Sampling and analysis, as well as documentary and testimonial evidence, revealed widespread environmental damage and contamination resulting from Chevron's reckless and substandard oil extraction activities in the concession area.[14] (*Id*.)

B. Chevron Returns to the U.S. and Invokes 28 U.S.C. § 1782 to Collaterally Attack Its Chosen Forum

Faced with this mountain of damning evidence in the Lago Agrio Litigation, Chevron unleashed a strategy to undermine the very Ecuadorian courts it once championed to obtain its *forum non conveniens* dismissal from the S.D.N.Y. It began by filing an AAA arbitration proceeding in an effort to strong-arm the Republic of Ecuador by offering to dismiss the arbitration in exchange for the government's "intervention" in the Lago Agrio Litigation; the action was ultimately stayed by the S.D.N.Y.[15] It then unsuccessfully lobbied Congress to cancel U.S. trade preferences to Ecuador to pressure the Ecuadorian government to quash the Lago Agrio Litigation.[16] Chevron also initiated an arbitration against the

[14] For example, Chevron's own internal environmental audits conducted in the early 1990s revealed extensive contamination at its former oil production facilities. (A-627.)

[15] *See Republic of Ecuador*, 499 F. Supp. 2d at 469.

[16] *See* Michael Isikoff, *Chevron hires lobbyists to squeeze Ecuador in toxic-dumping case. What an Obama win could mean*, Newsweek, July 25, 2008, *available at* http://www.newsweek.com/2008/07/25/a-16-billion-problem.html;

Republic of Ecuador pursuant to the U.S.-Ecuador Bilateral Investment Treaty (the "BIT Arbitration") in which it has asked the private arbitration panel to order the executive branch of the Republic of Ecuador to compel the judiciary to dismiss the Lago Agrio Litigation.[17] But most pertinent to this appeal, Chevron initiated a nationwide campaign, bringing "an extraordinary series of at least 25 requests to obtain discovery from at least 30 different parties pursuant to [28 U.S.C. §] 1782 in United States District Courts throughout the United States."[18]

1. Chevron's 28 U.S.C. § 1782 Proceedings Before Judge Kaplan

Among Chevron's myriad Section 1782 actions, the company (and two of its former attorneys who, at that time, were facing criminal charges in Ecuador) sought the entire litigation file of Steven Donziger—counsel for the Ecuadorian Plaintiffs for the past 18 years—in a proceeding filed in the S.D.N.Y. before the Honorable Lewis A. Kaplan, U.S.D.J. In that action, Judge Kaplan held that Donziger waived all privileges attaching to his litigation file because he failed to

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Members of Congress Urge USTR to Ignore Chevron Petition on Ecuador Legal Case, *available at* http://lindasanchez.house.gov/index.php?option=com_content&task=view&id=490&Itemid=32 (letter from members of Congress describing Chevron's lobbying effort as "little more than extortion").

[17] The Ecuadorian Plaintiffs are not a party to the BIT Arbitration.

[18] *In re Application of Chevron Corp. (Uhl Baron)*, 633 F.3d 153, 159 (3d Cir. 2011); *see also In re Application of Chevron Corp. (Kohn)*, 650 F.3d 276, 282 n.7 (3d Cir. 2011) (describing Chevron's exploitation of Section 1782 as "unique in the annals of American judicial history").

prepare and serve a privilege log spanning 18 years of litigation in only 18 days.[19] The Second Circuit upheld Judge Kaplan's ruling, but premised its affirmance solely on the unique exigency claimed by the criminal defendants (Chevron's lawyers)—namely, their purported need for these documents to defend themselves in an upcoming preliminary criminal hearing in Ecuador.[20] The Second Circuit cautioned that if this exigency dissipated Judge Kaplan should "stay the enforcement of the subpoenas *sua sponte* to permit a more probing . . . review of the parties' various arguments with respect to privilege and relevance."[21] Yet, even after the criminal proceedings in Ecuador were adjourned and later dismissed, Judge Kaplan refused to reconsider his waiver finding or conduct a "more probing" review of the Ecuadorian Plaintiffs' assertions of privilege.

2. Chevron Capitalizes on U.S. Courts' Unfamiliarity with Ecuadorian Law and Procedure to Undermine an Expert Report Submitted in the Lago Agrio Litigation

Armed with massive amounts of the Ecuadorian Plaintiffs' privileged documents, Chevron brought numerous Section 1782 proceedings aimed at manufacturing a "scandal" concerning the relationship between the Ecuadorian Plaintiffs' legal team and an environmental expert named Richard Cabrera, who

[19] *See In re Chevron Corp.*, 749 F. Supp. 2d 170, 184–85 (S.D.N.Y. 2010).

[20] *See Lago Agrio Plaintiffs v. Chevron Corp.*, No. 10-4341-cv, 2010 WL 5151325 (2d Cir. Dec. 15, 2010).

[21] *Id.* at *2.

was appointed by the Ecuadorian Court to provide a report on the economic value of damages (the "Cabrera Report")—one of well over 100 expert reports submitted to the Ecuadorian Court throughout the Lago Agrio Litigation.[22] Cabrera, in addition to personally performing forty-eight separate site inspections, asked—and the Ecuadorian Court so-ordered—that "[t]he Parties could submit documentation to the expert that could be useful to him in the drafting of his report." (A-623.) As authorized under Ecuadorian law, the Ecuadorian Plaintiffs had *ex parte* meetings with Cabrera and—as fully disclosed in a court filing to the Ecuadorian Court—"took advantage of the opportunity to advocate their own findings, conclusions, and valuations before Cabrera for him to consider their potential adoption." (A-631 to A-632.)

Chevron has repeatedly insisted that these *ex parte* communications were improper or nefarious, but the company has not cited a single law or regulation suggesting that *ex parte* communications with experts are improper *under Ecuadorian law*.[23] Chevron submitted reams of evidence to the Ecuadorian Court

[22] *See Uhl Baron*, 633 F.3d at 157–60.

[23] To the contrary, two distinguished Ecuadorian law professors—Dr. Juan Pablo Albán Alencastro and Dr. Farith Ricardo Simon—have confirmed in sworn affidavits that there are no prohibitions against *ex parte* communications and coordination with court appointed experts in Ecuador. (A-668, A-682 to A-683.) Indeed, there is no dispute that Chevron secretly participated in *ex parte* meetings with court-appointed experts. For example, a private Chevron consultant, Engineer Alfredo Guerrero, participated in an *ex parte* "technical planning meeting" with

that it obtained through its Section 1782 campaign attacking the Ecuadorian Plaintiffs' relationship with Cabrera (*see* A-627), but the Ecuadorian Court did not find that these *ex parte* communications were improper (A-793 to A-795).

C. The Parties File Supplemental Submissions Concerning Damages

Approximately two years after Cabrera submitted his report, in an attempt to defuse the Chevron-manufactured controversy regarding the Cabrera Report, the Ecuadorian Plaintiffs petitioned the Ecuadorian Court to allow the parties to file additional, supplemental damages submissions. (A-627 to A-634.) On August 2, 2010, the Ecuadorian Court granted the request and invited both parties to submit the supplemental reports by September 16, 2010. (A-1125 to A-1126.) The Court also reminded the parties that issues related to Cabrera were of limited importance because "the judge is not required to agree with the opinion of the experts." (A-1125.)

