IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| In re Motion of<br><br>CHEVRON CORPORATION,<br><br>Petitioner,<br><br>To Compel the Production of Documents from<br><br>THE WEINBERG GROUP,<br><br>Respondent,<br><br>In Connection with a Civil Action Pending in the United States District Court for the Southern District of New York. | Civ. Action No: 1:11-mc-00409-CKK, JMF |

**MEMORANDUM OF LAW IN OPPOSITION TO CHEVRON CORPORATION'S AMENDED MOTION TO COMPEL THE WEINBERG GROUP TO PRODUCE DOCUMENTS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 45**

## PRELIMINARY STATEMENT

Chevron Corporation's ("Chevron") amended motion to compel discovery from the Weinberg Group is meritless. The facts demonstrate that the Weinberg Group was engaged as a consulting expert in the Ecuadorian litigation underlying this case and tasked with assisting the Ecuadorian Plaintiffs[1] in coordinating the preparation of six supplemental expert reports. These supplemental expert reports were required to further verify the grave environmental damage Chevron has wreaked upon the Ecuadorian Amazon after Chevron called the veracity of the original report of the Lago Agrio Court's appointed expert (the "Cabrera Report") into question. Notwithstanding its grandiose allegations, Chevron has offered nothing in the way of proof to support its accusation that the Weinberg Group was involved in any fraudulent activity in connection with the Ecuadorian judgment. Chevron merely proclaims it to be so, but those bare allegations are far from enough to permit the unprecedented discovery Chevron now seeks from its adversary's consulting expert.

Chevron does not dispute the Weinberg Group's role as an "expert" in connection with the Ecuadorian litigation. To minimize or eviscerate the privilege applicable to the Weinberg Group's work, Chevron spends considerable time trying to persuade the Court that the Weinberg Group acted not in a consulting expert capacity, but as a "testimonial expert" instead. In arguing so strenuously about that, Chevron tacitly acknowledges the law which holds that privilege generally should attach to the work product of a consulting expert and the communications to

[1] The Ecuadorian Plaintiffs opposing the instant motion are Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje. By filing this memorandum of law, the Ecuadorian Plaintiffs do not intend to waive any defenses they may have in connection with this proceeding or S.D.N.Y. Nos. 11-cv-3718 and 11-cv-0691, including but not limited to, a lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process.

which such expert is a party. But the snippets of the record to which Chevron cites do not sustain Chevron's assertion that the Weinberg Group's work rises to a level beyond that of a non-testifying expert.

Recognizing its effort to pierce the consulting expert's privilege through conventional means would be unavailing, Chevron argues principally that the Weinberg Group's work loses its privileged status by virtue of the crime-fraud exception. What Chevron fails to do, however, is make any showing that Weinberg Group's work would be subject to that infrequently-used exception to well-settled privilege principles. Chevron contends that the Weinberg Group was part of an effort to "whitewash" the purportedly fraudulent Cabrera Report, but the facts—even the ones cherry-picked by Chevron—fail to show any such "whitewash." To the contrary, to the extent that any of the expert reports coordinated by the Weinberg Group relied on information in the Cabrera Report—and many did not—any such reference or reliance was meticulously disclosed. There was no deception whatsoever in that regard.

Further, Chevron has offered no evidence to support its contention that the Weinberg Group essentially authored the six supplemental experts' reports. In fact, the evidence Chevron attaches to its motion to compel illustrates precisely the opposite— that the Weinberg Group respected the independence of the experts, and they remained free to accept or reject any proposed language or data provided by the Weinberg Group. Although Chevron disagreed with the Lago Agrio Court's decision to allow the parties to supplement the record through additional expert reports, that does not render this supplementation a "whitewash," much less a fraud or a crime. Indeed—and as Chevron tellingly omits when it trumpets to the Court that it has already received discovery from the six so-called "cleansing" experts who communicated with the

Weinberg Group—none of the courts in which Chevron sought such discovery has applied or otherwise adopted Chevron's arguments on the crime-fraud exception.

In its most desperate ploy yet, Chevron also levels the incredible claim that the Weinberg Group was involved in drafting the Ecuadorian judgment issued on February 14, 2011 (the "Judgment"). Chevron makes this charge based upon nothing more than its own assumption that there is "no other way" to explain how data sets referenced in the Judgment, containing supposedly "unique" errors, match documents supposedly within the Weinberg Group's files. Of course, the mere fact that the Weinberg Group may have possessed a copy of the documents containing data that ended up in the Judgment could never be proof of its ghostwriting some portion of the Judgment. To make that nefarious leap, however, Chevron proffers the unsubstantiated assertion that such documents "do not appear anywhere in the Ecuador court record." (Chevron Br., Dkt. 17-00, at 12). Chevron lacks any competent proof however, for that bald assertion. The Chevron "expert" who reaches this "conclusion" does not affirm that he or anyone else has combed the 230,000 page Ecuadorian record to determine whether or not those data sets are part of the record. On information and belief, such a review would be insufficient in any event, as the Lago Agrio Court record is not yet certified.

Chevron not only takes liberties with its commentary on the Ecuadorian record, it goes so far as to grossly mischaracterize the Southern District of New York ("S.D.N.Y.") record in this case. In reference to the alleged fraud in obtaining the Ecuadorian Judgment, Chevron states that "Judge Kaplan already has determined that the work performed by Weinberg was part of that fraud[.]" (*See* Chevron Br., Dkt. 17-00, at 2.) However, what Judge Kaplan in fact stated with regard to the Lago Agrio Court's minor reliance on certain of the supplemental reports was only that "Chevron has raised substantial questions that present a fair ground for litigation as to

whether the Ecuadorian judgment is a result of fraud practiced on the Ecuadorian tribunal even if the Ecuadorian court did not consider the Calmbacher and Cabrera reports." *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 637 (S.D.N.Y. 2011).[2]

Chevron also fall short in its attempt to have argue for a broad waiver of the consultant expert privilege based upon the six experts' prior production of Weinberg Group-related documents in each of their possessions. Simply because Chevron considers those experts to have waived the privilege over the documents they produced, it does not mean that they simultaneously waived (or even had the ability to waive) any privileges over the Weinberg Group's documents.

Finally, this Court must be mindful that the Lago Agrio court, fully apprised of Chevron's claims that the six supplemental expert reports were "tainted" by the specter of fraud in the Cabrera Report, rendered its Judgment expressly disclaiming any reliance on the Cabrera Report. In light of that, the Third Circuit has already noted that the issue of fraud in procuring the Ecuadorian Judgment may well be subject to the preclusive effect of res judicata. *In re Application of Chevron Corp.*, No. 10-2815, 2011 WL 322380, at *13 (3d Cir. Feb 3, 2011). For all these reasons, discussed more fully below, Chevron's motion to compel should be denied.

## RELEVANT FACTUAL BACKGROUND

### A. The Lago Agrio Litigation

In 1993, a group of Amazon communities filed a federal class-action lawsuit against Chevron's predecessor-in-interest (Texaco) in the U.S. District Court for the Southern District of New York ("S.D.N.Y."). *See Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002). From

[2] Once it proclaims its faulty premise about Judge Kaplan's "determination," Chevron proceeds to assert that Magistrate Judge Francis then confirmed Judge Kaplan's "finding" (Chevron Br., Dkt. 17-00, at 10.), a finding that was never made.

the lawsuit's inception, Chevron fought vigorously to re-venue the case from the S.D.N.Y. to the courts of Ecuador.[3] After Chevron succeeded in having the case dismissed on *forum non conveniens* grounds in favor of Ecuador, in 2002 the Ecuadorian Plaintiffs re-filed the case in Lago Agrio (the "Lago Agrio Litigation").