In August 2010, with the limited time afforded by the Ecuadorian Court to tackle such broad subject matter, the Ecuadorian Plaintiffs retained The Weinberg Group—a small business specializing in scientific and regulatory consulting—to assist with this submission. The Weinberg Group ultimately retained six experts—

Judicial-Inspector Expert Dr. Marcelo Muñoz Herrería ("Muñoz"), during which it "approved" of a plan and a road map for his expert report. (*See* A-656.) The meeting took place before the Ecuadorian Court appointed Muñoz as Judicial Inspector—thus making it virtually identical to the Ecuadorian Plaintiffs' *ex parte* communications with Cabrera. (*Id.*)

Douglas C. Allen, Lawrence W. Barnthouse, Ph.D, Carlos E. Picone, M.D., Daniel Rourke, Ph.D, Paolo Scardina, Ph.D, and Jonathan S. Shefftz—to draft six separate reports collectively constituting the Ecuadorian Plaintiffs' supplemental damages submission (the "supplemental expert reports").[24] (A-207, A-1183, A-1205, A-1221, UA-195, UA-222.) The Weinberg Group's main duty was to serve as a coordinator for the preparation of these reports. In that capacity, and mindful of the short timeframe within which it was tasked with facilitating the filing of those reports, The Weinberg Group served various functions, such as: providing the experts materials useful to them in drafting their respective reports; informing the experts of basic, non-substantive formatting expectations for the reports, and, in some cases, providing skeletal outlines of potential topics to address; and providing feedback to certain of the experts concerning their respective reports. (*See* A-691 to A-693, at 228:14–230:20; A-703, at 69:12–25; A-706, at 146:2–147:14; A-712, at 65:13–18; A-736, at 54:13–20.)

D. Chevron Struggles to Taint the Six Supplemental Expert Reports

1. Chevron Initiates a Section 1782 Campaign Against the Six Supplemental Experts

Almost immediately after the reports were filed, Chevron initiated yet another Section 1782 campaign—this time aimed at the six supplemental experts

[24] Chevron submitted ten of its own supplemental expert reports to the Ecuadorian Court on September 16, 2010. Subsequent to that, Chevron submitted at least eight rebuttal reports addressing the Ecuadorian Plaintiffs' supplemental expert reports.

retained by The Weinberg Group. In support of its discovery applications to district courts nationwide, Chevron argued, just as it did in the court below, that the supplemental expert reports were fraudulent because they were nothing more than an attempt to "cleanse" or "whitewash" the Cabrera Report.[25] But this argument was disproved by the very discovery Chevron received in those actions. Two of the experts—Drs. Rourke and Picone—testified that they did not rely on the Cabrera Report at all,[26] and two others were openly critical of aspects of the Cabrera Report.[27] The discovery also confirmed what the supplemental expert reports already made clear—that the experts who relied on data from the Cabrera Report did not in any way attempt to "disguise" their reliance on Cabrera.[28] Any

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[25] *See, e.g., Chevron Corp. v. Rourke*, No. 8:10-cv-02989, Dkt. 1, at 2, 11 (D. Md. Oct. 22, 2010).

[26] For example, when Chevron asked Dr. Rourke how he utilized the Cabrera Report in creating his own expert report, he responded, "[I] didn't make any use of . . . the Cabrera Report." Chevron then asked whether Dr. Rourke "ultimately rel[ied] on the Cabrera Report in any way," to which Rourke replied: "No, I did not." (A-692, at 230:8–231:8; *see also* A-737, at 58:3–8, 82:4–20 (deposition testimony of Dr. Picone: "[The Weinberg Group] shared with me the [Cabrera] report and we talked about the report, and . . . I truly felt that I could not rely on any information in the report.").)

[27] A-736 to A-738, at 56:11–58:8, 82:4–20; A-716, at 111:15–20.

[28] *See, e.g.,* A-177, at 268:11–269:8 (deposition testimony of expert Jonathan Shefftz stating: "It's very straightforward what I did. And my report is very explicit. . . . I'm very clear there about my reliance on the Cabrera report. . . . I say I've reviewed the Cabrera report. It's—my reliance upon the Cabrera report is very straightforward there."); *see also* A-731, at 57:10–22; A-704, at 122:1–16.

reliance on the Cabrera Report by the supplemental experts was conspicuously and meticulously disclosed to the Ecuadorian Court.[29]

2. All Six District Courts Refuse to Apply the Crime-Fraud Exception to the Supplemental Experts' Documents

Confronted with the same arguments that Chevron leveled in the lower court here—that the crime fraud exception should vitiate the privileges and protections over the supplemental experts' documents—*none* of the district courts that considered Chevron's Section 1782 applications seeking discovery from the supplemental experts found that the experts had participated (either wittingly or unwittingly) in an alleged fraud on the Ecuadorian Court. *All six* of the district courts declined Chevron's request to find a waiver of privilege on crime-fraud

[29] A-1224 (13-page expert report of Paolo Scardina referencing the Cabrera Report no fewer than 35 times); A-1440 (expert report of Douglas Allen noting "[t]he primary information and data used by [Allen] for this valuation . . . included: (1) the expert reports and associated annexes of Richard Cabrera; (2) technical reports cited in the Cabrera reports"); UA-196 (expert report of Lawrence Barnthouse noting "data and analyses relevant to the second and third steps [to determine compensation for natural resource services losses] are available only from the study of Cabrera (2008). For this reason, the present evaluation relies heavily on Cabrera (2008)"); *see also Chevron Corp. v. Barnthouse*, No. 1:10-mc-00053, Dkt. 36, Order at 13, 21 (S.D. Ohio Nov. 26, 2010) (provided at UA-18) (noting same); UA-223 (expert report of Jonathan Shefftz noting on page one: "I have also reviewed the unjust enrichment calculations in the report prepared by Court-appointed expert Richard Stalin Cabrera Vega ('Cabrera'). . . . Starting with the Cabrera report's engineering figures and cost estimates, I have performed my own financial analysis"); *see also Chevron Corp. v. Shefftz*, No. 10-mc-10352-JTL, Dkt. 45, Memorandum Order at 6 (D. Mass. Dec. 7, 2010) (provided at UA-59) (noting same).

grounds, two of which reached this conclusion after conducting an *in camera* review of the experts' documents.[30]

E. The Ecuadorian Court Enters Judgment Against Chevron, Excludes the Cabrera Report, and Rejects Chevron's Claims of Fraud Relating to the Supplemental Expert Reports

On February 14, 2011, Judge Nicolas Zambrano Lozada, the Presiding Judge of the Ecuadorian Court, rendered a comprehensive, 188-page opinion and judgment (the "Ecuadorian Judgment") finding Chevron liable for the devastating pollution of natural resources. (*See* A-744 to A-933.) Judge Zambrano carefully

[30] *Chevron Corp. v. Allen*, No. 2:10-mc-00091, Dkt. 38, Order at 13 (D. Vt. Dec. 2, 2010) (provided at UA-40) (conducting an *in camera* review of all of Allen's privileged documents and concluding that "[h]aving reviewed the materials the Court is satisfied that no evidence of fraud, false pretenses or undue influence appears"); *Barnthouse*, Order at 21 (UA-38) ("Chevron has presented no evidence or facts from which the Court could reasonably conclude that Mr. Barnthouse had any knowledge of the allegedly fraudulent nature of the Cabrera Report, or that he participated in any ongoing fraud by relying on the Cabrera Report knowing it to be fraudulent or on any other documents or information that would call into question the authorship of his own report. Chevron has not presented any evidence . . . that would show Mr. Barnthouse authored or submitted his report in furtherance of ongoing fraud or crime. Therefore, the crime-fraud exception does not apply in this case."); *Shefftz*, Memorandum Order at 20–21 (UA-78 to UA-79) ("[Chevron] has not shown Respondent engaged in or intended any criminal or fraudulent activity [nor has Chevron] presented evidence that would provide a reasonable basis to believe that this particular Respondent used any lawyer's services to foster a crime or a fraud."); *Chevron Corp. v. Picone*, No. 10-cv-02990, Dkt. 28 (D. Md. Nov. 24, 2010) (provided at UA-1) (declining to apply the crime-fraud exception to the supplemental experts' documents); *Chevron Corp. v. Rourke*, No. 10-cv-02989, Dkt. 34 (D. Md. Nov. 24, 2010) (provided at UA-1) (same); *Chevron Corp. v. Scardina*, No. 10-cv-00549, Dkt. 33 (W.D. Va. Nov. 19, 2010) (provided at UA-10) (same).

considered Chevron's arguments regarding the supposed fraud relating to the Cabrera Report and the supplemental experts. The Ecuadorian Court stated that it had viewed and scrutinized the documents, emails, and video clips submitted by Chevron regarding the Ecuadorian Plaintiffs' alleged contacts with Cabrera and involvement with the Cabrera Report. (A-793 to A-795.) The Ecuadorian Court declined to find that Chevron's purported evidence[31] concerning the Cabrera Report established fraud or improper conduct, but nevertheless granted Chevron's request to exclude the Cabrera Report from the record.[32] (A-795.)

Turning to the supplemental expert reports, the Ecuadorian Court denied Chevron's request to exclude the reports merely because they relied, in part, on the Cabrera Report. (A-801 to A-802.) The Ecuadorian Court opined that Chevron's charge that the Ecuadorian Plaintiffs committed "ideological forgery" by attempting to disguise the Cabrera Report as the work of the supplemental experts was "reckless [and] without merit." (A-802.) The Court held that: (1) no one had

[31] The Ecuadorian Court also acknowledged the Ecuadorian Plaintiffs' challenge to Chevron's video evidence on the grounds that it was deceptively edited and constituted a fraction of the total video evidence in Chevron's possession. (A-794.)

[32] Because the Ecuadorian Court addressed Chevron's claims concerning the Cabrera Report and, as a result, expressly disclaimed any reliance on the report in issuing its judgment, one circuit court recently posited that "the [Ecuadorian] Court's findings [may be] entitled to issue preclusive or claim preclusive effect . . . [because] the [Ecuadorian] Court did not consider the Cabrera Report in issuing its judgment." *Kohn*, 650 F.3d at 293.

attempted to pass these reports off as anything more than the work of experts *hired by the Plaintiffs*; (2) to the extent that these experts reviewed and relied on work found in the Cabrera Report, that *reliance was fully disclosed to the Court*; and (3) Plaintiffs did not purport to deliver anything more than what the court previously requested—a series of economic reference points to aid the Court in its valuation of the damages evidenced elsewhere in the record. (A-801 to A-802.)

Notwithstanding the Ecuadorian Court's findings, the Ecuadorian Judgment itself reflects almost no reliance on these reports by the Court. The Ecuadorian Judgment makes no mention at all of the Scardina, Rourke, or Shefftz reports,[33] and only refers to the Picone report when addressing Chevron's motion to exclude the supplemental expert reports. (A-801.) Only the Barnthouse and Allen reports received substantive mention—but the Court's use of these reports in reaching its damages award appears to be minimal. (A-924 to A-926.) With respect to the Barnthouse report, the court explicitly *rejected* the report's damages valuation. (A-924, A-926.) Soil remediation costs, the primary topic of Allen's report, account for the majority of the overall damages award, but the Ecuadorian Court did not rely on the Allen report to reach that figure. Instead, the Court relied on the

[33] The Ecuadorian Court did not award any damages whatsoever with respect to the topics of the Rourke and Shefftz reports (excess cancer deaths and unjust enrichment, respectively). (A-928 to A-929.)

valuations proposed in the report of a court-appointed expert who performed work in the case at Chevron's request. (A-924 to A-925.)

Both parties appealed and those fully *de novo* appeals are pending before a three-judge panel in Ecuador.[34] The parties also agree that the Ecuadorian Judgment is not final—and thus remains unenforceable—until the Ecuadorian appellate court rules on the appeals.[35]

III. THE *SALAZAR* ACTION

A. Chevron Returns to the S.D.N.Y. to Preemptively Extinguish the Judgment and Judge Kaplan Grants Unprecedented Injunctive Relief

Two weeks before the Ecuadorian Court entered the Ecuadorian Judgment, Chevron brought this 18-year saga full circle, returning to the S.D.N.Y.—the forum it once rejected—in an effort to preemptively extinguish the possibility of judgment enforcement. Chevron's 155-page, nine-count Complaint asserted numerous federal and state law causes of action against more than fifty defendants, including the Ecuadorian Plaintiffs and certain of their counsel. Count Nine of the Complaint demanded a declaration that any Ecuadorian judgment that might issue would be unenforceable under New York law, and a permanent anti-foreign-suit injunction prohibiting any attempt to enforce any judgment anywhere in the world

[34] *See* Transcript of Oral Argument in *Chevron Corp. v. Naranjo*, Tr. at 22:14-25 (2d Cir. Sept. 16, 2011) (provided at UA-81).

[35] *Id.* at 23:12–25:24.

(outside of Ecuador). (A-946.) Chevron simultaneously moved (by *ex parte* Order to Show Cause) for a temporary restraining order and preliminary injunction enjoining the Ecuadorian Plaintiffs and others from "advancing in any way" or "benefitting from" any action or proceeding to enforce the Ecuadorian Judgment outside of Ecuador. (A-950 to A-955.) In support of its request, Chevron submitted a 70-page brief and nearly 600 exhibits totaling almost 7,000 pages. Chevron listed the prior S.D.N.Y. Section 1782 actions as "related cases" and the action was referred to Judge Kaplan.

Judge Kaplan entered the requested temporary restraining order before the Ecuadorian Judgment even existed and provided the Ecuadorian Plaintiffs with only three business days to submit opposition to Chevron's massive preliminary injunction motion. And just three days after Chevron submitted an additional 100 exhibits, including twelve new "expert" declarations, in support of its motion, Judge Kaplan abruptly "closed" the record without prior notice and informed the parties that he would not hold an evidentiary hearing.