Trial began in the Lago Agrio Litigation in 2003 before the Superior Court of Nueva Loja in Lago Agrio, Ecuador (the "Lago Agrio Court"). The record contained more than 200,000 pages of evidence and roughly 63,000 chemical sampling results produced by laboratories contracted by both parties and the court experts. Testimony was taken from dozens of witnesses and dozens of judicial field inspections of former Chevron wells and production sites were conducted over a five-year period under the oversight of the Lago Agrio Court. (*See* Declaration of Julio C. Gomez "Gomez Decl.," Ex. 1.) Faced with a mountain of damning evidence in the Lago Agrio Court, Chevron unleashed a strategy to undermine the very Ecuadorian proceedings it had instigated. First, on September 23, 2009, Chevron filed "a notice of arbitration" under the UNCITRAL rules pursuant to the U.S.-Ecuador Bilateral Investment Treaty (the "BIT Arbitration"). Chevron asked this private arbitration panel for unprecedented relief: an order to the government of Ecuador to instruct its independent judiciary to dismiss the Lago Agrio Litigation. Soon thereafter, Chevron began a nationwide campaign in the U.S. for discovery, relying on § 1782 but seeking a broad application of that statute never before seen by its drafters. (*See* Gomez Decl., Exs. 2, 3.)

Disingenuously cobbling together bits of information gleaned from over twenty § 1782 proceedings in courts throughout the U.S., Chevron attempted to manufacture a "scandal"

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[3] *See Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y.. 1996), *vacated by 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).

concerning Plaintiffs' *ex parte* contacts with one expert – the Court-appointed damages expert, Richard Cabrera. Mr. Cabrera was appointed to provide an assessment of the environmental damage from Chevron's pollution of the Amazon. Mr. Cabrera, in addition to personally performing forty-eight separate site inspections, asked—and the Lago Agrio 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." (*See* Gomez Decl., Ex. 4.) Plaintiffs had *ex parte* meetings with Mr. Cabrera (which meetings are permitted under Ecuadorian law), and—as disclosed in a court filing to the Lago Agrio Court—"Plaintiffs took advantage of the opportunity to advocate their own findings, conclusions, and valuations before Cabrera for him to consider their potential adoption." (*See* Gomez Decl., Ex. 5.) Chevron tried its best to capitalize on the fact that such *ex parte* meetings with court-appointed experts are frowned upon in the U.S., however these meetings are routine and lawful in Ecuador. (*See* Gomez Decl., Ex. 6.) And although Chevron attempted to conceal this fact, it has now come to light that Chevron itself engaged in such *ex parte* meetings. In a letter to the Lago Agrio Court concerning payment, court appointed expert Dr. Marcelo Muñoz Herrería disclosed that he had met with one of Chevron's technical consultants, Engineer Alfredo Guerrero, at Hotel Coca for a "technical planning meeting" in March of 2010. (*See* Gomez Decl., Ex. 7.) At this meeting Guerrero even "approved" of a plan for Muñoz. *Id*. Chevron does not deny that this meeting took place. Although Chevron would have this Court believe that the Plaintiffs' *ex parte* communications were in some way illicit under Ecuadorian law, the fact is that Chevron either knew these communications were completely acceptable in Ecuador or Chevron itself participated in behavior it believed to be illegal.

Chevron again attempts to gain advantage out of the U.S. courts' unfamiliarity with the Ecuadorian legal system. However, two distinguished Ecuadorian law professors—Dr. Juan Pablo Albán Alencastro and Dr. Farith Ricardo Simon—have confirmed that there are no prohibitions against *ex parte* communications with court appointed experts in Ecuador. (*See* Gomez Decl.; Ex. 9 at 4; Ex. 10 at 2-3; *See also Infra*. Note 17.) Additionally, Ecuadorian law does not limit how much of a party's work product an expert can use in his final report. (*See* Gomez Decl., Ex. 9 at 5.) If the expert agrees with the methods and conclusions of the work product, he may cite the documents as grounds for his opinion or adopt the work product as his own. *Id*. at 5. Chevron cannot (and does not) cite any Ecuadorian constitutional provision, civil code provision, law, or regulation prohibiting such contact with court experts.

**B. The Weinberg Group's Work on the Lago Agrio Litigation Has No Connection to the Alleged Fraud Relating to the Cabrera Report.**

Approximately two years after Cabrera submitted his report, in an attempt to put to rest any further controversy on the matter, the Ecuadorian Plaintiffs petitioned the Lago Agrio Court to allow both Chevron and the Ecuadorian Plaintiffs to submit an additional damages submission. (*See also* Gomez Decl., Ex. 6.) On August 2, 2010, the Lago Agrio Court granted the Ecuadorian Plaintiffs' request and invited the parties to file supplemental damages submissions by September 16, 2010. (*See also* Gomez Decl., Ex. 30.) In so granting the Ecuadorian Plaintiffs' request, the Lago Agrio Court recognized Chevron's repeated filings regarding the Cabrera report, including Chevron's submission of evidence obtained through § 1782 proceedings indicating that the parties had *ex parte* contact with Mr. Cabrera. But, as the Lago Agrio Court reminded both parties, "the judge is not required to agree with the opinion of the experts." *Id*.

In mid-August 2010, 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[4] to draft six separate reports collectively constituting the supplemental damages submission. The Weinberg Group's main duty was to serve as a coordinator for the preparation of these reports.[5]

On September 16, 2010, the Ecuadorian Plaintiffs' experts submitted their six reports to the Lago Agrio Court. On October 22, 2010, over one month after the submissions, Chevron filed six *ex parte* § 1782 applications in multiple federal courts seeking discovery of these experts.[6] Chevron's applications were eventually granted. Prior to their depositions, the experts made extensive document productions, which included, among many other materials, responsive documents and communications between them and the Weinberg Group. (*See* Gomez Decl., Ex. 15.)

Between December 10 and 22, 2010, Chevron conducted full-day depositions of each expert, totaling over forty-two hours.[7] In taking full advantage of its deposition time, Chevron propounded a number of questions on these witnesses regarding the Weinberg Group's activities. The testimony obtained from these six experts confirmed only that it was these experts—not the Weinberg Group—that drove the creation of their own reports. Four of the six experts drafted

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[4] The six experts are: Douglas Allen; Lawrence Barnthouse; Carlos Emilio Picone; Daniel Rourke; Robert Paolo Scardina; and Jonathan Shefftz.

[5] For example, the Weinberg Group hired the experts and provided documents to them in response to their requests. (*See, e.g.*, Gomez Decl., Ex. 12 at 227:1-228:21; Ex. 13 at 69:17-25; Ex. 14 at 65:13-22, 65:19-24.)

[6] *See, e.g.*, *In re: Applic. of Chevron Corp.*, 2:10-mc-00091-wks, Dkt. 1, at 5; (D. Vt. Oct. 22, 2010.)

[7] (Gomez Decl., Ex. 13, at 1:16, 380:23 (Mr. Allen's deposition commenced at 9:25 a.m. and concluded at 5:52 p.m.); Ex. 14, at1:16, 257:20 (Dr. Barnthouse's deposition commenced at 9:19 a.m. and concluded at 4:45 p.m.); Ex. 17, at 1:21, 280:8-9, (Dr. Picone's deposition commenced at 9:12 a.m. and concluded at 4:36 p.m.); Ex. 12, at 1:21, 297:8-9. (Dr. Rourke's deposition commenced at 9:11 a.m. and concluded at 5:44 p.m.); Ex. 18, at 1:13, 300:20 (Dr. Scardina's deposition commenced at 8:26 a.m. and concluded at 3:58 p.m.); Ex. 16, at 1:12, 273:21-22 (Mr. Shefftz's deposition commenced at 9:07 a.m. and concluded at 6:02 p.m.).)

their reports with only ministerial assistance from the Weinberg Group.[8] (*See* Gomez Decl., Ex. 16 at 60:3-5; ("Q. Did anybody assist you in preparing this report . . . ? A. No. I did not have assistance."); Ex. 14, at 109:5-7 ("Q. Did you have any assistance in preparing the report? A. No, I did not."); Ex. 13, at 123:7-8 ("Q. Did you write this report, sir? A. I did."); Ex. 12, at 241:4-10; 289:7 – 290:16.) Likewise, the conclusions drawn by the experts were theirs alone. (*See e.g.* Gomez Decl., Ex. 16, at 57:23-58:4 (Q. And was it your conclusion that the economic benefit analysis that you performed showed that the defendant had unjust enrichment of $4.57 billion on an after-tax basis and $9.46 billion on a pretax basis? A. Yes, that summaries my calculations."); Ex. 14, at 109:8-10 ("Q. The conclusions in the report, are those your conclusions alone? A. Yes, they are."); Ex. 12, at 279:3 – 280:17; 282:9 – 283:20; Ex. 13, at 123:12-13 ("Q. Are the conclusions in the report yours? A. They are.").