On this one-sided record submitted by Chevron, Judge Kaplan concluded that the facts were "essentially undisputed"[36] and that Chevron was likely to

[36] At oral argument before the Second Circuit, the panel noted that "the timelines were pretty tight" for the Ecuadorian Plaintiffs to respond to Chevron's massive submissions and chided Chevron's counsel for suggesting that the evidence was "undisputed" or "uncontroverted." Transcript of Oral Argument in *Chevron Corp. v. Naranjo*, Tr. at 16:2–17:17 (2d Cir. Sept. 16, 2011) (provided at UA-81).

prevail on its declaratory judgment claim because it had "established serious questions" as to whether the Ecuadorian Judgment was (1) procured by fraud, and (2) rendered by a judicial system that fails to provide due process or impartial tribunals.[37] With respect to the Cabrera Report, Judge Kaplan found that the Ecuadorian Plaintiffs' counsel "orchestrated a scheme in which [their consulting expert] ghost-wrote much or all of Cabrera's supposedly independent damages assessment without, as far as the record discloses, notifying the Ecuadorian court of its involvement."[38] This, Judge Kaplan held, constituted "ample evidence of fraud in the Ecuadorian proceedings."[39] With regard to the supplemental expert reports, Judge Kaplan accepted Chevron's assertion that those reports were part of "a scheme to 'cleanse' the Cabrera report."[40] Judge Kaplan afforded no deference to the conclusion reached by the Ecuadorian Court—on essentially the identical evidence—that there was nothing "fraudulent" about the supplemental expert

[37] *Donziger*, 768 F. Supp. 2d at 596–97, 633–37.

[38] *Id.* at 636.

[39] *Id.* It is important to note that the Cabrera Report "controversy" is limited to the *authorship* of the report and whether it should rightfully have been viewed as a party expert report rather than that of a court-appointed expert. Neither Judge Kaplan nor any other court has ever held that the *science* embodied in the Cabrera Report (most of which was drawn directly from the Ecuadorian Court record) was somehow fraudulent.

[40] *Id.*

reports.[41] Judge Kaplan did not make any findings of fact or conclusions of law regarding whether the crime-fraud exception required the disclosure of any documents held by The Weinberg Group or any of the supplemental experts relating to the preparation and submission of the supplemental expert reports.

Certain of the defendants—including the Ecuadorian Plaintiffs—timely appealed the Injunction Order. The Second Circuit stayed certain portions of the Injunction, expedited the appeal, and scheduled oral argument for September 16, 2011. (UA-193.)

B. Magistrate Judge Francis Follows the Injunction Order

Before the Second Circuit vacated the Injunction in its entirety and stayed the *Salazar* action indefinitely, *see infra* Section III.D, Chevron served subpoenas on twenty-nine non-parties—many of which were duplicative of discovery previously sought by Chevron in its Section 1782 actions. Judge Kaplan referred several S.D.N.Y. discovery disputes to Magistrate Judge James C. Francis IV,

[41] At the September 16, 2011 oral argument, the Second Circuit appeared to question Judge Kaplan's unwillingness to extend comity to the Ecuadorian Court's rejection of Chevron's numerous fraud arguments, stating: "Don't we have some sense of comity to the legitimacy of the process? Are we just to say to the people of Ecuador you're all corrupt and your process doesn't matter to the United States or a United States federal judge is not going to hear anything about the legitimacy of your process, a process, by the way, which [Chevron] invoked?" Transcript of Oral Argument in *Chevron Corp. v. Naranjo*, Tr. at 52:19–53:3 (2d Cir. Sept. 16, 2011) (provided at UA-81).

including Chevron's motion to compel three of the Ecuadorian Plaintiffs' current and former attorneys to produce thousands of privileged documents.

In the Francis Order—entered on August 3, 2011—Magistrate Judge Francis found that the Injunction Order "identified three specific examples of fraud: (1) forging a report submitted under the name of Dr. Calmbacher; (2) ghost-writing much or all of the expert report submitted by Mr. Cabrera; and (3) 'undert[aking] a scheme to 'cleanse' the Cabrera report.'"[42] Relying *exclusively* on those "findings," Magistrate Judge Francis concluded that Chevron had "carried its burden of demonstrating that the crime-fraud exception applies to the creation of" the supplemental expert reports.[43] Magistrate Judge Francis then directed the attorneys to produce to him a substantial number of documents "for *in camera* review to determine whether they in fact fall under the crime-fraud exception as detailed [in his order]."[44] Both the Ecuadorian Plaintiffs and Chevron filed Rule 72 objections and Judge Kaplan stayed compliance with the Francis Order pending resolution of the objections. The objections remain unresolved—and the Francis Order remains stayed—as a result of the Second Circuit's stay of proceedings in the *Salazar* action. *See infra* Section III.D.

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[42] *Chevron Corp. v. Salazar*, 275 F.R.D. 437, 454 (S.D.N.Y. 2011) (quoting *Donziger*, 768 F. Supp. 2d at 636).

[43] *Id.* at 455.

[44] *Id.*

C. Chevron Seeks Discovery from The Weinberg Group and the District Court Adopts the Injunction and Francis Orders in Whole Cloth

On May 23, 2011, Chevron served on The Weinberg Group a subpoena *duces tecum*, issued from the U.S. District Court for the District of Columbia in connection with the *Salazar* action. (A-253.) Chevron sought a broad range of documents relating to The Weinberg Group's work for the Ecuadorian Plaintiffs in the Lago Agrio Litigation, notwithstanding a pending Section 1782 action against The Weinberg Group seeking essentially the same documents.[45] The Weinberg Group served objections, produced more than one thousand responsive documents (some of which it redacted to protect privileged and/or non-responsive, confidential information), and withheld documents on the basis of the attorney-client and work-product privileges. Chevron initiated the instant action seeking an order compelling The Weinberg Group to produce unredacted copies of every document on its privilege and redaction logs. Chevron argued, *inter alia*, that the crime-fraud exception vitiated any claim of privilege that may have otherwise protected the documents from disclosure.

Concluding that it was bound by the law of the case doctrine to adopt the "findings" in the Injunction Order, as well as the Francis Order (which itself merely adopted the Injunction Order's "findings"), the lower court held that "The

[45] *See Chevron Corp. v. Weinberg Group*, No. 11-mc-030 (D.D.C.).

Weinberg Group's role in the preparation and submission of the cleansing reports was clearly a part of . . . an alleged fraud [on the Ecuadorian Court] and [thus] its claim of privilege cannot survive." (A-17.) The lower court defined the purported fraud as "the enterprise of replacing the discredited Cabrera report with a new one while disguising the experts' reliance on the Cabrera report." (A-19.) The lower court did not (1) conduct an independent analysis of the evidence submitted or authority cited by the parties; (2) examine a single document *in camera*; (3) make any findings as to whether any or all of the documents ordered to be produced were created or used "in furtherance" of this purported fraud on the Ecuadorian Court; or (4) explain why The Weinberg Group was not entitled to withhold non-responsive, confidential information from Chevron, including sensitive personal information and privileged information relating to work that The Weinberg Group performed in a completely unrelated case on behalf of other clients. The Weinberg Group and the Ecuadorian Plaintiffs sought reconsideration and the lower court denied the motion. (A-23.)

D. The Second Circuit Vacates the Injunction and Stays Proceedings

The validity of the lower court's Orders was thrown into doubt within days of their issuance. Just one business day after oral argument on the Ecuadorian Plaintiffs' appeal from the Injunction Order, the Second Circuit entered a Summary Order vacating the Injunction "in its entirety" and staying all

proceedings in the *Salazar* action pending the issuance of a written decision. (A-1648 to A-1649.)