Chevron's assertion that the Weinberg Group controlled the information upon which the experts relied is likewise false. The Weinberg Group made efforts to provide the experts the documents that those experts requested; and, furthermore, the experts were encouraged to and in fact did rely on many materials not provided to them by the Weinberg Group. (*See, e.g.*, Gomez Decl., Ex. 13, at 147:2-14 (Mr. Allen stated that "I was free to . . . use whatever sources that I felt were appropriate that would support my independent valuation, which is exactly what I did."); Gomez Decl., Ex. 12, at 230:5-14 (Dr. Rourke testified that he received "a couple of paper reports . . . but I didn't make any use of those, nor did I come to think of it, the Cabrera Report.").) The experts performed their own research to locate materials upon which they relied. (*Id*. at 39:1-21 (Rourke reviewed numerous reports related to the health effects caused by

[8] The Weinberg Group provided draft language to two of the experts who were free to use or disregard that language at their choosing. (*See, e.g.*, Gomez Decl., Ex. 18, at 86:6-13.) Indeed, Dr. Scardina had "the liberty to read, review, accept, include, and reject any" or all of that language. (*Id*. at 85:11-17.) Dr. Scardina made substantial changes to the draft language he was provided. (*Id*. at 85:11-17.)

exposure to crude oil, which he located through his own efforts); Ex. 14, at 227:17-25 (Dr. Barnthouse used the Miami University library system to acquire surveys upon which to rely.))

Finally, Chevron's allegation that the six expert reports were an attempt to whitewash the Cabrera Report is disproved by the discovery Chevron has itself taken.[9] Indeed, some experts – such as Drs. Rourke and Picone – did not rely on the Cabrera Report at all. (*See, e.g.*, Gomez Decl., Ex. 12, at 230:5–14; 231:6-8; Ex. 17, at 54:16-17; 58:3-8; 82:9-20). Others were critical of the analysis in the Cabrera Report. (*See, e.g.*, Gomez Decl., Ex. 14, at 111:15-20.) And even the experts that utilized data from the Cabrera Report in no way hid their reliance on the report or any data contained therein. (*See, e.g.*, Gomez Decl., Ex. 16, at 268:6-24.)

Chevron's bid to cast these expert reports as "fraudulent" has generally focused on the short time in which they were apparently created, the "failure" of these experts to travel to Ecuador and mine new data, and their reliance on the purported "fraudulent evidence" of the Cabrera Report. But Chevron's gripes about the quality of its adversary's science 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 the perpetration or the continuance of any "fraud" or wrongdoing of any kind.

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[9] For example, Chevron attempts to mischaracterize an e-mail drafted by one of the Ecuadorian Plaintiffs' lawyers, in which the lawyer brainstorms strategy relating to the expert reports. (*See* Dkt. 1-05.) Far from damning evidence of a conspiracy to "whitewash," it is clear that this e-mail is a reflection on the most effective way to utilize the experts within the limited period of time allotted by the Court. The lawyer seems to be anticipating precisely the tactic that Chevron is now employing – seizing upon *any* reference to the Cabrera Report as a means of casting a pall on the good work of these experts. As with most of the bounty of privileged emails that Chevron has been able to obtain, this e-mail vindicates the Ecuadorian Plaintiffs' position, despite Chevron's attempts to distort the truth.

**C. The Lago Agrio Judgment and Chevron's Filing of The Present Action**

On February 14, 2011, Judge Nicolas Zambrano Lozada, the Presiding Judge of the Lago Agrio Court, issued the Judgment—a thorough 188-page analysis finding Chevron liable for devastating pollution of natural resources. (*See* Gomez Decl., Ex. 19.) Judge Zambrano carefully considered Chevron's various arguments to evade liability, including the supposed fraud relating to two expert reports. Judge Zambrano concluded that Chevron failed to prove fraud, but nevertheless granted Chevron's request to exclude the two expert reports.[10] (Gomez Decl., Ex. 19 at 48-51.) Both parties' appeals are pending before a three-judge panel. The panel's review is *de novo*. (*See generally* Gomez Decl., Ex. 20 at 54.)

On February 1, 2011, anticipating a judgment in Ecuador, Chevron filed a 397-paragraph, nine-count Complaint in the S.D.N.Y. asserting numerous federal and state law causes of action against more than fifty defendants, including the Ecuadorian Plaintiffs (sued as defendants) and certain of their counsel. The Complaint demanded, *inter alia*, (i) a declaration that any Ecuadorian judgment is unenforceable, and (ii) a permanent anti-foreign-suit injunction prohibiting any attempt to enforce any judgment worldwide. (Gomez Decl., Ex. 21 at 53.) Chevron then moved (by *ex parte* Order to Show Cause) for temporary restraints barring these defendants from taking any action to enforce any Ecuadorian judgment anywhere in the world (outside of Ecuador). (*See* Gomez Decl., Ex. 22.) Chevron submitted a 70-page brief and over 450 exhibits totaling almost 7,000 pages, but the Southern District's schedule left only two business days to submit opposition. *Id*.

[10] Judge Zambrano declined Chevron's request to exclude additional reports merely because they relied in part on one of the excluded reports. ( Gomez Decl., Ex. 19 at 57-58.) The judge concluded, among other things, that the additional reports fully disclosed those instances where they relied upon the excluded report. *Id*. In any event, the Judgment reflects almost no reliance on these reports by the court.

On February 8, 2011, *before the Judgment from Ecuador even existed*, the Southern District entered temporary restraints and directed the defendants to file opposition to the requested preliminary injunction within three days. (*See* Gomez Decl., Ex. 23) On March 7, 2011, the Southern District granted a Preliminary Injunction (the "Injunction") prohibiting defendants from, *inter alia*, "advancing in any way" or "benefiting from" any action or proceeding to enforce the Judgment outside Ecuador. (Gomez Decl., Ex 24, at 125.) On the one-sided record submitted largely by Chevron, the district court opined that Chevron was likely to succeed on Count Nine of the Complaint, which seeks both a declaration that the Judgment is unenforceable under New York's judgment enforcement statute and a permanent injunction barring enforcement of the judgment *worldwide*. This was in no way a finding that fraud did, in fact, exist in the rendering of the Judgment, as Chevron would have this Court believe. Certain of the defendants—including the Ecuadorian Plaintiffs—timely lodged an appeal to the U.S. Court of Appeals for the Second Circuit ("Second Circuit") (*See* Gomez Decl., Ex. 25.) That appeal, which the Second Circuit expedited, was fully briefed as of July 5, 2011 and oral argument is scheduled for September 16, 2011.

Chevron then moved by *ex parte* Order to Show Cause to bifurcate and expedite discovery and trial on Count Nine. (*See* Gomez Decl., Ex. 26) The Ecuadorian Plaintiffs (in their role as defendants) opposed the motion, arguing, *inter alia*, that a bench trial on Count Nine will violate their Seventh Amendment right to a jury trial on the remaining counts. (Gomez Decl., Ex. 27 at 10-25.) On April 15, 2011, the court granted the motion bifurcating Count Nine for declaratory judgment (thereby creating the above-captioned action) and set an aggressive schedule calling for a trial in seven months and ordering expedited discovery. (*See* Gomez Decl., Exs. 28, 29.)

The Weinberg Group was served with a subpoena for the production of documents on May 23, 2011. On the subpoena's return date, June 3, 2011, the Weinberg Group filed its objections to the subpoena. The Weinberg Group began its rolling production of documents on June 24, 2011. On July 18, 2011, this Court issued an order instructing the Weinberg Group to file a Status Report with the Court by July 22, 2011, at 12 p.m. (*See* Dkt. 04-00 at 2) The Weinberg Group complied with the court order and on July 22, 2011 filed a Status Report briefly informing the Court of the nature of its principle assertions of privilege and other objections to production, and informed the court of the volume of documents reviewed and withheld to date regardless of the basis for privilege, the volume of documents reviewed and withheld to date as privileged and how many had been reviewed and withheld to date on other grounds, and that it expected to complete production and produce a privilege log by July 29, 2011. (*See* Dkt. 07-00 at 2) The Weinberg Group produced its privilege and redaction logs on July 29, 2011.

Subsequently, this Court ordered the parties to meet and confer regarding Chevron's claims of deficiencies in the Weinberg Group's privilege and redaction logs and ordered the Weinberg Group to produced amended logs on or before August 6, 2011, a mere three days after the order. (*See* Dkt. 10-00 at 2-3) On August 5, 2011, the Weinberg Group fully complied with the Court's August 3, 2011 order and produced final privilege and redaction logs addressing Chevron's claimed "deficiencies" in the original logs.

## ARGUMENT

### A. The Weinberg Group Served as a Consulting Expert and its Documents Should Be Considered Privileged

It is well-established that non-testifying, consulting experts are generally immunized from discovery. *See* Fed. R. Civ. P. 26(b)(4)(D) (shielding discovery of a party's consulting

expert); *see also Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984, 990 (D.C. Cir. 1979) (Rule 26 "imposes a partial . . . ban on fact- or opinion-discovery from a non-testifying expert."). Nevertheless, Chevron claims that it is entitled to take discovery of the Weinberg Group, a non-testifying consulting expert, on the theory that the Weinberg Group was an "architect" and drafter—rather than a mere consultant—for the supplemental damages reports. Rule 26 requires a party seeking discovery of a consultant to demonstrate "exceptional circumstances" warranting invasion of the consulting expert privilege. Fed. R. Civ. P. 26(b)(4)(D). A party bears a heavy burden to make this requisite showing, which Chevron has not met. *See Pinal Creek Group v. Newmont Mining Corp.*, No. CV-91-1764, 2006 WL 1817000, at *4 (D. Ariz. June 30, 2006).

Chevron offers no testimonial or documentary evidence sufficient to defeat the consulting expert privilege. Chevron argues that exceptional circumstances exist to pierce the consulting expert privilege because Weinberg "proffered its work product to the Ecuadorian court either directly or indirectly." (Chevron Br., Dkt. 17-00, at 16.) But the deposition testimony Chevron obtained from the six testifying experts demonstrated that each of those experts had full control over the ultimate substance of their reports. For example, Messrs. Allen and Shefftz, and Dr. Barnthouse testified they alone provided the substantive content for their respective reports. (Gomez Decl., Ex. 13, at 123:7-8, 14-17.) ("Q. Did you write this report, sir? A. I did." . . . Q. And are the conclusions in the report yours? A. They are."); Ex. 16, at 60:3-5 ("Q. Did anybody assist you in preparing this report . . . ? A. No. I did not have assistance."); Ex. 14, at 109:3-10 ("Q. You wrote [your report]? A. Yes, I did. Q. Okay. Did you have any assistance in preparing the report? A. No, I did not. Q. The conclusions in the report, are those your conclusions alone? A. Yes, they are.").) And while not directly questioned on the matter, Dr.

Rourke discussed the role played by each member of the Weinberg Group with whom he interacted, in the process illustrating that the Weinberg Group had little, if any, influence over the substance of his report. (Gomez Decl., Ex. 12, at 228:14-234:8.) Therefore, with regard to these four experts, Chevron cannot show the substantial collaboration of work sufficient to pierce the Weinberg Group's consulting expert privilege.

Even with respect to Drs. Picone and Scardina, with whom Chevron contends the Weinberg Group's involvement was more extensive, Chevron is unable to demonstrate why it is necessary to pierce the consulting expert privilege. Chevron questioned both Drs. Picone and Scardina each for a full seven hours on all facets of their expert reports, including any assistance provided by the Weinberg Group. Moreover, both Drs. Picone and Scardina produced their documents to Chevron—including any shared work between these experts and the Weinberg Group. (*See* Gomez Decl., Ex. 15.) Under these circumstances, even if there was arguably "substantial collaboration" between the Weinberg Group and Drs. Picone and Scardina, Chevron still would be unable to pierce the Weinberg Group's consulting expert privilege.[11] *See Doe v. District of Columbia*, 231 F.R.D. 27, 41 (D.D.C. 2005) (exceptional circumstances not found and discovery of consulting expert denied even though testifying expert relied on work product of consulting expert where opposing party thoroughly deposed consulting expert on the basis of his report and testifying expert produced all of his documents).

This Court should deny any further discovery of the Weinberg Group based upon the deposition testimony of the six supplemental damages experts alone, just as further discovery

[11] This is equally true of the other four experts – Messrs. Allen and Shefftz and Drs. Barnthouse, and Rourke – as to whom Chevron has made no showing sufficient to satisfy its burden of exceptional circumstances necessary to pierce the consulting expert privilege. As with Drs. Scardina and Picone, these four experts were extensively questioned on every conceivable facet of their reports and all four produced every single document relevant to their reports.

was denied in the analogous case of *Estate of Manship v. United States*, 240 F.R.D. 229, 231-32 (M.D. La. 2006). In *Estate of Manship*, a testifying expert had provided a declaration describing his interactions with a consulting expert in response to what the court termed a "speculative" assertion that the consulting expert "assisted" the testifying expert "by providing information beyond that specifically identified in [the testifying expert's] declaration." *Estate of Manship*, 240 F.R.D. at 232. The district court there concluded that "given [the testifying expert's] representation to the Court that he has produced all of the information and data that he 'considered' in forming his opinions and that he did not rely upon the opinions or assistance of [consulting experts] in preparing his report," the consulting experts' depositions could not be taken pursuant to Fed.R.Civ.P. 26(a)(2)(B). *Id.* The Court should likewise deny further discovery here, where—through depositions and document productions—Chevron already has all of the information the six experts relied upon, much less any significant evidence demonstrating that the Weinberg Group assisted these experts in a substantive manner.

Indeed, even with respect to the documents cherry-picked by Chevron and cited in its briefing, those documents reveal only that the six experts controlled the development of their own work product and received limited assistance from the Weinberg Group. Chevron cites an August 25, 2010 email communication between the Weinberg Group and Mr. Allen in a failed attempt to show "control" over Mr. Allen, despite the fact that this document merely shows Mr. Allen was told of basic, non-substantive expectations for format, length, and a skeletal outline of topics, none of which demonstrate "control" over content of Mr. Allen's writing or of the conclusions he would draw. (*See* Chevron Br., Dkt. 17-00, at 17 (citing Ex. 14, Email between Allen and Chris Arthur of Weinberg).) In fact, if anything, the email communications and outline exchanged between the Weinberg Group and Mr. Allen demonstrate that the six experts'

independence was respected by counsel and the Weinberg Group because it reveals that Mr. Allen challenged any assumptions by seeking the raw "geographic and contaminant concentration sampling data" to facilitate his evaluation of the data. (*See* Chevron Br., Dkt. 17-00, at 17 (citing Ex. 14, Email between Allen and Chris Arthur of Weinberg).) The outline itself also demonstrates the experts' independence in its broad phrasing of placeholders such as "[d]evelopment of a potable water system" and "[c]ore clean-up and remediation" that suggested Mr. Allen "[c]onsider doing 2-3 assessments." (*Id.*) In sum, Chevron's Exhibit 14 militates against its own argument. Likewise, August 26, 2010 email communications between the Weinberg Group and Mr. Picone show that Mr. Picone affirmatively drafted his own outline for his report and sought only information-gathering assistance, feedback and critique from the Weinberg Group. (*See* Chevron Br., Dkt. 17-00, at 11 (citing Ex. 16, Email between Picone and Chris Arthur of Weinberg).)

In a truly desperate stroke, Chevron attempts to confuse the Court by explaining how "in several of the related § 1782 proceedings" courts have granted discovery of certain experts because those experts' work product served as an opinion filed under the name of a separate "testifying" expert. (*See* Chevron Br., Dkt. 17-00, at 16.) This strained argument ignores that those decisions arose from the preparation of the Cabrera Report, which presented an entirely distinct set of facts and arrangements between an entirely *different* set of consulting and testifying experts, and that none of those § 1782 proceedings have any application to the consulting work of the Weinberg Group or the six testifying experts.[12]

[12] In addition, from a policy perspective, finding that the Weinberg Group was a testifying expert would also have a chilling effect on the willingness of consultants to serve in a non-testifying role for fear that, notwithstanding the safeguards afforded by the Federal Rules, they may still be compelled to testify and to open their files to the world.