SUMMARY OF THE ARGUMENT

The lower court's Orders compelling The Weinberg Group to produce more than one thousand privileged and confidential documents must be reversed for at least three reasons.

First, Chevron failed to meet its burden of establishing a *prima facie* showing of a crime or fraud sufficient to invoke the crime-fraud exception. The lower court's conclusion that the supplemental experts—and thus The Weinberg Group—defrauded the Ecuadorian Court by "disguising" their reliance on the Cabrera Report is factually incorrect. The record evidence plainly demonstrates that only four of the six supplemental experts relied on the Cabrera Report, and those that did disclosed their reliance to the Ecuadorian Court in an entirely conspicuous and transparent manner. The district court's conclusion that it was bound to defer to "findings" on this point in the now-vacated Injunction Order was wrong as a matter of law. If deference was due here, it was to the contrary findings of the Ecuadorian Court (the ostensible victim of the alleged fraud), which concluded that there was nothing fraudulent about the supplemental expert reports and that any reliance on the Cabrera Report was fully disclosed, and to the six

district courts that considered this identical issue in discovery actions initiated against the supplemental experts.

Second, the lower court erred as a matter of law by ordering the wholesale disclosure of every document withheld by The Weinberg Group without reviewing a single document *in camera* or undertaking *any* analysis to determine whether the documents were created or used *in furtherance of* the purported fraud. Evidence of an alleged fraud alone is not sufficient to invoke the crime-fraud exception; the exception applies only when the documents or communications at issue were generated in furtherance of a crime or fraud. The district court's failure to consider this mandatory element of the crime-fraud exception also requires reversal.

Third, the lower court erred in compelling The Weinberg Group to produce unredacted copies of documents that it had properly redacted to preserve non-responsive confidential information. The Weinberg Group even provided Chevron with a color-coded log explaining the reasons for the various redactions, though no such log was required. The law is clear that Chevron is not entitled to confidential, personal, or otherwise irrelevant information, and The Weinberg Group's redaction of such documents was entirely appropriate. The lower court's decision to compel disclosure of this non-responsive, confidential information was wrong as a matter of law and must be reversed.

STANDARD OF REVIEW

A district court's finding of waiver of privilege by application of the crime-fraud exception to the attorney-client and work-product privileges is generally reviewed for abuse of discretion,[46] but issues of law underlying the application of the crime-fraud exception are reviewed *de novo*.[47] A district court abuses its discretion when it makes an error of law or an improper application of law to fact.[48] Findings of fact are reviewed for clear error.[49]

[46] *In re Sealed Case*, 754 F.2d 395, 399–400 (D.C. Cir. 1985).

[47] *In re Sealed Case*, 223 F.3d 775, 778–79 (D.C. Cir. 2000) ("Here the application of the crime fraud exception turns on a pure question of law, which we resolve de novo."); *In re Grand Jury Proceeding Impounded*, 241 F.3d 308, 312 (3d Cir. 2001) (vacating and remanding district court holding, because courts "exercise de novo review over the legal issues underlying the application of the crime-fraud exception to the attorney-client privilege").

[48] *Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law."); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.").

[49] *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003).

ARGUMENT

I. THE DISTRICT COURT ERRED IN COMPELLING DISCLOSURE OF EVERY PRIVILEGED DOCUMENT WITHHELD BY THE WEINBERG GROUP ON THE GROUND THAT THE DOCUMENTS FALL WITHIN THE CRIME-FRAUD EXCEPTION

The Weinberg Group's privilege log invokes both the attorney-client and work-product privileges. (A-283.) As the lower court stated, "[t]here is no dispute that in providing the assistance it did to the lawyers in the [Lago Agrio L]itigation, the Weinberg Group functioned as those lawyers' agents and therefore can claim the work product privilege."[50] Nor is there any dispute that a non-testifying consulting expert such as The Weinberg Group may invoke the attorney-client privilege.[51] To pierce these privileges based on the crime-fraud exception, Chevron bore the heavy burden of establishing *both* (1) "a prima facie showing of

[50] A-21; *see also* Fed. R. Civ. P. 26(b)(3); Fed. R. Civ. P. 26(b)(4)(D); *United States v. Nobles*, 422 U.S. 225, 238–39 (1975) (extending work-product protection to the work product of agents for a client's attorney).

[51] *See United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007) (noting that the attorney-client privilege extends to communications between the client's "lawyer and the lawyer's representative"); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) ("The privilege also is held to cover communications made to certain agents of an attorney . . . hired to assist in the rendition of legal services."); *United States Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 161 (E.D.N.Y. 1994) (stating that the attorney-client privilege "is now recognized as extending to representatives of the attorney, such as . . . non-testifying experts").

a [crime or fraud] sufficiently serious to defeat the privilege,"[52] *and* (2) that the documents or communications were made "with an intent to further" the purported crime or fraud.[53]

Chevron failed to meet its burden as to either element and the district court's contrary decision should be reversed for several independent reasons. The lower court's conclusion that it was *required* by Judge Kaplan's purported "findings" in the Injunction Order to conclude that the supplemental expert reports coordinated by The Weinberg Group constituted a "fraud" on the Ecuadorian Court is incorrect as a matter of law and fact. Not only has the Injunction Order now been vacated by the Second Circuit, but the law did not *compel* the lower court to adopt Judge Kaplan's supposed findings. Moreover, the lower court's finding of fraud on the Ecuadorian Court (supposedly compelled by Judge Kaplan's findings) is wholly unsupported by the record. Nothing in the record even remotely suggests that the supplemental expert reports "disguis[ed]" their reliance on the Cabrera Report or

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[52] *In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007) (internal quotation marks omitted).

[53] *See United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989) (Ginsburg, Ruth B., J.). To establish the crime-fraud exception to communications protected by the attorney-client privilege, courts must determine whether a crime or fraud was actually carried out and also whether an otherwise privileged communication was made "with the intent to further [that] unlawful or fraudulent act." *In re Sealed Case*, 223 F.3d at 778. For work product, the question is whether the "general purpose" in consulting counsel was to commit a crime or fraud. *Id.* Although the tests are framed slightly different, the two-step approach is essentially identical.

otherwise defrauded the Ecuadorian Court. The lower court then compounded these errors by failing to make any findings or even address the second mandatory element of the crime-fraud analysis—ordering The Weinberg Group to produce all of its privileged documents without considering whether the documents were used or created *in furtherance of* the purported fraud.

A. The District Court Erred in Concluding that Chevron Met Its Burden of Establishing a *Prima Facie* Showing of a Crime or Fraud Sufficient to Pierce the Ecuadorian Plaintiffs' Privileges

1. The District Court Erroneously Concluded That It Was Required to Adopt Judge Kaplan's "Findings" in the Injunction Order

Instead of undertaking its own examination of the evidence and making any of its own findings, the lower court concluded that it was compelled to adopt the "findings" and conclusions in the Injunction Order and that those "findings" required application of the crime-fraud exception. (A-19.) As an initial matter, the lower court's decision should be reversed because it rests entirely upon purported "findings" in an order that has now been vacated. Four days after The Weinberg Group produced its privileged documents and only one business day after the Second Circuit heard oral argument, the Second Circuit vacated the Injunction Order "in its entirety" and stayed the *Salazar* action. (A-1648 to A-1649.) The

Second Circuit's Order, coupled with the district court's failure to undertake its own analysis of the evidence,[54] warrants reversal.[55]

Even if the Second Circuit had not vacated the Injunction Order, the lower court's determination that it was "bound" by the law of the case doctrine to adopt Judge Kaplan's findings was reversible error. Courts with coordinate jurisdiction are not bound by the law of the case doctrine and need not defer to previous findings or conclusions made by other judges or courts.[56] The "law of the case is, at best, a *discretionary* doctrine which does not constitute a limitation on the court's power. . . . Thus, judges of coordinate jurisdiction are not bound by each others[']rulings, but are free to disregard them if they so choose."[57] Moreover, the Supreme Court has recognized that conclusions reached in the course of preliminary injunction determinations should not constitute the law of the case

[54] The lower court also cited the Francis Order, but, as noted, Magistrate Judge Francis also did not make any independent findings of fact. The Francis Order relied entirely on the supposed "findings" of fraud made in the Injunction Order. Significantly, Judge Kaplan stayed the Francis Order in its entirety pending a ruling on the parties' Rule 72 objections.

[55] On December 14, 2011, another district court that relied on the Injunction Order to compel the disclosure of privileged documents from one of the Ecuadorian Plaintiffs' counsel pursuant to the crime-fraud exception directed Chevron to return all privileged documents produced to Chevron in light of the Second Circuit's decision. *Chevron Corp. v. Page*, No. 11-cv-1942, Dkt. 43 (D. Md. Dec. 14, 2011) (provided at UA-189).

[56] *See United States v. Birney*, 686 F.2d 102, 107 (2d Cir. 1982).

[57] *Id.* (emphasis added) (internal quotation marks omitted).

because they are typically reached in short order and without the benefit of a full hearing on the merits of the underlying claims.[58] The Supreme Court's admonition applies with even greater force here given that Judge Kaplan entered the Injunction Order and reached his "findings" based on a lopsided record (due to Judge Kaplan's expedited briefing schedule) and absent an evidentiary hearing.[59] Thus, even if Judge Kaplan made "findings" with respect to the supplemental expert reports—and it is not at all clear that he did[60]—the lower court certainly was not

[58] *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (observing that given the "limited purpose" of a preliminary injunction, and the "haste" with which courts must dispose of such requests, courts are not bound by findings or conclusions made by those courts in granting preliminary injunctions); *see also Grudzinski v. Staren*, No. 02-cv-3479, 2004 WL 103014, at *3 (6th Cir. Jan. 21, 2004) (declining to adopt plaintiff's assertion that state court's findings in the course of issuing preliminary injunction were law of the case because "preliminary injunctions require plaintiffs to satisfy a lesser burden of proof than is required for a decision on the merits"); *Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997) ("Interlocutory orders are not subject to the law of the case doctrine . . . ."); *Meineke Discount Muffler v. Jaynes*, 999 F.2d 120, 122 n.3 (5th Cir. 1993) ("[Appellant's] argument presupposes that the court's findings and conclusions after an abbreviated hearing on a preliminary injunction are binding as the law of the case. Such an argument is incorrect."); *Nat'l Org. for Women v. Soc. Sec. Admin.*, 736 F.2d 727, 744 n.154 (D.C. Cir. 1984) (holding that a court's decision "to grant or deny a preliminary injunction does not constitute the law of the case for the purposes of further proceedings").

[59] *See supra* Section III.A; *see also Camenisch*, 451 U.S. at 394–95.

[60] The vacated Injunction Order did not even address whether the crime-fraud exception should apply to the supplemental expert reports. That issue is pending before Judge Kaplan in the parties' Rule 72 objections to the Francis Order. Judge Kaplan stayed compliance with the Francis Order pending resolution of the parties' Rule 72 objections.

required to adopt these findings, especially in light of the severely expedited and one-sided nature of the preliminary injunction proceedings before Judge Kaplan.

Nor did principles of comity somehow *require* the lower court to adopt Judge Kaplan's purported "findings" in the context of a preliminary injunction, while ignoring the decisions of the Ecuadorian Court and other U.S. courts addressing the identical issue presented here. (A-19.) To the contrary, principles of comity required the lower court to give due consideration to those courts' decisions. During argument before the Second Circuit, the panel expressed grave concern about Judge Kaplan's failure to show any deference to the Ecuadorian Court's findings[61]—a failure that has been repeated by the lower court here.

Chevron submitted all of the same evidence and made the same argument—that the supplemental expert reports purportedly "whitewashed" the Cabrera Report—to the Ecuadorian Court and that court rejected any alleged wrongdoing on behalf of the Ecuadorian Plaintiffs. In its February 14, 2011 Judgment, the

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[61] During the September 16, 2011 oral argument, a member of the Second Circuit panel stated:

> Don't we have some sense of comity to the legitimacy of the process? Are we just to say to the people of Ecuador [']you're all corrupt and your process doesn't matter to the United States or a United States federal judge is not going to hear anything about the legitimacy of your process, a process by the way, which [Chevron] invoked?[']

Transcript of Oral Argument in *Chevron Corp. v. Naranjo*, Tr. at 52:19–53:3 (2d Cir. Sept. 16, 2011) (provided at UA-81).

Ecuadorian Court concluded that the Ecuadorian Plaintiffs had *not* attempted to deceive the court into believing that supplemental expert reports were anything other than reports by experts *hired by the Ecuadorian Plaintiffs*. (A-801 to A-802.) The Ecuadorian Court found that the supplemental expert reports clearly disclosed the instances in which they relied on data or other information from the Cabrera Report and that there was no attempt to pass off Cabrera's work as their own. **(***Id.*) The Ecuadorian Court's holding on this point is at least entitled to substantial deference. Indeed, in a related appeal, the Third Circuit suggested that the rejection of Chevron's fraud allegations by the Ecuadorian Court (the alleged victim of the fraud) may be entitled to preclusive effect in U.S. courts.[62]

The lower court also erred when it failed to give any weight to the six U.S. district courts that have already considered Chevron's allegations of fraud regarding the supplemental expert reports and rejected them.[63] Unlike the Injunction Order, these district courts considered Chevron's crime-fraud arguments as applied to the supplemental experts—the precise issue presented to the lower court. *All six* district courts refused to apply the crime-fraud exception. For example,

[62] *Kohn*, 650 F.3d at 293.

[63] *See supra* note 30.