**B. Chevron Fails To Meet Its Burden in Making a *Prima Facie* Showing that a Crime or Fraud Has Occurred.**

Chevron's arguments that the crime-fraud exception applies here miss the mark, as the Weinberg Group became involved long after the alleged wrongdoing associated with the Cabrera Report was concluded. In slinging together their slapdash "guilt-by-association" argument, Chevron cannot even coherently identify the crime or fraud in which the Weinberg Group allegedly participated.

For the crime-fraud exception to apply, Chevron must: (1) "make a *prima facie* showing of a violation sufficiently serious to defeat the privilege," and (2) "establish some relationship between the communication at issue and the *prima facie* violation." *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985). In this Circuit, what constitutes a *prima facie* violation is within the discretion of the district court, but generally means "that the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme." *Id.*

As applied to the Weinberg Group, Chevron has failed to satisfy its burden as to either threshold requirement: (1) Chevron has not made—and cannot make—a *prima facie* showing that a crime or fraud has occurred with regard to the Weinberg Group's activities in coordinating the six experts' preparation of supplementary reports; and (2) even assuming *arguendo* that Chevron could establish occurrence of a crime or fraud, which it cannot, Chevron makes no showing that the individual communications on the Weinberg Group's privilege log, *i.e.*, "the communications in question," bear any relationship to any alleged crime or fraud.

In explaining the application of the crime-fraud exception to various privileges, the D.C. Circuit has stated:

> [T]here are slight[] . . . differences in the formulation of the test for the crime-fraud exception as applied to the two privileges in question, attorney-client and work-product. To establish the exception to the **attorney-client privilege**, the court must consider

> whether the client "made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act," and establish that the client actually "carried out the crime or fraud." *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997). To establish the exception to the **work-product privilege**, courts ask a slightly different question, focusing on the client's general purpose in consulting the lawyer rather than on his intent regarding the particular communication: "Did the client consult the lawyer or use the material for the purpose of committing a crime or fraud?" *Id. at 51*.

*United States v. Naegele*, 468 F. Supp. 2d 165, 174 (D.D.C. 2007) (emphases added) (quoting *In re Sealed Case*, 223 F.3d 775, 778 (D.C. Cir. 2000)). Chevron cannot establish the crime-fraud exception to overcome either the attorney-client privilege or work product protection because Chevron can demonstrate no intent by the Weinberg Group to do anything dishonest or underhanded in coordinating the preparation of the six supplemental damages reports. Indeed, the supplemental damages reports were ordered by the Lago Agrio Court and intended to resolve the perceived problems surrounding the Cabrera Report, not to compound those problems. **(***See* Gomez Decl., Ex. 30.) For its part, the Weinberg Group coordinated a process by which six independent experts assessed the evidence relied upon by the Lago Agrio Court. Any reliance on the Cabrera Report's data and findings by those six experts was plainly cited as such. Try as Chevron might to muddy the crime-fraud issue by baselessly conflating the preparation of the Cabrera Report with the Weinberg Group's subsequent work in coordinating the work of the supplemental experts, its counsel's constant repetition of the words "criminal," "fraudulent," and "scheme" is not sufficient to prove such conduct.[13]

[13] Even the *American Lawyer* has observed Chevron's counsel's flippant invocation of the terms "fraudulent" and "criminal" are not limited to the Chevron-Ecuador matter but are apparently part and parcel of counsel's usual litigation strategy and may go "[t]oo [f]ar," noting that "[t]he firm's aggressive tactics have backfired at least once." (*See* Gomez Decl., Ex. 31.)

The most outrageous of Chevron's allegations of the Weinberg Group's purported involvement in a crime or fraud is Chevron's assertion that the Weinberg Group was involved in drafting the Ecuadorian Judgment. (Chevron Br., Dkt. 17-00, at 12.) Chevron makes this claim because data in one of the documents the Weinberg Group gave to supplemental expert Allen (the "Selva Viva Data Base") seems to appear in the Judgment. *(Id*.) According to Chevron, this "Selva Viva Data Base" document is not part of the Lago Agrio Court record *(id.)*, but that contention rings hollow for several reasons. First, none of Chevron's declarants swears to having reviewed the entire Lago Agrio Court record. Such a review may be insufficient in any event, as it does not appear that the Lago Agrio Court has yet certified the record. Second, no one on Chevron's behalf (other than the computer forensicist, Mr. Younger, in a cryptic parenthetical) affirms that the Selva Viva Data Base is not part of the Ecuadorian record. (*See* Dkt. 18-02.) Mr. Younger never offers any substantiation for that assertion, nor could he, since he has not reviewed or attempted to review the entire Ecuadorian record. (*See* Dkt. 18-02. ("In February 2011, I was asked to evaluate specific files from the Lago Agrio litigation provided through counsel."[14]))

**1. Chevron Fails to Disclose That Not A Single One of The Five District Courts Presented with Chevron's Assertion of the Crime-Fraud Exception Relating to The Supplemental Expert Reports Has Applied the Crime-Fraud Exception.**

The totality of Chevron's argument that a predicate crime or fraud occurred or even was planned is based solely upon its assertions that the Weinberg Group had a "central role in

[14] According to the Declaration of Michael Younger, the files he was provided include the following: (1) Adobe Acrobat file "Sentencia 1.pd,"; (2) Adobe Acrobat file "LAGO AGRIO JUDGMENT (Cert Eng).pdf"; (3) Microsoft Excel spreadsheet files: "DA00000040.xls," "DA00000041.xls," and "DA00000042.xls"; (4) Forty-seven Adobe Acrobat files, including 24 "Judicial Inspection Reports" and 23 "Lab Reports"; and (5) PDF file "SN 049997-SN 050000.pdf." Those snippets are a far cry from the complete 230,000 page Ecuadorian record. (*See* Dkt. 18-02.)

drafting and overseeing the creation of reports whose stated purpose was to 'cleanse' the Cabrera fraud" and its unsubstantiated claim that Weinberg was somehow involved in drafting the Ecuadorian Judgment.[15] (Chevron Br., Dkt. 17-00, at 15.) Tellingly, Chevron does not disclose that it earlier raised these same allegations with respect to the supplemental damages reports and invoked the crime-fraud exception before five separate federal district courts—and not *one* of those courts applied the crime-fraud exception. In fact, three of those courts outright rejected Chevron's allegations of fraud. (Gomez Decl., Ex. 33 at 12-13, Ex. 34 at 20-21; Ex. 35 at 21.) Of those three courts, two concluded that any reliance on the Cabrera Report was transparent and not fraudulent. (Gomez Decl., Ex. 34 at 20-21; Ex. 35 at 21.) As to the third court, then-Chief Judge William K. Sessions III of the District of Vermont conducted an *in camera* review of the communications of one of the experts regarding his report and was "satisfied that no evidence of fraud, false pretenses or undue influence appear[ed]." (Gomez Decl., Ex. 33 at 12-13.) Apart from Chevron's rank speculation, there is simply no basis to conclude that any involvement by the Weinberg Group related to the six expert reports is *prima facie* evidence of a crime or fraud.

It is equally worth noting that 15 of the 19 district courts which also evaluated "crime-fraud" claims similar to the ones Chevron alleges here (but against entities other than the drafters

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[15] Chevron also seems to suggest that the so-called "Cabrera fraud" could be a predicate crime or fraud for the Weinberg Group. First, on an appeal of a separate § 1782 action, the Third Circuit gave clear guidance on considering the supposed Cabrera Report "fraud" that Chevron attempts to shoehorn into this unrelated question of the Weinberg Group's involvement. *See generally In re Application of Chevron Corp.*, 2011 WL 2023257. In examining whether the Ecuadorian Plaintiffs' purported role in the preparation of the expert submission known as the Cabrera Report was sufficient to trigger the invocation of the crime-fraud exception, the Third Circuit noted that the Lago Agrio Court "expressly declined to consider the Cabrera report in reaching its judgment" and suggested that those findings may be "entitled to issue preclusive or claim preclusive effect given the surrounding circumstances," bringing into question the "viab[ility]" of Chevron's claims. *Id.* at 13 (citation omitted). As the Lago Agrio court was presented with much of the same discovery Chevron has presented before U.S. Courts (including outtakes from *Crude*) but rejected Chevron's repeated requests to nullify the judgment on the basis of a purported fraud, Chevron should be estopped from arguing that the Ecuadorian Plaintiffs' contacts with Cabrera show any evidence of a crime or fraud. Although Chevron dismissed these and the Third Circuit's other findings as mere "dicta" (*See* Gomez Decl., Ex. 32 at 21 n.10), the company was apparently so concerned by this "dicta" that it filed a substantial motion for *en banc* rehearing, which the Third Circuit promptly denied. (*Id*. at 12.) On these recycled facts, there simply can be no finding of that a crime or fraud has occurred.

of the six supplemental expert reports) did not apply the exception, despite Chevron's urging. (*See* Gomez Decl. Ex. 36.) Seven of those courts expressly refused to apply the exception, concluding either that: (1) no crime or fraud was apparent from the evidence; or, alternatively, (2) it would be inappropriate for a U.S. court to opine on whether events that occurred in the context of a foreign proceeding amount to a fraud – particularly where the evidence concerning the alleged fraud was squarely before the foreign court. *See id.*[16]

Chevron ignores these facts and instead would have this Court rely on a recent order by Magistrate Judge Francis in the S.D.N.Y. for the proposition that the existence of crime-fraud, as it relates to the "cleansing" reports, has already been decided. (*See* Gomez Decl., Ex. 37.)

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[16] *See Chevron Corp. v. Bonifaz*, No. 3:10-mc-30022-MAP, 2010 WL 5437234, at *11 (D. Mass. Dec. 22, 2010) ("To the extent Chevron . . . assert[s] that the crime-fraud exception should overcome any privilege, the court finds that they have not met their heavy burden in establishing that narrow exception. More particularly, the court concludes that the applicants have not made a *prima facie* showing that Bonifaz's assistance was sought by the Ecuador Plaintiffs in furtherance of a crime or fraud. *In this regard, the court notes that several other district courts have expressly denied the applicants' requests to invoke the crime-fraud exception with respect to other respondents*." (emphasis added)); *Chevron Corp. v. Shefftz*, No. 10-mc-10352-JLT, Dkt. 45 (D. Mass. Dec. 7, 2010) ("[Chevron] has not shown Respondent 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) ("Having reviewed the materials [submitted for *in camera* review], the Court is satisfied that no evidence of fraud, false pretenses or undue influence appears . . . ."); *Chevron Corp. v. Wray* , No. 10-mc-00371, Dkt. 78, Order at 20-21 (D.D.C. Nov. 30, 2010) (noting "the Court [will not] opine on the merits of Applicants' proffered 'crime-fraud exception' argument based on the record created by the parties" and citing case law "deferring to Ecuadorian courts to adjudicate allegations concerning crime-fraud").); *Chevron Corp. v. Barnthouse*, No. 1:10-mc-00053, Dkt. 36, Order at 21 (S.D. Ohio Nov. 26, 2010) ("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. . . . Therefore, the crime-fraud exception does not apply in this case."); *Chevron Corp. v. Stratus*, No. 1:10-cv-00047, Dkt. 262, Order at 9 (D. Colo. Oct. 1, 2010) ("[T]he Court intends to avoid any analysis of the merits of the underlying litigation, including whether Petitioner contaminated the Ecuadorian Amazon as argued by Plaintiffs or whether Mr. Cabrera defrauded the Ecuadorian court, as averred by Petitioner. . . . The Court, in this order, restricts its adjudication to the legal issues of privilege in this discovery proceeding, without intruding into the merits that are committed to the jurisdiction of the Ecuadorian trial court."); *Chevron Corp. v. Quarles*, No. 3:10-cv-00686, Dkt. 108, Order at 2 (M.D. Tenn. Sept. 21, 2010) (addressing alleged Cabrera report fraud: "While fraud on any court is a serious accusation that must be investigated, it is not within the power of this court to do so, any more than a court in Ecuador should be used to investigate fraud on this court.").) Only four courts chose to apply the exception and one of those decisions was reversed by the Third Circuit. *See In re Application of Chevron Corp.*, No. 10-2815, 2011 WL 322380 (3d Cir. Feb. 3, 2011).

However, the Magistrate Judge made no independent findings of fraud. Instead, he relied on Judge Kaplan's earlier examples of three *alleged* frauds to find "probable cause." *Id.* In reaching his incorrect conclusion that Judge Kaplan had already "determined" the fraud issue, the Magistrate Judge refused to recognize or consider at all (i) the Third Circuit decision rejecting the same allegations as a basis to apply the crime-fraud exception and (ii) that the Lago Agrio Court refused to rely on the allegedly "tainted" reports in arriving at its Judgment. By trumpeting Judge Francis' interim decision (his order is now the subject of Objections under review by the Southern District), Chevron would have this Court rely on a decision that was simply not based on any independent analysis whatsoever. If this Court is inclined to look to other courts for guidance, it should look to the Third Circuit, which noted the Lago Agrio Court's judgment may preclude a crime-fraud determination and that Chevron's claim may not be viable considering the Lago Agrio court's exclusion of the Cabrera report from its findings. *In re Application of Chevron Corp.*, No. 10-2815, 2011 WL 322380, at *13 (3d Cir. Feb 3, 2011). This Court may also look to the holding of the one court thus far to have actually conducted an *in camera* review of the communications of one such supplemental expert (Allen), and concluded: "Having reviewed the materials, the Court is satisfied that no evidence of fraud, false pretenses or undue influence appears . . . ." *Chevron Corp. v. Allen*, No. 2:10-mc-00091, Dkt. 38, Order at 13 (D. Vt. Dec. 2, 2010).

**2. Chevron Fails to Meet its Burden to Demonstrate that Specific Communications Were in Furtherance of Any Crime or Fraud.**

Even were this Court to find that Chevron has made a *prima facie* showing that a crime or fraud had occurred in the preparation of the supplemental experts' reports, there remains no evidence that any of the Weinberg Group's documents and communications bore any relationship to, or were used to further such a "fraud" – a key threshold requirement in this

Circuit before the crime-fraud exception is applied. *See In re Sealed Case*, 754 F.2d at 399; *In re Sealed Case*, 676 F.2d 793, 814-15 (D.C. Cir. 1982); *see also In re Application of Chevron Corp.*, No. 10-2815, 2011 WL 322380, at *11 (3d Cir. Feb 3, 2011) (vacating crime-fraud determination, finding "evidence in the record is simply too sparse for us to conclude that Chevron has met that burden" to prove furtherance prong).

Chevron describes what it purports to be a crime or fraud in the vaguest of terms—saying only that the Ecuadorian Plaintiffs had a scheme "to whitewash the Cabrera fraud." (Chevron Br., Dkt. 17-00, at 10.) The Weinberg Group's entire *raison d'etre* in the Lago Agrio Litigation, however, was to help prove that the Ecuadorian Plaintiffs and their homeland were harmed by Chevron despite any aspersions cast upon the Cabrera Report, so its work was corrective rather than complicit in relation to the Cabrera Report. Some of the so-called "cleansing experts"—namely, Dr. Daniel Rourke and Dr. Carlos Picone—did not rely on the Cabrera Report at all. (*See* Gomez Decl. Ex. 38; Ex. 39; Ex 12 at 230:5-14, 231:6-8; and Ex. 17 at 54:16-17; 58:3-8; 82:9-20.) Others referenced the Cabrera Report to some extent but were critical of it. (*See, e.g.*, Gomez Decl., Ex. 40, at 10 ("Cabrera (2008, Appendix R, used a population growth of 4.4%, which might be somewhat high.").) But all were candid about their respective limitations and degree of reliance on the Cabrera report for data. (*See, e.g.*, *id.* at 9-10 ("Developing detailed, up-to-date costs for the regional systems described by Cabrera (2008) would require an in-depth engineering design effort and is not the intent of this report. Rather, the conceptual approach recommended was examined using largely information developed by Cabrera (2008, Appendix R) during his more detailed research and system design analysis. . . .")) This level of transparency is neither criminal, nor fraudulent.