- *Chevron Corp. v. Shefftz*, No. 10-mc-10352-JLT, Dkt. 45, Memorandum Order at 20–21 (D. Mass. Dec. 7, 2010) (provided at UA-59) ("[Chevron] has not shown Respondent [one of the Ecuadorian Plaintiffs' supplemental experts] engaged in or intended any criminal or fraudulent activity [nor has Chevron] pointed to any evidence that would provide a reasonable basis to believe that this particular Respondent used any lawyer's services to foster a crime or a fraud.");

- *Chevron Corp. v. Allen*, No. 2:10-mc-00091, Dkt. 38, Order at 13 (D. Vt. Dec. 2, 2010) (provided at UA-40) ("Having reviewed the materials [submitted for *in camera* review by Allen], the Court is satisfied that no evidence of fraud, false pretenses or undue influence appears.");

- *Chevron Corp. v. Barnthouse*, No. 1:10-mc-00053, Dkt. 36, Order at 21 (S.D. Ohio Nov. 26, 2010) (provided at UA-18) ("Chevron has presented no evidence or facts from which the Court could reasonably conclude that Mr. Barnthouse [one of the Ecuadorian Plaintiffs' supplemental experts] had any knowledge of the allegedly fraudulent nature of the Cabrera Report, or that he participated in any ongoing fraud by relying on the Cabrera Report knowing it to be fraudulent or on any other documents or information that would call into question the authorship of his own report. Chevron has not presented any evidence . . . that would show Mr. Barnthouse authored or submitted his report in furtherance of ongoing fraud or crime. Therefore, the crime-fraud exception does not apply in this case.").[64]

The lower court maintained that it was "not permitted to 'shop' among opinions" (A-21) but that was exactly what it did when it deferred to the Injunction Order and disregarded more relevant, and perhaps binding, authority. Contrary to the lower court's unsupported assertions, neither the law of the case doctrine nor "fundamental principles of comity" (*id.*) required the court to adopt Judge

[64] *See also Chevron Corp. v. Picone*, No. 10-cv-02990, Dkt. 28 (D. Md. Nov. 24, 2010) (provided at UA-1); *Chevron Corp. v. Rourke*, No. 10-cv-02989, Dkt. 34 (D. Md. Nov. 24, 2010) (provided at UA-1); *Chevron Corp. v. Scardina*, No. 10-cv-00549, Dkt. 33 (W.D. Va. Nov. 19, 2010) (provided at UA-10).

Kaplan's purported "findings" of fraud in the face of contrary authority and evidence.

2. The Supplemental Expert Reports Did Not "Disguise" Their Reliance on the Cabrera Report or Otherwise Defraud the Ecuadorian Court

The lower court's summary conclusion that the Ecuadorian Plaintiffs (together with The Weinberg Group and the supplemental experts) committed a fraud on the Ecuadorian Court is wholly unsupported by the record and must be reversed. Had the lower court actually considered the evidence presented by the parties instead of blindly adopting what it perceived as Judge Kaplan's "findings" in the now-vacated Injunction Order, it undoubtedly would have reached a contrary conclusion. The supplemental expert reports were *not* "part of a fraudulent effort to deceive the Ecuadorian court into believing that the cleansing reports were not based on the discredited Cabrera report when in fact they were." (A-17.) The record evidence, as well as the Ecuadorian Judgment (and, for that matter, Judge Kaplan's Injunction Order), indisputably establish that those supplemental expert reports that relied on the Cabrera Report clearly disclosed their reliance on the Cabrera Report.

Although one would not know it from the lower court's decisions or Chevron's submissions, certain of the supplemental experts did not rely on the

Cabrera Report at all,[65] and others were critical of the report.[66] The experts who did utilize data from the Cabrera Report in no way hid their reliance on the report or any data contained therein.[67] Indeed, as noted, the purported victim of the alleged fraud—the Ecuadorian Court—has already considered and rejected Chevron's allegations and purported evidence of fraud.[68] Moreover, the six U.S. district courts to consider Chevron's demands for discovery directly from the supplemental experts have all been confronted with Chevron's allegations and declined to apply the crime-fraud exception.[69] Finally, even Judge Kaplan conceded that the supplemental experts were "explicit" about their reliance on the

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[65] *See supra* note 26 and accompanying text.

[66] *See supra* note 27 and accompanying text.

[67] *See supra* notes 28–29 and accompanying text.

[68] The lower court did not hold that mere citation to or reliance on the Cabrera Report would constitute a fraud on the Ecuadorian Court. Nor could it. The dispute over the Cabrera Report is one of authorship—not substance. Chevron has never argued or offered any evidence suggesting that the data and science underlying the Cabrera Report were somehow fraudulent. *See supra*, note 39. Indeed, the vast majority of the data in the Cabrera Report was drawn directly from the Ecuadorian Court record. While Chevron disputes some of the underlying science and conclusions, its gripes are unremarkable—that is what parties do in environmental litigation. The fact that the Ecuadorian Plaintiffs continued to advance their scientific arguments post-Cabrera—or that their experts examined, and in some cases relied on, data in a report that Chevron had supposedly impugned not based on its science but on the circumstances of its authorship—cannot be characterized as a "fraud" or wrongdoing of any kind.

[69] *See supra* note 30.

Cabrera Report.[70] This evidence and authority—all of which was before the lower court when it compelled production of The Weinberg Group's privileged documents—establishes that the lower court erred in concluding that Chevron met its burden to establish a crime or fraud concerning the supplemental expert reports. Accordingly, the lower court's decision must be reversed.[71]

B. The Lower Court Erred in Applying the Crime-Fraud Exception Without Making Any Determination as to Whether the Documents Were Created or Used in Furtherance of a Crime or Fraud

This Court has long held that the "crime-fraud exception . . . applies *only* when the communications . . . further a crime, fraud, or other misconduct. It does not suffice that the communications may be related to a crime."[72] The lower court here ordered the disclosure of every document identified on The Weinberg Group's privilege and redaction logs without considering whether *any* of the more than 1,400 documents or communications identified on those logs were created or used to further a crime or fraud. Instead, the lower court concluded that Judge Kaplan's "findings" of fraud alone sufficed to warrant disclosure of the Ecuadorian Plaintiffs' privileged documents under the crime-fraud exception. (A-20.) When

[70] *Donziger*, 768 F. Supp. 2d at 636,

[71] *See, e.g., In re Sealed Case*, 223 F.3d at 779 (holding that the district court erred as a matter of law that the crime-fraud exception applied "because what RNC and its officials are accused of is not criminal").

[72] *White*, 887 F.2d at 271 (emphasis added).

The Weinberg Group and the Ecuadorian Plaintiffs asked the lower court to reconsider, it again held that a *prima facie* finding of fraud, on its own, was sufficient to compel disclosure of the documents.

> The Weinberg Group finally argues that the Court . . . failed to make factual findings as to whether or not each document was used to further the fraud upon the Ecuadorian court. . . . 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.)

The lower court's conclusion is wrong as a matter of law.[73] A district court does not have discretion to order production of privileged documents pursuant to the crime-fraud exception without specifically determining whether the documents and communications furthered a crime or fraud. As the Third Circuit recently held in reversing a district court's application of the crime-fraud exception in a related case, "evidence of a crime or fraud, no matter how compelling, does not itself

[73] *See White*, 887 F.2d at 271; *see also In re Sealed Case*, 107 F.3d 46, 51 (D.C. Cir. 1995) (reversing district court's order compelling disclosure of privileged document pursuant to the crime-fraud exception because the document at issue was created after the date of the alleged crime and thus could not have been created in furtherance of the crime); *In re Richard Roe*, 68 F.3d 38, 40 (2d Cir. 1995) ("[T]he crime-fraud exception does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud. . . . Instead, the exception applies only when the court determines that the client communication or attorney work product in question was itself in furtherance of the crime or fraud.").

satisfy both elements of the crime-fraud exception" because the party seeking to invoke the exception must also demonstrate that the documents or communications were made "in furtherance of that [crime or] fraud."[74] Thus, the lower court's failure to address this mandatory second step of the crime-fraud analysis also requires reversal.