Second, even with regard to the Cabrera Report (from which nearly all of Chevron's claims of fraud derive on this motion), Chevron has submitted no Ecuadorian law, nor any procedural or civil rule, that prohibits or criminalizes *ex parte* contact with a court-appointed expert or the submission of materials to that expert. To the contrary, submitted herewith are two affidavits by Ecuadorian law professors opining that *ex parte* contacts with court-appointed neutral experts in Ecuador are not prohibited under Ecuadorian law and are, in fact, commonplace in that system.[17] It is not surprising then that, even when presented with Chevron's evidence of purported "misconduct," the Lago Agrio Court refused to rule that the Ecuadorian Plaintiffs had committed any fraudulent or criminal acts. While that may differ from what is permitted in the American judicial system, as the Third Circuit has noted, "American courts, though justifiably proud of our system, should understand that other countries may organize their judicial systems as they see fit." *In re Application of Chevron Corp.*, 2011 WL 2023257, at *14. And finally, as to Chevron's outlandish claim that the Weinberg Group authored part of the Judgment, Chevron points to nothing more than its own incompetent say-so. There is even less effort by Chevron to show that any of the entries on the Weinberg Group privilege log could have in any way led to those nefarious circumstances.

**3. This Court Should Abstain From Deciding Issues Central to the Count Nine Proceedings.**

Chevron claims that the documents and evidence it seeks from Weinberg Group are "highly relevant to the SDNY Action," and to whether "the Judgment is fraudulent and

[17] (*See* Gomez Decl.., Ex. 10 at ¶ 7 (noting that "[i]n Ecuador there are no regulations that prohibit or prevent the parties from meeting with an expert appointed in a civil trial, to plan the work that will be carried out," that "there are no regulations that prohibit one party in a civil suit from meeting with a person before this person is appointed expert in the lawsuit that is taking place," and that, under Ecuador's civil procedure rules, "there are no provisions that prevent or prohibit the expert from coordinating the execution of their work with any of the parties."); *See also* Gomez Decl,. Ex. 9 at ¶ 7.)) Chevron is duplicitous to contend otherwise, as there is also evidence that Chevron secretly met with court-appointed experts. (*See* Gomez Decl., Ex. 8.)

unenforceable." (*See* Chevron Br., Dkt. 17-00, at 1, 7.) For this Court to make findings on core issues that form the basis for the severed Count Nine trial, *i.e.*, that there is evidence of a "fraud" and that communications furthered a "fraud" in the conduct of the Ecuador proceedings, would "at the very least [] tilt the playing field of this lawsuit at a relatively early stage in the litigation." *In re Omnicron Group Inc.*, 233 F.R.D. 400, 405-06 (S.D.N.Y. 2006). This is yet another reason why the crime-fraud exception should not be applied here.

### C. Donziger's Compelled Production of Privileged Documents Does Not Extend to His Communications with the Weinberg Group

Chevron argues that Steven Donziger, one of the Ecuadorian Plaintiffs' counsel in the Lago Agrio litigation, voluntarily waived privilege when, in a § 1782 proceeding, he was compelled by Judge Kaplan in the Fall of 2010 to produce all privileged materials from his 17-year case file as a sanction for not having produced a privilege log at the time he timely filed a motion to quash the §1782 subpoena on privilege grounds.[18] To support its argument, Chevron relies heavily on the recent order issued by Magistrate Judge Francis in the S.D.N.Y. action. *Chevron Corp. v. Salazar, et al*, No. 1:11-dv-3718-LAK-JCF, Order (S.D.N.Y. Aug. 3, 2011), in which Magistrate Judge Francis decided that the Donziger "waiver carries over to related cases." *Id.* at 20. Magistrate Judge Francis' decision, which is the subject of pending Objections by both the Ecuadorian Plaintiffs *and* Chevron, was based on a misapplication of relevant case law and an improper extension of an order in an earlier proceeding in which he has no jurisdiction. To

[18] As the premise for this sanction, Judge Kaplan relied on S.D.N.Y. Local Rule 26.2 and Fed.R.Civ.P. 45(d)(2)(A), which he interpreted to essentially provide that at the time a person is due to serve objections to discovery, any documents which that person claims to be privileged must be described in a privilege log. Judge Kaplan was unsympathetic to the fact that it may well have been a physical impossibility for Donziger to have collected and reviewed his 17 years worth of files and logged 17 years worth of privileged communications in the 18 days between the time he was served with the Subpoena and filed his motion to quash (on privilege grounds, no less).

avoid the impact of settled case law holding that disclosures of privileged materials pursuant to court order do not waive privilege, the Magistrate Judge found that the Court's earlier sanction was an "implied waiver."[19]

The cases upon which Magistrate Judge Francis relied in a strained effort to extend the "implied waiver" to "related cases" were inapposite. *See In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993); *Urban Box Office Network, Inc. v. Interfase Mgrs.*, No. 1:01-dv-8854-LTS-THK, 2004 WL 2375819, at *3-4 (S.D.N.Y. Oct. 21, 2004). Unlike the parties in *Steinhardt Partners* and *Urban Box Office*, Donzinger did not voluntarily produce privileged documents in an attempt to use them as both a "sword" and a "shield." *See also Fonar v. Johnson & Johnson*, 227 U.S.P.Q. 886, 887 (D. Mass. 1985). Nor did he affirmatively put the protected communications "at issue" by invoking advice of counsel as a defense. *See Carl Zeiss Jena GmbH v. Bio-Rad Labs, Inc.*, 98 Civ. 8012, 2000 WL 1006371 (S.D.N.Y. July 19, 2000). Donziger produced the documents kicking and screaming at the direct order of Judge Kaplan, who required their production as a sanction for Donziger's failure to produce a privilege log in an inordinately short period of time. It borders on absurd to characterize Judge Kaplan's declaration of "waiver" in the Donziger §1782 proceeding as anything other than punitive, and not the result of intentional waiver of the attorney-client privilege by either the Ecuadorian Plaintiffs (who as the clients, are the holders that privilege) or work product immunity by Donziger. As such, neither *Steinhart Partners* nor *Urban Box Office* provides any basis for Magistrate Judge Francis to have imported the waiver sanction into the S.D.N.Y. case, and Chevron's reliance on his ruling is fatally flawed.

[19] It should be noted that even this alleged "waiver" would apply to only twenty-five documents on the Weinberg Group's privilege log.

Quite the contrary, courts have refused to find waiver when the party's disclosure of privileged materials was the result of "de facto compulsion." *Transmerica Computer Co., Inc. v. Int'l Bus. Machines Crop.*, 573 F.2d 646 (9th Cir. 1978). In *Transamerica*, IBM was, in a prior proceeding ordered to produce nearly 17 million pages of documents in three months time. In the course of the production, IBM inadvertently produced 1,138 privileged documents. *See id.* at 648, 650. The plaintiff sought production of the documents, claiming that privilege had been waived. *See id.* at 647. The Court ruled in favor IBM finding that the production schedule imposed "such incredible burdens" on IBM that "it would be disingenuous for us to say that IBM was not, in a very practical way, 'compelled' to produce privileged documents which it certainly would have withheld" had it been give more time. *Id.* at 651-52. The burdens placed on Donziger to review, produce, and log materials were just as onerous, if not more so, than the burdens on IBM. To comply with Chevron's subpoena and the dictates of the court, Donziger would have been required to amass documents related to seventeen years of litigation, review these documents, and then generate a privilege log, all within eighteen days. Under these crushing time-constraints, Donziger's inability to quickly produce a privilege log and the resulting "waiver" sanction imposed by Judge Kaplan was no different from IBM being effectively compelled to produce privileged documents.

**D. The Ecuadorian Plaintiffs Never Waived Privilege Over the Weinberg Group's Documents.**

Chevron contends that when the Ecuadorian Plaintiffs' counsel produced a number of documents relating to the Weinberg Group in their production of testifying expert documents in earlier § 1782 proceedings, the Ecuadorian Plaintiffs thereby waived the consultant privilege over all documents related to the Weinberg Group and their work. But, the Ecuadorian Plaintiffs did not waive privilege over any documents not already produced to Chevron.