Had the lower court considered the "in furtherance of" prong of the crime-fraud analysis—as it was required to do—it could not possibly have concluded that every document and communication on The Weinberg Group's privilege and redaction logs was made in furtherance of the purported fraud. A simple example proves the point. In the lower court's words, the purported "fraud" was "the preparation and submission" of supplemental expert reports to the Ecuadorian Court that "disguis[ed] the experts' reliance on the Cabrera report." (A-17.) Because the Ecuadorian Plaintiffs submitted the supplemental expert reports to the Ecuadorian Court on September 16, 2010, the alleged "fraud" necessarily ended that day and any documents created after that date could not have been created "in furtherance of" that "fraud."[75] Of the 1,194 documents on The Weinberg Group's

[74] *Uhl Baron*, 633 F.3d at 166–67.

[75] *See United States v. Zolin*, 491 U.S. 554, 562–63 (1989) (noting that the crime-fraud exception only applies to documents or communications relating to "future wrongdoing") (emphasis added); *In re Sealed Case*, 107 F.3d at 51–52 (stating that "the government's argument for invoking the crime-fraud exception goes nowhere" because the attorney "wrote the memorandum long after the vice

privilege log, at least 714 of these documents *post-date* the submission of the supplemental expert reports. Similarly, of the 351 documents on the redaction log, 335 of these documents post-date the submission of the supplemental expert reports. Thus, this simple analysis demonstrates that nearly *68%* of the documents could not possibly fall within the crime-fraud exception, but were erroneously ordered to be disclosed by the lower court because it failed to consider the second prong of the analysis. Accordingly, the lower court's Orders requiring production should be reversed and, at a minimum, the matter should be remanded for a more searching analysis of the "in furtherance of" prong of the crime-fraud analysis—including an *in camera* review of all documents that fall within the relevant dates.[76]

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president committed the offenses" and "the crime-fraud exception for the work product immunity cannot apply if the attorney prepared the material after the client's wrongdoing ended"); *In re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d 826, 831 (9th Cir. 1994) (holding that documents created by corporate counsel after the latest possible date of the alleged scheme were shielded by the attorney-client privilege because "attorney-client communications concerning past or completed crimes do not come within the crime-fraud exception to the attorney-client privilege").

[76] *See Uhl Baron*, 633 F.3d at 167 ("[W]e will remand the case to the District Court to conduct an in camera review of the documents in issue to determine whether they were created or used in furtherance of a fraud and thus whether the crime-fraud exception to the attorney-client privilege is applicable to some or all of the documents the Court reviews."); Edna Selan Epstein, The Attorney-Client Privilege and the Work Product Doctrine § 1.V.B.5 (5th ed. 2007) ("It now appears to be an established proposition that without an *in camera* review of the privilege-protected evidence, a court cannot hold that the privilege has been pierced as a result of the communication having been made in furtherance of a crime or fraud.").

II. THE DISTRICT COURT ERRED BY ORDERING THE WHOLESALE DISCLOSURE OF DOCUMENTS THAT HAD BEEN PROPERLY REDACTED TO PROTECT CONFIDENTIAL, NON-RELEVANT INFORMATION

Even if this Court affirms the lower court's crime-fraud decision—and it should not—a partial reversal is nevertheless warranted insofar as the lower court required The Weinberg Group to produce non-responsive, confidential information that it had properly redacted from documents produced to Chevron. As part of its good-faith efforts to comply with Chevron's subpoena, The Weinberg Group produced hundreds of documents with redactions intended to shield confidential, non-responsive information, including personal information and privileged information relating to work that The Weinberg Group performed in completely unrelated cases on behalf of other clients. And even though it was not required to do so, The Weinberg Group voluntarily provided Chevron with an extensive "redaction log" identifying the reasons for redaction of each document. Incredibly, the district court provided virtually no explanation for its decision compelling the production of unredacted copies of these documents, stating only that The Weinberg Group "fail[ed] to make more than general assertions as to the nature of such information." (A-26.) This aspect of the lower court's decision is wrong as a matter of law and must be reversed.

Chevron is not entitled to confidential, personal or otherwise irrelevant information. The case law is clear that "sensitive financial information, including,

but not necessarily limited to, credit card and bank account numbers" may properly be redacted due to the "real and substantial harm that would result from the disclosure of this information."[77] Likewise, it is wholly appropriate to redact "material irrelevant to the subject matter of the pending litigation."[78] This necessarily includes privileged information that The Weinberg Group possessed as a result of work it performed for other clients in unrelated cases, and portions of correspondence that are of a personal nature. Compelling production of this information was clearly inappropriate.

There can be no dispute that The Weinberg Group was entitled to redact non-responsive, confidential information from the documents it produced, yet the lower court ordered The Weinberg Group to produce this information to Chevron due to unexplained deficiencies with its "redaction log." (A-26.) The lower court's decision on this point is incorrect for at least two reasons. First, the federal rules do not require a redaction log that identifies the reason for and nature of every redaction made to documents produced in response to a subpoena.[79] Second,

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[77] *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 919, 934 (D.D.C. 2003).

[78] *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, No. 86-385, 1987 WL 9034, at *1 (D.D.C. Mar. 19, 1987).

[79] *See Graham v. Mukasey*, 247 F.R.D. 205, 207 (D.D.C. 2008) ("There is also no need, and the federal rules do not require a defendant, to create a log that describes the author, the date, the type of document, and so on, when the requesting party can see that information simply by looking at the document.").

a redaction log is necessary only when making a claim of privilege.[80] The Weinberg Group voluntarily provided the redaction log out of an abundance of caution, and supplied all relevant information necessary for Chevron to determine the reasons for the redactions.[81]

There is no reason why the lower court's crime-fraud decision should have also required the production of non-responsive, confidential information and privileged information relating to other cases and belonging to other clients. Any concerns the lower court may have had regarding the appropriateness of particular redactions should have been resolved by ordering the production of a more detailed log or conducting an *in camera* review, rather than ordering wholesale disclosure of the redacted information. Accordingly, this Court should reverse the district court's decision insofar as it required The Weinberg Group to produce confidential, non-relevant information.

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[80] *See* Fed. R. Civ. P. 26(b)(5)(A) ("When a party withholds information . . . by claiming that the information is privileged . . . the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.").

[81] The redaction log complied with the provisions generally required for a privilege log: "the basis upon which the [redaction] is claimed, . . . the subject matter, number of pages, author, date created, and the identity of all persons to whom the original or any copies of the document were shown or provided." *Loftin v. Bande*, 258 F.RD. 31, 33 (D.D.C. 2009).

CONCLUSION

The lower court improperly applied the law concerning the crime-fraud exception to the attorney-client and work-product privileges. For the reasons set forth above, this Court should vacate the lower court's Orders compelling The Weinberg Group to produce its privileged documents and remand to the lower court with instructions to deny Chevron's motion to compel in its entirety or, at a minimum, perform a thorough and proper analysis of the Ecuadorian Plaintiffs' claims of privilege and confidentiality.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,521 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(A)(7)(B)(iii) and Circuit Rule 32(a)(1).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman, 14-point font.

s/ James E. Tyrrell, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2012, I electronically filed the foregoing Brief on Behalf of Respondent-Appellant with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

Service was accomplished on the following persons on this 3rd day of January, 2012, by electronically filing the foregoing Brief on Behalf of Respondent-Appellant with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system:

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