Chevron relies upon *In re Sealed Case* in an attempt to prove that the privilege was waived over all the Weinberg Group's documents. 676 F.2d 793 (D.C.Cir.1982). However, the court's decision in *In re Sealed Case* was based on specific facts not applicable here. The producing party in *In re Sealed Case* represented that all of the party's documents related to the subject matter were being disclosed. *Id*. at 822. The Ecuadorian Plaintiffs never made such a representation. (Dkt. 1-30, Ex. 28 to Barrett Decl.) (December 13, 2010 letter of A. Small to R. Mastro regarding production by experts)). While the court found that the producing party in *In re Sealed Case* produced some information but "withheld crucial documents that reveal a different, highly embarrassing, version of events," the Ecuadorian Plaintiffs did not selectively disclose documents but produced all of Weinberg Group's documents that were in the testifying experts' possession. (*See* Chevron Br., Dkt. 17-00, at 6 (acknowledging that "the individual cleansing experts produced everything that they had previously logged, including their communications with Weinberg.")) While Chevron claims that the Ecuadorian Plaintiffs sought to gain tactical advantage through the production of Weinberg Group related documents, the Ecuadorian Plaintiffs were merely trying to expedite what would have otherwise been an arduous and contentious discovery process. Additionally, even if the Ecuadorian Plaintiffs waived attorney-client privilege over the subject matter of those Weinberg Group documents produced in the testifying experts' productions, the waiver Chevron is attempting to impose is too broad and should be narrowed. *In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 159 F.R.D. 307, 309 (D.D.C.) (finding that it is within the court's "discretion to define the subject-matter of the disclosed documents narrowly to prevent the scope of the subject-matter waiver from being unduly broad.")

**E. Weinberg Group's Final Privilege Log Establishes That Its Contents Are Privileged**

Chevron continues its campaign of harassment and its crusade for universal waiver over all documents in this case by claiming that Weinberg Group's log is inadequate, even after the Weinberg Group amended the log to address what Chevron claimed were "deficiencies." While the Court ordered the Weinberg Group to amend its original log, it did not order the Weinberg Group to placate Chevron on every one of its unfounded claims of deficiency.

Chevron relies on its own *ipse dixit* assertion that the Weinberg Group be treated as a testifying expert to determine that it is entitled to documents "considered by Weinberg." (*See* Chevron Br., Dkt. 17-00, at 18.). However, Weinberg Group has every right to assert work product privilege over documents in its possession that were prepared in furtherance of the Lago Agrio litigation. Further, although Chevron claims it is entitled to communications regarding the Weinberg Group's and the six supplemental experts' compensation under Rule 26, if Rule 26 were to apply here what Chevron in fact would be entitled to is "a statement of the compensation to be paid for the study and testimony in the case." Fed.R.Civ.P. 26(B)(5). Rule 26 does not entitle Chevron to descriptions of work performed by the experts or a general discussion of compensation.

As further support for its bogus justification to receive privileged information in the possession of the Weinberg Group, Chevron disingenuously claims not to know Selva Viva's "entity status" or "relationship to Weinberg." (*See* Chevron Br., Dkt. 17-00, at 18.) Chevron had no difficulty identifying Selva Viva's "entity status" or its relationship to the Ecuadorian Plaintiffs or the Weinberg Group when it postulated that they where involved in fraudulently drafting the Lago Agrio Courts' final judgment based on the Selva Viva Database Compilation. (*See* Dkt. 18-02; *See also* Chevron Br., Dkt. 17-00, at 12.) Yet, Chevron now pleads ignorance to create "deficiencies" where there are none. Somewhere between the time Chevron's lawyers

drafted the first and second half of their motion, they claim to have forgotten what Selva Viva is. But Selva Viva has in fact appeared on privilege logs since the first productions in Chevron's 1782 proceedings. **(**Gomez Decl., Ex. 42.)

Chevron also purports to characterize LexisNexis as an "unrelated third party" that would presumably break privilege, although they do not specify which privilege. (*See* Chevron Br., Dkt. 17-00, at 18.) Chevron is referring to electronically populated emails and reports from LexisNexis to members of the Weinberg Group which were held back on the basis of the work product doctrine.[20] Chevron attempts to mislead the court into believing that the Weinberg Group shared litigation related material with an "unrelated third party." LexisNexis can hardly be considered a third person. These electronic research results are automatically-generated search results based upon criteria entered by the requesting party, *i.e*., the Weinberg Group, into the LEXIS database. Chevron would not dare concede that its own attorneys' and consultants' LexisNexis research and results are not privileged, yet they do so with respect to the Ecuadorian Plaintiffs and the Weinberg Group. Calling Chevron's position on this point disingenuous would be an understatement. The emails with and reports generated by the LexisNexis searches comprise the thought process of an attorney's agent, and are inarguably privileged. *In re Sealed Case,* 676 F.2d 793, 810 (D.C. Cir. 1982) ("However, to the extent that work product reveals the opinions, judgments, and thought processes of counsel, it receives some higher level of protection, and a party seeking discovery must show extraordinary justification.").

[20] Chevron also cites to a communication between a member of the Weinberg Group and Anthony Calascibetta. (See Chevron Br., Dkt. 17-00, at 18.) Calascibetta is identified as a member of WISS & Company LLP and was a potential consulting expert. Therefore, communications with Calascibetta are protected by the consulting expert privilege. (Gomez Decl., Ex. 41 at 69.)

Chevron also alleges, without citing any support, that attorney client privilege cannot be asserted over communications to which an attorney was not a party. (*See* Chevron Br., Dkt. 17-00, at 18-19.) This is simply false. Courts have found that communication between non-attorneys relaying legal advice received from an attorney is protected under the attorney-client privilege. *See Long v. Anderson University*, 204 F.R.D. 129 (S.D. Ind. 2001) (finding email communications between university employs to be privileged under the attorney client privilege when those communications were about legal advice given by university counsel); *See also McCook Metal L..L.C v. Alcoa Inc.*, 192 F.R.D. 242. 254 (N.D. Ill. 2000) ("Management should be able to discuss amongst themselves the legal advice given to them as agents of the corporation with an expectation of privilege). An attorney need not appear on the "to" or "from" line of an email communication for it to be privileged. Employees of the Weinberg Group were relaying legal advice obtained during communications with counsel, and thus the communications are privileged.

Finally, Chevron makes general allegations that the Weinberg Group has failed to produce an adequate log under F.R.Civ.P. 45(d)(2)(A). (*See* Chevron Br., Dkt. 17-00, at 19.) However, the Weinberg Group's August 5, 2011 log both expressly makes claims of privilege and "describes the nature of the withheld documents, communication, or tangible things in a manner that . . . will enable the parties to assess the claim." **(***See* Gomez Decl., Ex. 41.) In its August 3, 2011 order, the Court cited to its previous finding on the adequacy of a privilege log as instructive to the Weinberg Group's endeavor in producing a final log. *In re Application of Veiga,* 746 F. Supp. 2d 27, 40 (D.D.C. 2010). Unlike the log submitted by the party in *In re Veiga*, the Weinberg Group's logs provide descriptions of individuals who appear on the log and provide specific descriptions of the documents over which privilege is being asserted. (Gomez

Decl., Ex. 41 at 2 (identifying Jeff M. Schwaber as counsel from Stein, Sperling, Bennet, DeJong, Driscoll & Grennfeig, and providing the following description of the withheld document: "Email between and among Ecuadorian Plaintiffs' consulting experts and counsel, prepared in furtherance of litigation, discussing legal strategy regarding subpoena served on consulting experts, prepared on behalf of the Ecuadorian Plaintiffs.")) Each entry identifies the privilege being asserted, properly identifies the parties to the communication or author of the document being withheld on the basis of that privilege, and provides a specific description of the nature of the document. The form of the log is more than sufficient, and the Weinberg Group has not waived any privilege due to the log and its contents.

## CONCLUSION

For all of the foregoing reasons, Chevron's motion to compel the Weinberg Group's production of documents should be denied in its entirety.

Respectfully submitted,

BY: RICHARD D. CARTER, PLLC

*/s/ Richard Carter*

Richard Carter, DC Bar #339358
CARTER COLEMAN & RAGLAND
602 Cameron Street
Alexandria, VA 22314
T: (703) 739-4200 Ext. 207
F. (703) 739-4210
Email: rcarter@colemanragland.com

*Attorney for the Weinberg Group, Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje*

BY: /s/*Julio C. Gomez*

Julio C. Gomez (*pro hac vice pending*)
GOMEZ LLC
ATTORNEY AT LAW
The Trump Building
40 Wall Street, 28th Floor
New York, NY 10005
T: 212-400-7150
F: 212-400-7151
E-mail: jgomez@gomezllc.com

*Attorney for the Weinberg Group, Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje*