IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:10-cv-00047-MSK-MEH

CHEVRON CORPORATION a Delaware corporation,

Petitioner,

vs.

STRATUS CONSULTING, INC.,
DAVID J. CHAPMAN, an individual,
DOUGLAS BELTMAN, an individual,
JENNIFER M.H. PEERS, an individual,
PETER N. JONES, an individual,
LAURA BELANGER, an individual, and
ANNE S. MAEST, an individual,

Respondents.

and,

DANIEL CARLOS LUSITANDE YAIGUAJE, *et al.*,

Ecuadorian plaintiffs/Interested parties.

THE ECUADORIAN PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO CHEVRON'S MOTION TO COMPEL

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INTRODUCTION

In a final, desperate attempt to invade the privilege of its adversary's consulting experts, Chevron relies on misrepresentations, highly misleading allegations, and now, creative translating, to pursue its false claim.

Missing entirely from Chevron's brief is the fact that: (1) *Chevron* repeatedly met *ex parte* not merely with court experts, but with the *Court itself*; (2) *Chevron* ghostwrote parts of the opinion of another, neutral, independent court expert; (3) the Cabrera issue is currently before the Lago Court, but that Court has not opined any improper conduct by plaintiffs at all; and (4) in the Ecuadorian forum, the forum *Chevron* (not plaintiffs) chose, any documents disclosed to Cabrera are not discoverable; indeed, the Lago Court has rebuffed such attempts by Chevron.

Chevron claims Plaintiffs "lack evidence" that it contaminated the Amazon. That is wrong. Chevron's internal memos and audits reveal massive contamination by Chevron. Exs. 48-51. Chevron claims (or at least claimed) that *ex parte* contacts with court experts are improper. That is wrong. Chevron repeatedly met *ex parte* even with the Court itself. Exs. 52, 60. Chevron claims that the parties could not contribute materials to court experts. That is wrong. The Lago Court authorized both parties to "submit to the expert whatever documentation they believe may be useful in preparing his report," Ex. 17, at 9, and Chevron itself ghostwrote portions of the report of the neutral, independent court expert: Mr. Barros, *Compare* Ex. 67 (Chevron's Connor Report) at 1-2, 19 *with* identical sections in Ex. 68 (Barros Report) at 3-4, 7.

And now Chevron claims that Mr. Fajardo stated on March 3, 2007 that Plaintiffs would prepare the expert report, "and Cabrera would simply 'sign the report and review

it.'" Chevron Br. 8. But as plaintiffs learned just this morning, that too is wrong. Mr. Fajardo actually said:

> What the expert will do is **give his criteria… right… his opinion**, and sign the report, and review it as well. But we, all of us, have to contribute to the report. Together, right?

Exs. 83-84. Mr. Fajardo's translator is also heard (but not seen) on the clip, saying in English:

> Translator: *The final report will on… will only be elaborated by the expert? No. The expert, what he's going to do is* ***he's going to give his criterias, his opinion****, and sign the report, and review it. But we, all of us, we have to all… uh, together, right.*

Id. That is a radically different statement, but Chevron hid that from the Court as well.

Stratus has produced thousands of pages in discovery in Colorado, and Plaintiffs have spent hundreds of hours carefully preparing a privilege log following the Court's order. Chevron's blunderbuss motion ignores Plaintiffs' privilege log, ignores the law of waiver, ignores the law of crime-fraud, and ignores the Ecuadorian Court altogether. For the reasons set forth below, the motion should be denied in its entirety.

BACKGROUND

I. Chevron's Pollution of the Ecuadorian Amazon

Apparently in support of their "crime fraud" argument, Chevron makes the remarkable claim that plaintiffs "lack evidence" of Chevron's contamination. Chevron Br. at 10. The argument is beyond frivolous.

The legacy of Chevron's operations in the Ecuadorian Amazon basin (roughly between 1964 and 1992) is well-documented. During that period, Chevron operated an approximately 1,500 square-mile concession in Ecuador that contained numerous oil

fields and more than 350 well sites. The Company deliberately dumped many billions of gallons of waste byproduct from oil drilling directly into the rivers and streams of the rainforest covering an area roughly the size of Rhode Island. Ex. 27 at 703-704.[1] Chevron's operation was grossly substandard by any measure: it violated, *inter alia*, then-current U.S. industry standards, Ecuadorian environmental laws, the Company's contract with Ecuador's government – which prohibited Chevron from using production methods that contaminated the environment – and international law. *Id.*

A. Chevron's Audits and Internal Memos Reveal Massive Contamination

There is neither space nor reason to recreate a seven-year, 200,000-page trial record, but Chevron's claim that it did not contaminate the Amazon – a shocking and false misrepresentation in this case – merits a response. Chevron's *own* internal audits of its environmental impact, conducted in the early 1990s by independent outside consultants and placed in evidence in the Ecuadorian case, found extensive contamination at Chevron's oil production facilities. As an October 1992 report of Chevron's environmental auditors notes:

> The audit identified hydrocarbon contamination requiring remediation at *all* production facilities and a *majority* of the drill sites . . . . Based on the field observations and the assumptions herein, approximately 50 percent of the drill pad and pit contamination and thirty percent of the hydrocarbon contamination at production facilities was attributed to TEXPET's operations from 1964 through 1990. . . . *All produced water from the production facilities eventually discharged to creeks and streams* except for one facility which used a percolation pit. None of the discharges were registered with the Ecuadorian Institute of Sanitary Works (IEOS) as required by the Regulations for the Prevention and Control of Environmental Pollution related to Water Resources (1989).

Ex. 49 at E-1-2 (emphasis added). Plaintiffs did not say that; Chevron's auditors did.

[1] All Exhibits, unless otherwise noted, are to the concurrently-filed Declaration of O. Andrew F. Wilson, dated Sept. 28, 2010.

And this is only a most miniscule part of an overwhelming 200,000-page record indicting Chevron for its indisputable destruction of the Ecuadorian Amazon. *See also* Ex. 50 (Apr. 17, 1992 Memo detailing contamination); Ex. 51 (Jan. 3, 1995 Memo discussing oil discharges into various rivers and tributaries); Ex. 48 (Oct. 1993 Report of Chevron's auditors) at 5-10-14 (noting, among other contamination, "sewage was released on land or stored in pits that emptied into the local river" and "oil emulsion and produced water is discharged into a local creek or river or in some instances directly into the jungle") and at 6-24 and Tables 6-4- 6-6 (finding "environmental damage that may require extensive mitigative action or may be of long-term duration before recovery," where "contaminants appear to have migrated out of the pit.").

B. The Outtakes Reveal Massive Contamination

The outtakes of the March 3 Plaintiffs' meeting reveal a group of lawyers determined to expose Chevron's illegal conduct. It is a serious, sober discussion concerning Chevron's massive contamination, both before and after the so-called "remediation." *See* Ex. 65, CRS 188-1, at 3-4 (summarizing hundreds of contaminated samples, as found by both plaintiffs and Chevron); at 5 ("Here is all of the summary chart for the sites inspected. As we can see, the majority of them are sites that supposedly underwent remediation by Texaco. All of them currently show contamination."); *id.* ("if they take out all of our evidence, I think that we'll win this case. In other words, Texaco is proving our case. With all of their manipulation of the sampling, as can be seen in the inspections, they are still drawing soil and water samples that violate the laws of Ecuador."); at 7 (discussing "remediation": "They came in, they capped it off, took something out, poured water, planted trees and that was the remediation. As you can see, there are 8 wells out of 64. The rest of the sites are just as Texaco left them."); at 8-10

(discussing Chevron's manipulation of sampling techniques to minimize findings of contamination); at 13 (describing how Chevron takes water samples upstream to avoid findings of contamination); at 13 ("For barium, we've found 8,030 in soil. The permissible standard in Ecuador is 750 PPM. And in one sample we found 8,030. For cadmium, 27. The permissible limit is one. Nickel, 199.37. The permissible limit is 40. Zinc, 617.91. This sample is from Texaco. The permissible limit is 200. Chromium, 232.8. The permissible limit is 63. Copper, 120."); CRS 188-2, at 2-3 (describing groundwater contamination); at 4-7 (challenges of remediation); CRS 189-1 at 4 (remediation is "a 17 to 20 year project"); 12 (17 to 20 years to remediate groundwater contamination). In short, the outtakes reveal a serious case to redress substantial harm caused by Chevron.

C. Chevron's Recent Deposition of Bill Powers Reveals Massive Contamination

Chevron's recent § 1782 deposition in California of Bill Powers, one of Plaintiffs' consultants, provided further, devastating evidence of Chevron's responsibility for this massive ecological disaster. Although Chevron has attempted to market the Powers deposition as evidence of "fraud," his testimony provides further evidence that Chevron's protestations of no liability are themselves the true fraud being perpetrated on this Court.

After Ms. Neuman examined Mr. Powers for a full day, Mr. Wilson stated that he too had some questions for Mr. Powers. This set off a panic among Chevron's counsel. First, Ms. Neuman claimed that the "office is closing" and therefore Mr. Wilson could not cross-examine. Ex. 69 at 294:15. Then Chevron's counsel stated that cross-examination could not go forward because Chevron was not "notified of that in advance," as if one must give advance notice of cross-examination in a deposition. *Id.* at 294:21-23.

Then Gibson claimed that "the cameraman has to pack up" and "we literally have to leave the building." *Id.* at 295:1-2, 15-16. Ms. Neuman's colleague then said she "honestly d[idn't]" have five minutes for Mr. Wilson to question Mr. Powers. *Id.* at 295:20-21. Mr. Wilson attempted to press on, notwithstanding all these false statements made by Gibson on the record. Off the record, the Gibson lawyers came up with yet another excuse, claiming that Mr. Wilson couldn't ask questions because he was not admitted in California, Wilson Decl. ¶ 4, even though his *pro hac vice* motion was pending and counsel had stipulated in the morning that Mr. Wilson could appear *pro hac vice*. Ex. 69 at 14:2-10.

Notwithstanding this obstreperous conduct, and Chevron's blatant attempt to hide the truth, Mr. Wilson insisted on fifteen minutes of cross-examination, during which the building did not shut down, the office did not close, the cameraman did not have to pack up, and no one had to leave the building. Here was the testimony Chevron so strenuously attempted to suppress:[2]

> Q: Now, when Chevron-Texaco designed its pits in the Ecuadorian Amazon, what design did it use?
>
> A: **Dug a whole in the dirt and deposited the drilling muds in the un[l]ined hole.**
>
> Q: And if Chevron-Texaco was designing those pits in the United States, would it have been able to dig a pit in the -- and put in the drilling muds as you described?
>
> A: **No.**

Id. at 307:8-16. Chevron's substandard design – dumping toxic chemicals into unprotected, unlined pits – had dramatic consequences:

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[2] Ms. Neuman's speaking objections are excised.

Q: **What's the consequence of Chevron's design of its pits** in the Lago Agrio concession?

….

THE WITNESS: Two consequences: **the leeching of the chemicals into the ground, and ultimately into the ground water; and the overflow of the pits** due to lack of maintenance and rain water and overflowing directly into the drainage channels surrounding that pit.

BY [MR. WILSON]:

Q: And what's the basis for your conclusions concerning the Chevron-Texaco's pits?

A: Having viewed the pits and reviewed the nature of how those pits were designed, utilized, and the fact that -- **it is uncontested that the pits were left with drilling mud in them.**

Id. at 307:15-308:6. Mr. Powers testified that Chevron should have reinjected the toxic chemicals into subsurface formations, where they would not have spread into surface water and groundwater, rather than simply leave toxic chemicals in open, unlined pits:

Q: And when Chevron developed the oil field in Ecuador, did it do so in conformity with standards for treatment of production water that were in place in the United States at the time that it was building its infrastructure in Ecuador?

A: **No.**

….

BY MR. WILSON:

Q: Can you describe the ways in which Chevron's Ecuadorian concession fell below standards it would have been required to meet if that field were in the United States?

….

THE WITNESS: Based on the salinity and the produced water from the field, **the company would have been required to reinject that water into a subsurface formation. Could not have operated that oil field or produced a single barrel of oil without having that produced water injection system operational.**

BY MR. WILSON:

Q: By failing to reinject production water in the Lago Agrio concession, what impact did that have on the environment in Lago Agrio?

….

THE WITNESS: **It contaminated the surface water at the points where it was injected**, not only with the high salinity of the produced water in an environment that has almost no natural salinity, but **the trace contaminants of heavy metals and oil also contributed to the generalized contamination of that surface water.**

Id. at 298:21-301:9. This was no minor pollution, but according to Mr. Powers, one of the biggest man-made oil disasters in the world:

Q: If you include the produced water in your comparison between the discharge into the environment from Chevron's Lago Agrio concession, when you compare that to the Exxon-Valdez oil discharge from that catastrophe, how would you compare them?

A: Both the produced water and the crude oil are toxic. The -- you can argue about the relative toxicity of them both. But **the amount of toxic liquids that should not have been in the environment in Ecuador was at least *30 times the quantity or the volume of crude that was spilled in the Exxon-Valdez disaster*.**

Id. at 303:19-304:6. *Thirty times* the Exxon-Valdez disaster, yet Chevron has repeatedly (and fraudulently) misrepresented to this and other federal courts that it did not pollute at all in the Amazon. Finally, Mr. Wilson asked Mr. Powers about the Cabrera report:

Q: Having reviewed your report that was marked as Exhibit 5, dated the 22nd of March 2008, **do you stand behind the conclusions** that you came to in that report?

A: **I do**.

Q: Does it surprise you that another expert would adopt those conclusions if they were presented to them?

MS. NEUMAN: Objection. Assumes –

THE WITNESS: No.

MS. NEUMAN: -- facts not in evidence.

BY MR. WILSON:
Q: Why not?

A: **The conclusions are well researched, well referenced, logical, easy to understand. And the whole point of developing the calculations was with the hope that they would be seen as compelling by the reviewing expert.**

Id. at 309:7-24. This is the heart of Chevron's "fraud" theory – that plaintiffs submitted compelling, logical, well-referenced reports, in whole or in part adopted by Mr. Cabrera.

II. The Lago Agrio Trial

In 1993, the Amazon communities filed a federal class-action lawsuit against Chevron in the United States District Court for the Southern District of New York, the site of Chevron's global headquarters. *See Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002); Ex. 61. Plaintiffs "sought money damages under theories of negligence, public and private nuisance, strict liability, medical monitoring, trespass, civil conspiracy, and violations of the Alien Tort Claims Act," as well as "extensive equitable relief to redress contamination of the water supplies and environment." *See id*. at 473.

From the lawsuit's inception, Chevron fought vigorously to re-venue the case from the Southern District of New York to the courts of Ecuador.[3] Chevron's motion on *forum non conveniens* and international comity grounds rested on two principal assertions: (1) that the Ecuadorian courts provided an adequate, fair, and neutral forum; and (2) that the evidence and the witnesses were in Ecuador.

For *nine years*, Chevron touted the wonders of the Ecuadorian judicial system, submitting numerous affidavits from experts and its own counsel, and repeating these assertions in extensive briefing. *See, e.g.*, Ex. 24, Affidavit of Dr. Rodrigo Perez Pallares

[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).

(Texaco's attorney) ("the Ecuadorian courts provide an adequate forum for claims such as those asserted by the plaintiffs"); Ex. 28, Texaco Inc.'s Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity ("Ecuador's judicial system provides a fair and adequate alternative forum"); Ex. 30 at 34, Brief for Chevron, U.S. Court of Appeals for the Second Circuit ("Ecuadorian legal norms are similar to those in many European nations.").

The Court of Appeals for the Second Circuit ultimately agreed. It affirmed the Southern District of New York's dismissal of the case, which was conditioned upon Chevron's consent to jurisdiction in Ecuador, in addition to its waiver of certain other defenses should the claims be re-filed there. *See Aguinda*, 303 F.3d at 476.

After final dismissal of the *Aguinda* action in 2002, the Plaintiffs re-filed the case in Lago Agrio, Ecuador (the "Lago Agrio Litigation"). Chevron ultimately broke the promise it had made as a condition of receiving dismissal from the U.S. courts, and argued, unsuccessfully, that the Ecuadorian courts lacked jurisdiction. This would not be the last time that Chevron's deeds would stand in sharp contrast to its prior, vehement assertions that the Ecuadorian courts provide a "fair" and "adequate" forum: Chevron's aspersions on the Ecuadorian courts in these Section 1782 proceedings are just the most recent example.

Trial began in the Lago Agrio Litigation in 2003, and the case remains pending before the Supreme Court of Nueva Loja in Lago Agrio, Ecuador (the "Lago Agrio Court"). The relationship between the parties has been heated, and Chevron's Ecuadorian legal team has defended the case "vigorously" to say the least, infamously resorting to tactics such as menacing and threatening witnesses and their families. Ex.

46. The record contains more than 200,000 pages of evidence, roughly 63,000 chemical sampling results produced by laboratories contracted by both parties and the court experts, testimony from dozens of witnesses, and dozens of judicial field inspections of former Chevron wells and production sites conducted over a five-year period under the oversight of the Lago Agrio Court. Ex. 34.

III. Chevron's Repeated, Ex Parte Contacts With the Lago Agrio Court

Chevron's § 1782 campaign is perched on the faulty premise that *ex parte* contact with court experts in Lago Agrio is a "fraud." The premise is ironic given that (1) Chevron *never*, not *once*, denied that its own lawyers met *ex parte* with court experts; (2) even Chevron's own' "expert" in this case states that it is appropriate to meet *ex parte* with court experts under Ecuadorian law[4]; and (3) Chevron's lawyers repeatedly met secretly and *ex parte*, not just with court experts, but with *the court itself*.

Plaintiffs have now obtained declarations from two Ecuadorians who worked on the Lago Agrio case, in conjunction with the Plaintiffs' team, who witnessed Chevron's attorneys repeatedly meeting *ex parte* with the court in Lago Agrio, concerning Richard Cabrera and other aspects of the case. Robinson Yumbo Salazar has testified that:

> On multiple occasions, I personally saw the lawyers who represent Chevron Corporation in the Lago Agrio case, their technical personnel and their security guards, **meeting alone with the judge in charge of the case, without the presence of the plaintiffs' lawyers**. . . . I especially remember two cases where I saw Iván Alberto Racines, a lawyer of Chevron in the Lago Agrio case, and other lawyers of Chevron whose names I do not remember, meeting with Doctor Germán Yánez Ruiz, who was the judge of the case at the time. These meetings were without the participation of the Plaintiffs' representatives in the Lago Agrio case."

[4] Dkt. #238, Affidavit of Gustavo Romero Ponce ¶ 50 ("In my opinion, in the Ecuadorian judicial practice or custom, some direct communications with the expert without the presence of the other party are inevitable.")

Ex. 52 (Decl. of Robinson Yumbo Salazar) ¶¶ 4-5.

Corroborating this pattern of ex parte interactions between Chevron lawyers and the Lago Agrio court, Donald Rafael Moncayo Jimenez, has testified that

> [o]n multiple occasions, I personally saw the lawyers who represent Chevron Corporation in the Lago Agrio case **meeting alone with the judges who heard the case without the presence of the plaintiffs' lawyers**.

Ex. 60 (Decl. of Donald Rafael Moncayo Jimenez) ¶ 3. Mr. Moncayo provided details concerning a particular incident in the summer of 2007 where he "saw attorneys Adolfo Callejas Ribadeneira and Ivan Alberto Racines (lawyers of Chevron), and Dr. Efraín Novillo (who was in charge of the case at the time) in the offices of Judge Novillo. **They were talking about the expert designated by the Judge, Mr. Richard Cabrera**." *Id.* ¶ 4. When he "approached the offices, **the private security guards of Chevron and a Chevron technician tried to chase [him] away**." *Id.* Mr. Moncayo describes another incident where Judge Juan Núñez, then-President of the Provincial Court of Justice of Sucumbíos, "was talking to Dr. Diego Larrea and Alberto Racines about the inspection of the Auca wells and other stations, where there were oil wells, topic of the Lago Agrio case." *Id.* ¶ 5.

These revelations make plain the blazing hypocrisy of this company. Notwithstanding their pious invocations of fair play and phony outrage over a meeting between plaintiffs and a court expert, Chevron's own lawyers met *ex parte*, not merely with an expert, but with the court itself. It did so on multiple occasions. And when this secret conduct was discovered, Chevron's security guards tried to keep any witnesses to this conduct away.

III. Chevron's "Ghostwriting" of the Report of a Neutral, Independent Court Expert

Chevron's other complaint here concerns the submission of materials (including proposed findings) to a court expert, what it calls "ghostwriting." Chevron's lawyers somehow forgot to mention that *Chevron's* private expert, John A. Connor, ghostwrote part of the report of a different independent, neutral court expert in Lago Agrio: Mr. Barros.

Attached as Exhibit 67 is a report Chevron's private expert, Mr. Connor, dated June 16, 2005, titled *Prácticas y Reglamentos Internacionales Para el Uso y la Remediación de Piscinas de Campos Petroleros*. Apparently without any attribution, the neutral and independent expert appointed by the Lago Agrio Court, Mr. Barros, copied entire pages of Chevron's report, word for word. In his expert report submitted to the Court, Barros included a five-page passage with the same title as the Connor report: *Prácticas y Reglamentos Internacionales Para el Uso y la Remediación de Piscinas de Campos Petroleros*. Ex. 68. The first two pages of this section mirror the Connor report *exactly*. *Cf.* Ex. 67 at 1-3; Ex. 68 at 2-3. Barros then follows this introductory section with three other passages directly cut from different sections of Connor's report, all without attribution. *Compare* Ex. 67 at 8-9, 15, 19; Ex. 68 at 3-6. Nowhere does Barros appear to acknowledge that he has cut and pasted Chevron's expert's materials into his own avowedly neutral and independent report.

Does Chevron deny it had *ex parte* contact with Barros? It does not. Is it a miraculous coincidence that an entire section of the Barros report is a clever cut and paste of disparate portions of Chevron's work product? It is not. By Chevron's argument, this is fraud on the court and collusion with a neutral, independent expert. What Chevron

does *not* reveal, however, is that both parties were permitted to meet with court experts, to submit materials to court experts, and to draft materials for court experts, which is precisely what Chevron did. *See supra*.

IV. Chevron's Collateral Attacks on the Lago Agrio Trial: The BIT Arbitration and its Efforts to Invalidate the Cabrera Damages Report

As evidence in the Ecuadorian Litigation mounts against Chevron, the company has sought to use every conceivable method to attack its chosen forum of Ecuador, Plaintiffs, and their attorneys. Threatened by the possibility of a substantial Ecuadorian defeat, Chevron has shifted from contesting the merits of the Ecuadorian case to pursuing a three-prong strategy to undermine it: (i) shift the litigation to a new forum (an arbitration); (ii) attack the legitimacy of one of the Court's experts; and (iii) keep the Plaintiffs' attorneys occupied with duplicative, irrelevant discovery in multiple fora across the United States, purportedly "in aid" of (i) and (ii).

Chevron filed a "notice of arbitration" under the UNCITRAL rules pursuant to the U.S.-Ecuador Bilateral Investment Treaty on September 23, 2009. *See generally* Ex. 36. Chevron has asked this private arbitration panel to tell the government of Ecuador to tell the judge to dismiss the Lago Agrio litigation via an order requiring that the Republic's President violate Ecuador's own Constitution, interfere in the country's independent judiciary, and quash a trial brought by his own citizens against Chevron in the very court in which Chevron sought to have the claims heard. Ex. 36 at ¶ 76(3). Under BIT rules, Plaintiffs cannot even be a party to this proceeding. Plaintiffs recently moved to stay the arbitration and that stay motion is currently pending before the Second Circuit. *See Republic of Ecuador v. Chevron Corporation, et al.,* 10-1026 (CON) (2d Cir. 2010); Ex.

8. Although Chevron recently promised the Second Circuit that it would no longer seek to prevent entry of a final judgment in Ecuador, that proved to be just another Chevron misrepresentation: just weeks ago, Chevron asked the arbitrators to do just that. Ex. 70.

Chevron's other tactic (at the heart of this application) is to manufacture a scandal concerning Plaintiffs' contacts with a court expert, Richard Cabrera. Mr. Cabrera is but one of many experts in the Lago case, and the Cabrera report is but one of over a hundred reports in the case. Since that report, and pursuant to the Lago Court's August 2, 2010 Order, Ex. 12, Plaintiffs have submitted supplemental reports from a number of well-credentialed experts in the United States which concluded that some of the damage figures in the Cabrera report were high, others were low, but on balance, damages exceed $27.3 billion. *See infra* & Exs. 71-78.

Mr. Cabrera was an Ecuadorian expert appointed by the Lago Agrio Court to provide an assessment of the damage from Chevron's pollution of the Amazon. In the course of this work, Mr. Cabrera performed forty-eight separate site inspections. Ex. 46.[5] In addition to the information collected from these field inspections, Mr. Cabrera asked both Plaintiffs and Chevron to "submit to the expert **whatever documentation they believe may be useful in preparing his report.**" Ex. 17, at 9; Ex. 46 (emphasis added). Though Chevron refused to partake in the process, Ex. 46, Plaintiffs cooperated with Mr.

[5] Chevron was present for Mr. Cabrera's inspections, and often tried to obstruct and impede his work. Contrary to court orders, Chevron disturbed the areas where Cabrera was scheduled to perform testing, *e.g.*, using heavy machinery to stir up the ground, interfering with Mr. Cabrera's ability to sample there. Ex. 46. In November 2007, Mr. Cabrera filed an official complaint with the Lago Agrio Court describing how members of Chevron's legal team in Ecuador subjected him to threats and insults when he would conduct his field work. *Id.* As a result, the Lago Agrio Court mandated that Mr. Cabrera and members of his technical sampling team be given law enforcement protection when conducting field work. *Id*.

Cabrera and supplied him with information to support the preparation of a global damages assessment report.

Chevron petitioned the court to obtain copies of materials submitted by Plaintiffs to Mr. Cabrera, and objected to his consideration of them. The Lago Agrio Court either rejected or deferred these requests, and has not questioned the propriety of Plaintiffs' submission of materials to Mr. Cabrera. Ex. 46.

From his appointment, Chevron has gone to great lengths to discredit Mr. Cabrera. Chevron has filed no fewer than thirty separate motions in the Lago Agrio Court attacking Mr. Cabrera's qualifications, credibility, processes, and findings. Chevron has attempted to have the Cabrera Report stricken on bases ranging from Mr. Cabrera's alleged indirect relationship to Ecuador's state-owned oil company, to the accusation that the Court gave Mr. Cabrera insufficient time to conduct a study of that magnitude, to the claim that Mr. Cabrera failed to properly accept his appointment. The company propounded ten sets of interrogatories and complaints concerning his final report. Ex. 46. It made an approximately 1,000-page submission to Mr. Cabrera to which he has responded. *Id.*

In motions filed in Lago Agrio, Chevron has repeatedly asserted that "[m]uch of Cabrera's 'independent' report in this case was not authored by Cabrera at all, but rather was the work product of plaintiffs' representatives, consultants, and allied sponsors." Ex. 55 at 10. Nevertheless, the Lago Agrio Court has never stated that under Ecuadorian law, procedure, or the law of the Lago case, it would be improper for Cabrera to rely on documents produced by Plaintiffs in drafting the report.

Once again, Chevron's claim is nothing but ironic. Chevron secretly, *ex parte*, and without plaintiffs' knowledge, drafted at least one entire *judicial* opinion in this case, signed on the dotted line without a single change by a federal judge in Texas. Exs. 38, 39. The opinion, drafted and written by Chevron, was not revealed to plaintiffs until *after* it was already issued. Surely, however, Chevron would not question the neutrality or independence of a federal judge simply because Chevron wrote his opinion, in secret, word-for-word, in its entirety. Yet they ask this Court to opine that any drafting by plaintiffs of an expert report in Ecuador is a "fraud." *See infra*.

V. The Matter of Plaintiffs' Contacts Is Pending In Ecuador

Chevron's extensive, secret, *ex parte* contact with the Lago Court is just some evidence of the bankruptcy of Chevron's manufactured "scandal" concerning Mr. Cabrera. For Chevron has still to identify a single order, a single rule, a single regulation, or a single law prohibiting *ex parte* contact between either party and the court experts in the Lago Agrio case.

In addition to all of this, the question of contacts between Plaintiffs and Cabrera is already before the Lago Agrio Court. Of course, the Lago Court held that "the parties may submit to the expert whatever documentations they believe may be useful in preparing his report," Ex. 17 at 9. Plaintiffs did; Chevron didn't. Plaintiffs then told the Court, *inter alia*, that:

> Plaintiffs took advantage of the opportunity to advocate their own findings, conclusions, and valuations before Cabrera for him to consider their potential adoption. The information provided to Cabrera by Plaintiffs' counsel included proposed findings of fact and economic valuations for the environmental and other damages caused by Texpet's practices and pollution. Cabrera was, of course, free to adopt, wholly or in part, plaintiffs' views, proposed findings and valuations. And, in fact,

> apparently finding them credible, Cabrera adopted the proposals, analyses, and conclusions of the Plaintiffs concerning the damages and the valuation.

Ex. 11 at 6-7. The submission concluded:

> In conclusion, we believe there is sufficiently ample basis in the record before this Court to allow it to render a judgment containing just and appropriate redress without the need to include additional evidence. Nonetheless, in the interest of satisfying Chevron's vehemently expressed (albeit fabricated) "concerns," and so as to assure that this trial may proceed to conclusion without further delay and distraction resulting from Chevron's attacks in foreign courts, the Plaintiffs on the basis of numeral 1 of Art. 330 of the Judiciary Code take the liberty of submitting the following recommendation: That each of the parties be ordered to submit to the Court, within the term of 30 days, final, supplemental information to guide the Court in arriving at a global damage assessment, given the record evidence adduced during this trial over the past seven years.
>
> Following the submission of this supplemental information by each party, the parties shall be granted a final term of 15 days during which they may comment on the information submitted by the opposing party. After the conclusion of this comment period, you, Your Honor, may proceed to the portion of this litigation so that a final judgment can be rendered.

Id. at 7.

Notwithstanding Chevron's hyperbolic claims of fraud, collusion, and the like, the Ecuadorian court — the only court with knowledge of Ecuadorian law, procedure, and this case, and the only court in a position to rule on those issues — has given no indication that such contacts were or are improper. In response to this filing, the Lago Agrio court did not chastise the Plaintiffs. Nor did it suggest in any way, that under the law of *Ecuador* – the forum, after all, that *Chevron* chose, Exs. 23-31 – Plaintiffs committed any impropriety whatsoever.

To the contrary, the Court stated, in unambiguous terms: "**the judge is not required to agree with the opinion of the experts**." Ex. 12. The Court then "order[ed] the parties to submit, through the Office of this Presidency, a document setting forth and

justifying their positions on the economic and applicable criteria for environmental damage remediation." *Id.* The Lago Agrio Court therefore gave *both* parties the opportunity to provide their *own* submissions concerning damages. Ex. 12. To the extent Chevron believes that the Cabrera report is unsound for whatever reason ("collusion," bad science, or whatever else), it has now had the opportunity to produce its own *extra* submission to the Court, in addition to the seven-year, 200,000-page trial record.

Surely, any litigant with a professed desire for more due process would welcome such a development. Not Chevron. Chevron opposed the motion, and remarkably, announced it had no interest in filing a supplemental damages submission to the Court. Ex. 13 (referring to filings by Dr. Callejas, counsel for Chevron). The Court, however, rejected Chevron's cynical and completely indefensible position. Exs. 12, 13 ("ordering the parties to comply with the provisions of the order of August 2, 2010"). Against its own wishes, Chevron has now had the opportunity to provide a damages assessment directly to the Court.

Chevron's accusations that Plaintiffs' lawyers have made misrepresentations ignore Plaintiffs' submission to the Ecuadorian Court, and that Court's response.[6] If its justification for discovery here is based on these same critiques, discovery is unnecessary as the Lago Agrio Court already has these facts before it. If its discovery is in aid of its argument that it is dissatisfied with the judicial system it fought tooth and nail to litigate in, that complaint was waived by Chevron during a nine-year effort to transfer the case to Ecuador.

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[6] As Judge Lynch noted at oral argument with respect to representations made by Chevron's counsel, "we now know we have to make very clear what you're representing and what you're not representing." Ex. 46 at 53.

VI. Plaintiffs' Supplemental Submission to the Lago Court Concerning Damages

Pursuant to the Lago Court's August 2, 2010 order, plaintiffs on September 16, 2010 submitted supplemental reports concerning damages, from a number of well-credentialed experts retained by plaintiffs. Exs. 71-77. Contrary to Chevron's representations, many of these reports do not rely on (or in some cases, even refer to) the Cabrera report at all.[7]

For example, Dr. Daniel Rourke prepared a report concerning the "Estimate of the Number and Costs of Excess Cancer Deaths Associated with Residence in the Oil-producing Areas of the Sucumbios and Orellana Provinces of Ecuador." Exs. 73-74. His report does not rely upon or even mention the Cabrera report or, for that matter, any work by Carlos Martin Beristain. *Cf.* Chevron Br. at 17. Instead, relying, *inter alia*, upon "standard actuarial life-table methodology"; information from the "Instituto Nacional de Estadistica y Censos (INEC), the Ecuadorian equivalent of the U.S. Census Bureau, National Center for Health Statistics, and Bureau of Labor"; and a peer-reviewed article by "Hurtig and San Sebastian (2002)" concerning "excess cancer risk associated with residence near the oil fields," Ex. 78, Dr. Rourke estimates 9,950 "excess cancer deaths" in the four cantons most exposed to Chevron's contamination, assuming Chevron begins the remediation shortly and fully remediates by 2020. Ex. 73; Ex. 74 at 7. Assuming a value-per-life $7 million, a number based in part on valuations and over twenty studies

[7] Chevron's accusation that Plaintiffs "induced this Court to rely on their misrepresentations that the materials sought here would be irrelevant to that deadline [September 16, 2010]," is wrong. Chevron's stated intent in these proceedings is to tear down the Cabrera report. The September 16 deadline was set to allow Chevron and Plaintiffs to make *additional* damages submissions from *other* experts. In addition, Chevron omits from its submissions the supplemental reports that did not rely on, or in some cases even refer to, the Cabrera report.

by the U.S. Environmental Protection Agency, Ex. 73 at 17-18, Dr. Rourke estimates damages for this category at $69.7 billion, Ex. 74 at 7. Even if one were to assume that Chevron is not legally responsible for any damage caused by any contamination after 1990, Dr. Rourke estimates 4,224 "excess cancer deaths" in the four cantons, and damages of $29.6 billion. Ex. 74 at 7.[8]

For this category of damages, plaintiffs' expert estimated damage figures greater than in the Cabrera report. In other categories, plaintiffs' experts estimate lower damage figures than in the Cabrera report. For example, Douglas C. Allen, P.A. estimates a cost of $487 million to $949 million for soil remediation, Ex. 71 at 15, and $396 to $911 million for groundwater remediation, Ex. 71 at 18, figures substantially lower than the Cabrera report, and substantially lower than the "$6 billion figure developed by one of [Plaintiffs'] experts, David Russell." Chevron Br. at 10. For all of Chevron's citations of loose talk about "jacking up" damage estimates and science serving the law, et al., the *reality* is that plaintiffs recently submitted a conservative projection for remediation costs to the Lago Court, even though it is considerably smaller than the projection in the Cabrera report. Ex. 71.

VII. Procedural History in This Action

In addition to its arguments on privilege, Chevron's brief inevitably returns to the leitmotif of its Section 1782 applications: empty, collateral and incendiary attacks on counsel for opposing parties, Plaintiffs and Stratus. Contrary to its claims of

[8] Chevron misrepresents that "Plaintiffs also admit they cannot show a link between oil contamination and cancer." Chevron Br. at 11. Actually, in the clip cited by Chevron, plaintiffs' counsel mentioned the San Sebastian study, and stated there was circumstantial evidence (but not absolute, 100% certainty) of such a link. Hendricks Decl. Ex. A, 159-00-10.

"demonstrably false accusations to this Court," all parties have been steadily working towards a resolution of Chevron's proposed incursion into the attorney work product of Plaintiffs' consulting experts. As has been plain from the outset of these proceedings, in the parties' cascade of filings, Chevron and the Plaintiffs have radically different views of the privilege and propriety of Plaintiffs' communications with damages expert Richard Cabrera. Throughout this discovery process, Plaintiffs have openly sought to assert privilege over communications with Mr. Cabrera while, at the same time, providing enough context to the Court and Chevron to evaluate Chevron's attempts to pierce that privilege. Through this process, it has already been disclosed that Plaintiffs submitted materials to Mr. Cabrera and that Plaintiffs' consulting experts have had direct contacts with Mr. Cabrera. Chevron's efforts to portray this process as in bad faith are specious.

For example, Chevron's repeated suggestion that Plaintiffs' counsel misled the Court when he "stood silent during [Stratus's] false representations," at the April 27, 2010 Hearing, Chevron Br. at 3, is untrue and unfair. As Plaintiffs have reminded Chevron before, shortly after Mr. Silver spoke at the April 27 hearing concerning any communications between Stratus and Cabrera, Mr. Wilson, who was quite new to the case, issued a note of caution:

> WILSON: I'm just concerned, again, I'll sound this note again to the Court. The -- the tension and the drama of this proceeding and the invocation of fraud from my colleagues from Chevron hinges on what I preliminarily understand to be a view of what transpired in Ecuador which is not the whole picture. And I just – I'm concerned that we are not in a position today to be able to provide Your Honor with the full picture. And I'm very concerned that we start drawing bright lines around the communications and in a manner that Your Honor will revisit in two weeks time when we have the opportunity to present the full picture and –
> THE COURT: I understand.
> MR. WILSON: -- and things will be different. And -- and I -- my

> hope, and it will come as no surprise to the Court, is that by -- when we are able to present this picture in the full context, that a lot of the -- you know, a lot of the wind will be taken out of this -- the hyperbole allegations that are floating around. And -- but my concern is that this morning I don't want to be boxing ourselves into one view of how -- of what happened, and I think it's imperative that we be able to provide a full picture, and I don't want to rush that proceeding at the expense of providing the full picture.

April 27, 2010 Hearing Transcript, pp. 62-63; Dkt. #84. Stratus's counsel then properly submitted an additional update to the Court providing that after Counsel's own diligence, he determined that there were direct "communications between Mr. Cabrera and two representatives of Stratus." Dkt. #148 at 3. Chevron's criticisms of Stratus's counsel's representations at the preliminary conference ignore the broader statements of Mr. Wilson, recounted above, that emphasized the extent to which a fuller context of contacts between Cabrera and Plaintiffs would be disclosed through discovery and could be misconstrued absent the full context. And that context has manifestly emerged during these proceedings, and in the Ecuadorian proceedings as well.[9]

Plaintiffs have repeatedly stated their belief that their contacts with Mr. Cabrera were proper, and that—given Ecuadorian law—any adoption by Cabrera of work performed by Plaintiffs or by Stratus does not waive privilege over a number of documents responsive to the subpoenas. Chevron disagrees. The Court has set an

[9] Chevron's criticism of Plaintiffs' early reference to a metaphoric "landscape change" in January 2008, is also misplaced. Chevron Br. at 3-4. Plaintiffs' rhetorical use of this phrase to describe their evolving understanding of the Ecuadorian legal context initially underestimated the extent to which both parties were permitted to make *ex parte* submissions to the court and court experts throughout those proceedings. As a subsequent order from the Ecuadorian court made clear, the parties were able to "submit to the expert whatever documentation they believe may be useful in preparing his report." *See* Ex. 46; Ex. 17, at 9. As subsequent factual development also made clear, Chevron freely met *ex parte* not merely with a court expert but with *the Court* well prior to January 2008. Exs. 52, 60.

orderly schedule for assertion of privilege, and for the parties to brief these and other privilege issues, which are admittedly complex. But Chevron's wild and unsupported rhetoric has no place in this or its other submissions.

On May 25, 2010, this Court denied Plaintiffs' motion for a protective order and precluded Plaintiffs from asserting a blanket prohibition on discovery – akin to a motion to quash – *vis à vis* Rule 26(b)(4)(B), which would otherwise bar *all* discovery from Stratus without regard to the particular privileges adhering to each document. Dkt. #154. To ensure that there was no misunderstanding about this process, Plaintiffs moved for clarification of the Court's order on May 28, and this Court issued a second opinion on June 1, which provided that

> the proper and efficient method for responding to contested subpoenas would be for the responding party to redact or withhold confidential or privileged information, record the redactions or withholdings in a privilege log, and produce the remaining documentation….Here, the same process is appropriate. The Court previously denied the Ecuadorian Plaintiffs' Motion for a Protective Order, but such denial is distinguishable in that the motion served as an untimely de facto Motion to Quash.

Dkt. #161 at 2-3. Following this guidance, Plaintiffs proceeded with the understanding that this Court rejected the blanket *form* in which Plaintiffs raised their privilege arguments, but did not rule on the *substance* of privilege arguments as applied to specific documents.[10] Plaintiffs similarly understood that this Court has not ruled that Plaintiffs could no longer assert the attorney-client privilege or work product doctrine where applicable.

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[10] Chevron's repeated argument that Plaintiffs waived the right to assert specific objections to specific documents makes no sense given that Chevron has filed objections with the District Court taking exception with this precise ruling. *See* Dkt. # 169 at 1 (noting that "Magistrate Hegarty's June 1 Order apparently permits Plaintiffs to interpose attorney-client and other privilege objections").

In accordance with the Court's direction, Plaintiffs diligently reviewed documents for privilege, and then produced documents and privilege logs on a rolling basis. As of August 20, this massive review, which took hundreds of painstaking hours, encompassed approximately 2,500 documents with a corresponding privilege log which was 720 pages long. *See* Dkt. # 221. Throughout this process, the parties were in contact concerning the content and scope of this production and Plaintiffs made additional accommodations to Chevron to address several of its concerns regarding the form of the privilege log.[11]

In the midst of Plaintiffs' production, Chevron moved for an emergency telephonic conference regarding Plaintiffs' privilege log. *See* Dkt. #200. In response to the same allegations of delay and bad faith made here, Plaintiffs explained that they have been following the Court's direction to review these materials, assert document by document objections, where appropriate, and thus make them available for prompt production in the event that the Court rules that they are not privileged. Plaintiffs have made disclosures concerning their communications with Mr. Cabrera in general and logged each specific document they reviewed with related information concerning those

[11] Despite Plaintiffs' view that their privilege logs as constituted were adequate to put Chevron on notice of the basis for the assertion of privilege, and provide due opportunity for Chevron to challenge the same, Plaintiffs made additional accommodations in response to Chevron's requests. Plaintiffs agreed to (1) describe e-mail attachments in greater detail; (2) provide a page count for each document, including attachments to e-mails; and (3) provide Chevron with, a single, cumulative privilege log. These changes occurred with respect to documents logged since July 23 and were incorporated in subsequent logs. As a courtesy, Plaintiffs amended and re-submitted the descriptions of documents appearing on the July 9 and July 16 privilege logs. Plaintiffs also indicated that as soon as they produced and logged documents that have been Bates-labeled by Stratus prior to Plaintiffs' receipt, they would include Stratus Bates numbers on the logs. *See* Exs. 80 and 81.

materials.[12] Chevron and the Court have a rolling basis to evaluate specific documents and the privilege asserted over each. Chevron has now moved to compel these documents and the Court can rule on that motion in light of Plaintiffs' privilege arguments.

ARGUMENT

I. Chevron's Motion Should Be Denied Because It Fails To Challenge Privilege Assertions on a Document-by-Document Basis

Chevron's Motion to Compel is procedurally deficient because it fails to identify specific entries in the privilege log that it seeks to compel. As a procedural matter, in its June 1, 2010 order (Dkt. #161), this Court permitted the Ecuadorian Plaintiffs to assert "more narrow privilege objections to specific documents and questions" and reiterated that "it did not interpret the issuance of the subpoenas to implicate waiver of 'specific objections to specific questions or specific points of discovery' within that discovery permitted by Judge Kane." Dkt. #161 at 2. Pursuant to these parameters, Plaintiffs produced a comprehensive, approximately 700-page privilege log, following a process of time-consuming, laborious, and careful review. Having had months to prepare the instant Motion to Compel, however, Chevron makes virtually no attempt to challenge specific entries in the privilege log, choosing instead to rehash its arguments regarding waiver *in toto*, which this Court principally rejected in its June 1, 2010 order. *Id.* ("the production of documents or provision of testimony pursuant to the subpoenas at hand, like any production or provision responsive to a subpoena, may be subject to certain objections").

[12] Chevron's citation to *Muro v. Target Corp.*, 250 F.R.D. 350, 365 (N.D. Ill. 2007) to support its argument for waiver and sanctions is misplaced. In *Muro*, the District Court *reversed* the Magistrate's order of disclosure of documents (because there was no finding of willfulness, bad faith or fault) and "permit[ted] Target a final opportunity to revise its privilege log" to resolve any remaining issues. *Id.*

Chevron's failure to identify specific documents it seeks to compel production of, despite Plaintiffs' provision of a privilege log, is alone grounds to deny Chevron's Motion. *See, e.g., Cellectis S.A. v. Precision Biosciences, Inc.*, No. 5:08-CV0119-H, 2010 WL 2559081 (E.D.N.C. Jun. 18, 2010) (denying motion to compel for failure to clearly identify specific privilege log entries challenged); *Nevada Partners Fund, LLC v. United States*, No. 3:06cv379-HTW-MTP, 2008 WL 2484198, at *8 (S.D. Miss. May 12, 2008) (party's failure to identify specific documents in privilege log it challenges, "places an unreasonable burden on the court and the parties, which is far outweighed by the documents' marginal relevance"); *S.E.C. v. Beacon Hill Asset Mgmt. LLC*, 231 F.R.D 134, 141 (S.D.N.Y. 2004) (rejecting motion to compel insofar as it failed to address specific documents in privilege log). Chevron's abject failure to address the log cannot be excused, *see supra*, and is an end-run around an orderly process ordered by the Court. If the Court does not deny the motion on this basis, the Court should order Chevron to re-file its motion to compel and address entries on the log and the actual record, instead of making blunderbuss argument that ignores the record. Such a motion, at least, would permit Plaintiffs and the Court to evaluate Chevron's motion based on the record, not in the abstract.

II. The Subpoenas Seek Privileged Materials and Testimony

Painting with a broad brush, without reference to specific privilege log entries, Chevron contends that Plaintiffs have failed to establish that *any* of the withheld documents are privileged attorney-client communications or protected work product. Chevron Br. at 21. Specifically, Chevron contends that "[n]othing in Plaintiffs' log remotely comes close to showing that the communications they claim are privileged

constitute legal advice provided to the client, or that they contain client confidences. . . . Nor have Plaintiffs established that the substance of those documents and communications was never disclosed to Cabrera or any other third party." *Id.* at 22. This argument wildly mischaracterizes the governing legal standard and Plaintiffs' burden. Contrary to Chevron's manifestly overbroad argument, both the facts of this case and the governing case law make clear that the documents sought are privileged.

A. Stratus Is a Consulting Expert

Under the Federal Rules of Civil Procedure, the general rule is that a party may not discover "facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial." Fed. R. Civ. P. 26(b)(4)(B). In this regard, "confidential communications between a party's counsel and a non-testifying expert or consultant, hired in anticipation of litigation, are protected by the attorney-client privilege." *CoorsTek, Inc. v. Reiber*, No. 08-cv-01133, 2010 WL 1332845, at *4 (D. Colo. Apr. 5, 2010). In addition, where a consulting expert's materials were prepared at the direction of an attorney in anticipation of litigation, they also constitute attorney work product. *See Quinn Constr., Inc. v. Skanska USA Bldg., Inc.*, 263 F.R.D. 190, 193 (E.D. Pa. 2009); *see also* Fed. R. Civ. P. 26(b)(3) (limiting discovery of documents "prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)"). Stratus was a consulting expert under this clear standard.

In the present case, the crux of Chevron's argument is that Plaintiffs caused Stratus to become a "testifying"[13] expert — and thereby waived the consulting expert and

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[13] Chevron claims that "Stratus was retained *expressly* for the purpose of providing testimony to the Lago Agrio court." (Dkt. #232 at 22) But it is undisputed that Stratus has never provided the Lago Agrio court with formal testimony. *Cf. Crawford v. Washington*, 541 U.S. 36, 51 (2004) (defining testimony as, *inter alia*, a "solemn declaration or affirmation" (internal quotation marks omitted)). In this regard also, Magistrate Judge Brown of the Middle District of Tennessee recently found, with respect to another of Plaintiffs' consulting experts:

> Quarles was retained by the Ecuadorian Plaintiffs as a consulting, non-testifying expert in 2006 and remained such through 2008. The Ecuadorian Plaintiffs were involved in the Lago Agrio litigation in 2006, and Quarles was clearly retained in anticipation of litigation. The

work product privileges set forth in Rules 26(b)(4)(B) and (b)(3) — by providing Cabrera with certain of Stratus's findings, conclusions and valuations. *See* Chevron Br. at 23-26. In this regard, however, it is *Chevron*'s burden to prove waiver, not Plaintiffs' burden to prove "non-waiver." *W. Res., Inc. v. Union Pac. R.R. Co.*, No. 00-2043-CM, 2002 WL 181494, at *4 (D. Kan. Jan. 31, 2002); *see also id*. ("with respect to the documents that [plaintiff] claims are protected work product and/or 'privileged' pursuant to Fed. R. Civ. P. 26(b)(4)(B), [plaintiff] shall bear the burden to establish that they are work product and/or materials prepared by a non-testimonial expert retained in anticipation of trial, *and Defendants shall have the burden to prove waiver*." (emphasis added)); *Aull v. Cavalcade Pension Plan*, 185 F.R.D. 618, 624 (D. Colo. 1998) ("A party asserting waiver of a privilege has the burden of establishing the waiver.").

Chevron's claim that Plaintiffs caused Stratus to become a testifying expert by providing documents to Cabrera is, of course, predicated entirely upon Chevron's contention that Cabrera, himself, was a testifying expert — the theory being that "Rule 26 creates a bright-line rule mandating disclosure of all documents . . . given to testifying experts." Chevron Br. at 23 (internal quotation marks omitted). Even if accurately

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> requirements of Fed. R. Civ. P. 26(b)(4)(B) are met, and Quarles's work in that capacity is generally subject to work product protection.

Ex. 79 (Dkt. No. 241-1 (*In re Application of Chevron Corp.*, No. 3:10-cv-00686 (M.D. Tenn. Sept. 21, 2010)) at 3).

Indeed, even to the extent, if any, that Stratus's work product were to come before the Lago Agrio court through the court's consideration of Cabrera's report, the most that would be required under U.S. evidentiary rules — which do not apply in Ecuador — would be the disclosure of Plaintiffs' ties to Stratus. *See* 8A Charles Alan Wright, *et al*., Federal Practice & Procedure § 2032 (3d ed. 2010) ("A distinctive issue can arise when experts who will not testify in the case have been paid by parties to produce reports that will be used at trial. . . . In this situation, it may be appropriate to require disclosure of information about the ties of the parties to these nontestifying experts who have produced 'learned treatise' material that is used at the trial.").

described,[14] however, this rule simply does not apply to Cabrera. Specifically, waiver of the consulting expert and/or work product privilege only occurs where documents are provided to a testifying expert subject to the disclosure requirements set forth in Rule 26(a)(2)(B)(ii). *Quinn*, 263 F.R.D. at 197. The Federal Rules of Civil Procedure do not govern in Ecuador, and Mr. Cabrera is not subject to the Federal Rules, nor is he a testifying expert under the Federal Rules.

B. The Disclosure of Materials to Cabrera, Generally, Did Not Constitute a Waiver

Since nothing provided to Cabrera can possibly be subject to the disclosure requirement found in Rule 26(a)(2)(B)(ii), waiver in this case depends upon whether, in the context of the *Ecuadorian* proceeding, Cabrera is either an adversary or a conduit to a potential adversary by virtue of an analogous disclosure requirement. *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 447 (S.D.N.Y. 2004); *see also* 6-26 Moore's Federal Practice - Civil § 26.70[6][c] ("the test for determining whether the work product rule has been waived is whether, at the time of disclosure, there was a substantial danger that the documents would be disclosed to an adversary"); *Quinn*, 263 F.R.D. at 196-97 ("giving material protected as attorney work product under Rule 26(b)(3) to a testifying expert, *who is required to disclose that material to the opposing*

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[14] *Contra Teleglobe USA, Inc. v. BCE Inc. (In re Teleglobe Comm'cns. Corp.)*, 392 B.R. 561, 576 (Bankr. D. Del. 2008) ("a testifying expert does not have to produce documents which are protected as core attorney work product (i.e., reflects the attorney's mental impressions and trial strategy)"); *All W. Pet Supply Co. v. Hill's Pet Prods. Div.*, 152 F.R.D. 634, 638 (D. Kan. 1993) (holding "that the plaintiff did not waive the protection afforded by Rule 26(b)(3) for attorney work product by sharing the documents in question with its expert witness"); 6-26 Moore's Federal Practice - Civil § 26.80[1][a] ("the view that the work product doctrine may apply to materials provided to testifying experts holds merit").

party under Rule 26(a)(2)(B), waives the work product protection" (emphasis added)). Cabrera is neither an adversary, nor a conduit to one.

First, Cabrera is not Plaintiffs' "adversary"; Chevron is. Second, and in stark contrast to an American testifying expert subject to Rule 26(a)(2)(B)(ii), Cabrera and his technical experts are not conduits to a potential adversary. Ecuador has different procedural rules and no apparent analogue to Rule 26; party submissions to Cabrera were confidential and not subject to any required disclosure to the adversary.[15] Ex. 42 at ¶ 8; Ex. 43 at ¶¶ 6-7. In Ecuador, a party may request clarification and explanation of an expert report by propounding interrogatories on the expert, just as Chevron has done countless times with respect to the Cabrera Report. Ex. 43 at ¶ 5; *see also* Ex. 46 at ¶¶ 23-25. If the responses provided by the expert are deemed unsatisfactory, a party may move to strike — as Chevron has done — and that motion will be considered at the time of judgment. Ex. 42 at ¶ 7; Ex. 43 at ¶ 9; *see also* Ex. 46 at ¶¶ 23-25. Simply stated, there is no basis to conclude that a disclosure to Cabrera should be given the same legal effect as a disclosure to a U.S. testifying expert, and thus Chevron has failed to meet its burden in showing waiver.[16]

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[15] Unsurprisingly, Chevron contests this point. But it simply is not an issue to be decided by this or any other American federal court. Rather, this question of Ecuadorian law is best decided by the Ecuadorian court, which has refused Chevron's request for an order requiring the production of materials shared by Plaintiffs with Cabrera. *See, e.g.*, Ex. 46 at ¶ 20.

[16] Chevron half-heartedly argues that Plaintiffs are collaterally estopped from asserting privilege as to Stratus's documents because other courts have found waiver with respect to certain of Plaintiffs' *other* consulting experts. Chevron Br. at 25-26. If anything, however, this Court should find that *Chevron* is estopped from arguing that Cabrera is subject to some unidentified Ecuadorian analog to Rule 26(a)(2)(B)(ii), given the Ecuadorian court's refusal to permit Chevron to conduct the very discovery it seeks here. *See supra* note 4. And, Chevron should be estopped from attempting to try its purported fraud claim in this Court. *Cf.* Ex. 79 (Dkt. No. 241-1 (*In re Application of*

C. Any Purported Waiver Would Only Apply to the Documents Actually Provided

Even if this Court concluded that the Federal Rules applied to Cabrera, and that work product is waived even though Cabrera is not (under Ecuadorian law) a conduit to Plaintiffs' adversary, *cf.* 6-26 Moore's Federal Practice - Civil § 26.70[6][c], Chevron would still only be entitled to documents and communications within Stratus's custody and control actually provided to Cabrera.[17] *See* Fed. R. Civ. P. 26(a)(2)(B)(ii) (requiring disclosure of "the data or other information *considered by the witness*" (emphasis added)); *see also Quinn*, 263 F.R.D. at 196-97 ("when a party provides attorney work product to a testifying expert *and that information is 'considered' by the expert* and becomes subject to the disclosure requirements of Rule 26(a)(2)(B), then the protection from disclosure . . . is waived and the information must be disclosed" (emphasis added)); *id.* at 197 (finding testifying expert's admission that he reviewed document sufficient to establish that he "considered" it).

Chevron's argument is much broader: it claims that *none* of Stratus's documents are privileged if *any* documents were shared with Cabrera. *See* Dkt. #232 at 26-27. The

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Chevron Corp., No. 3:10-cv-00686 (M.D. Tenn. Sept. 21, 2010)) at 2) ("Chevron had an opportunity to litigate this matter in the United States and strongly opposed jurisdiction in favor of litigating in the Ecuadorian courts."). Regardless, as explained below, Chevron's collateral estoppel argument is unavailing because the issues are different in the two cases, and Stratus is not a party of any of Chevron's other § 1782 proceedings. *See Romano v. Gibson*, 239 F.3d 1156, 1179 (10th Cir. 2001) ("collateral estoppel precludes the *same parties* from litigating that same issue in any future lawsuit" (emphasis added)).

[17] Although Plaintiffs disagree with the Fifth Circuit's conclusion — which is not binding upon this Court — that documents actually provided to Cabrera are not protected, it bears noting that the Fifth Circuit's holding did not extend beyond this discrete category of documents. *See Ecuadorian Plaintiffs v. Chevron Corp.*, --- F.3d ---, No. 10-20389, 2010 WL 3491534, at *3-*4 (5th Cir. Sept. 8, 2010). Moreover, the Fifth Circuit held that *Chevron* bears the burden of demonstrating the disclosure of documents to Cabrera. *See id*. at *3.

claim is wrong. Even if Plaintiffs forfeited the non-testifying witness protections available to some category of Stratus documents by disclosing them to Cabrera, doing so "does 'not automatically . . . place the entirety of [Stratus'] work at issue in this case.'" *Monarch Fire Prot. Dist. v. Freedom Consulting & Auditing Servs.*, No. 4:08CV01424, 2009 WL 2029793, at *2 (E.D. Mo. July 10, 2009) (quoting *Hollinger Int'l Inc. v. Hollinger Inc.*, 230 F.R.D. 508, 522 (N.D. Ill. 2005)). To the contrary, "courts have generally held that partial disclosure of a non-testifying expert's work product does not waive a party's right to withhold production of the expert's *undisclosed* work product." *Hollinger*, 230 F.R.D. at 522 (collecting cases); *see also CoorsTek*, 2010 WL 1332845, at *8 ("Waivers of the [attorney-client] privilege have been held to be narrowly construed." (internal quotation marks omitted)).

Citing Federal Rule of Evidence 502(a), Chevron contends that "[d]isclosure of otherwise privileged information extends to undisclosed information where the waiver is intentional, the disclosed information concerns the same subject matter, and the information ought in fairness to be considered together." *See* Chevron Br. at 26. As a threshold matter, there is absolutely no evidence that Plaintiffs *intended* to waive any privilege, given their (proper) understanding of Ecuadorian procedural rules. *See supra*. Regardless, Rule 502 is inapposite here because it applies to "a voluntary disclosure *in a federal proceeding*. . . ." Fed. R. Evid. 502(a) advisory committee note (2008) (emphasis added); *accord United States v. Cinergy Corp.*, No. 1:99-cv-01693, 2009 WL 6327414, at *1 (S.D. Ind. Nov. 10, 2009) (distinguishing disclosure to adversary in federal proceeding from cases "concern[ing] when party X can be compelled to disclose work-product previously shared with *non*-party Y"). In contrast, the disclosures at issue in the present

case took place, not "in a federal proceeding," but rather in an Ecuadorian one. And Cabrera is a party neither here nor in Ecuador.

Even if the Court were to attempt to apply Rule 502(a)'s "subject matter" waiver, Chevron tellingly fails to define the subject matter regarding which it claims "fairness requires a further disclosure." *See* Fed. R. Evid. 502(a) advisory committee note (1998). Simply stated, "everything on Plaintiffs' privilege log" is not a subject matter. *Cf. Silverstein v. Fed. Bureau of Prisons*, No. 07-cv-02471, 2009 WL 4949959, at *12 (D. Colo. Dec. 14, 2009) ("there is no bright line test for determining what constitutes the subject matter of a waiver" (internal quotation marks omitted)). Rather, there is a principled basis for finding that fairness does *not* require the disclosure of documents reflecting litigation strategy, public relations strategy, raw scientific data, and Plaintiffs' interpretation of those materials

First, the disclosure of everything on Plaintiffs' privilege log would exceed the contours of Chevron's own § 1782 Application and, in turn, Judge Kane's Order granting the same. Chevron expressly stated that it was seeking "the data and methods underlying the Stratus opinions *adopted by Cabrera*." Dkt. #2 at 18 (emphasis added). Indeed, even in its brief, Chevron quietly acknowledges that the most it is possibly entitled to in this action are "the underlying bases" of Stratus's work provided to Cabrera. Chevron Br. at 26. Thus, irrespective of privilege, Chevron simply is not entitled to documents and communications *un*related to Cabrera, including, *inter alia*, undisclosed documents revealing Plaintiffs' public relations strategy and "raw" scientific data without commentary.

Second, although the rule is unsettled, given strong authority for the proposition that, "[*e*]*ven when opinion work product is shared with an expert witness in preparation for testifying at trial . . .* such opinion work product has nearly absolute immunity from discovery," *Estate of Chopper v. R. J. Reynolds Tobacco Co.*, 195 F.R.D. 648, 651 (N.D. Iowa 2000) (emphasis added), Chevron should not be permitted to obtain opinion work product unrelated to Cabrera, *see id*. at 652 (describing "heavy burden of establishing a rare and extraordinary circumstance entitling them to obtain these materials"); *see also Silverstein*, No. 07-cv-02471, 2009 WL 4949959, at *13 ("when considering the fairness of granting a subject-matter waiver of work-product protection pursuant to Federal Rule of Evidence 502(a), the court must pay close attention to the special protection afforded opinion work product"). This includes, *inter alia*, documents memorializing discussions between and among attorneys and consultants concerning litigation strategy.

Third, contrary to Chevron's claims, materials prepared concerning commentary to the Cabrera report and other media-related matters which reflect Plaintiffs' litigation strategy are also protected from discovery. *Cf.* Chevron Br. at 35-36. As Judge Kaplan held in *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 331 (S.D.N.Y. 2003), the attorney-client privilege applies to "(1) confidential communications (2) between lawyers and public relations consultants (3) hired by the lawyers to assist them in dealing with the media in cases such as this (4) that are made for the purpose of giving or receiving advice (5) directed at handling the client's legal problems are protected by the attorney-client privilege." Judge Kaplan explained

> the ability of lawyers to perform some of their most fundamental client functions-such as (a) advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions, (b) seeking

> to avoid or narrow charges brought against the client, and (c) zealously seeking acquittal or vindication-would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers' public relations consultants. For example, lawyers may need skilled advice as to whether and how possible statements to the press-ranging from "no comment" to detailed factual presentations-likely would be reported in order to advise a client as to whether the making of particular statements would be in the client's legal interest. And there simply is no practical way for such discussions to occur with the public relations consultants if the lawyers were not able to inform the consultants of at least some non-public facts, as well as the lawyers' defense strategies and tactics, free of the fear that the consultants could be forced to disclose those discussions.

Id.; see also F.T.C. v. GlaxoSmithKline, 294 F.3d 141, 148 (D.C. Cir. 2002) ("attorney-client privilege extends also to those communications that GSK shared with its public relations and government affairs consultants," as the consultants "became integral members of the team assigned to deal with issues [that] . . . were completely intertwined with [GSK's] litigation and legal strategies." (alterations in original)); *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (Attorney-accountant communications privileged because "the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit."); *Coorstek, Inc. v. Reiber*, No. 08-cv-01133-KMT-CBS, 2010 WL 1332845, at *4(D. Colo. Apr. 5, 2010) ("[t]he attorney-client privilege can extend to communications between representatives of the client or between the client and a representative of the client, if the communication was made in confidence for the primary purpose of obtaining legal advice"); *Forutnati v. Campagne*, No. 1:07-CV-143, 2009 WL 385433 at *5 (D. Vt. Feb. 12, 2009) (finding draft press releases subject to work-product privilege, as they "reflect the attorneys' process of assembling information and

sifting facts to reflect a cohesive theory of the case"); *In re Copper Market Antitrust Litig.*, 200 F.R.D. 213, 219 (S.D.N.Y. 2001) (finding communications between counsel and public relations firm relating to media strategy were subject to attorney-client privilege).[18] Here, there is no dispute that Plaintiffs hired Stratus to advise them as litigation consultants. To the extent that this work also included litigation strategy concerning commentary on the Cabrera report or other media matters, and those communications contained litigation strategy, those communications are privileged. Chevron has not made the necessary, particularized showing to pierce the privilege associated with any of the documents that have been logged in this category.

For this reason, any analysis of whether privilege or waiver applies to the documents Chevron seeks must focus on specific documents, or, at the least, specific categories of documents, at issue. Chevron's blanket assertion of no privilege must be rejected.

III. Chevron Fails to Meet Its Burden and Establish the Crime-Fraud Exception Applies to the Specific Documents It Seeks

Chevron's blunderbuss crime-fraud argument also fails, for three independent reasons. *First*, to invoke the crime-fraud exception, Chevron must make a showing "that *the client* was engaged in or was planning the criminal or fraudulent conduct when it

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[18] Chevron cites only one case in support of its argument for these materials, *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 54, 55 (S.D.N.Y. 2000). Chevron Br. at 35. But *Calvin Klein* predates the leading case, *In re Grand Jury Subpoenas*, and, in any event involved communications, unlike here, that did "*not* contain or reveal confidential communications from the underlying client." *Id.* (emphasis supplied). More recently, the Court of Federal Claims has interpreted *Calvin Klein* narrowly, explaining that "[p] ublic relations advice obtained by defendant's counsel with regard to litigation can be protected work product to the extent that it reveals the defendant's strategy for conducting the litigation itself." *Testwuide v. United States*, No. 01-201L, 2006 WL 5625760, at *8 (Fed. Cl. Aug. 7, 2006).

sought the assistance of counsel and that the assistance was obtained in furtherance of the conduct or was closely related to it." *In re Grand Jury Subpoenas*, 144 F.3d 653, 660 (10th Cir. 1998) (emphasis added). Here, Chevron has not identified *any* criminal or fraudulent conduct engaged in by the Plaintiffs, the clients in this case. *Second*, Chevron abjectly fails its burden of demonstrating that any submission of documents to Cabrera by Stratus and/or Plaintiffs' counsel constitutes a crime or fraud. *Finally*, Chevron's invocation of a blanket crime-fraud exception as to all privileged documents ignores that "there must be a *specific showing* that a *particular document or communication* was made in furtherance of the client's alleged crime or fraud." *In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 642 (8th Cir. 2001) (emphasis added).

A. Chevron Fails to Identify *Any* Conduct By the Ecuadorian Plaintiffs – The Holders of the Privilege[19]

The attorney-client privilege belongs to Plaintiffs, not to their lawyers or any consulting experts. Plaintiffs are over forty Ecuadorian individuals, living in an environmentally-decimated region, who have attempted to hold Chevron liable for its destruction for nearly twenty years. There is no allegation that these individuals have engaged in any crime or fraud. As a result, the crime-fraud exception cannot and does not apply.

As the Tenth Circuit and other courts have held, the crime-fraud exception does not vitiate the privilege applied to attorney work-product and attorney-client communications unless the *client* intended to use an attorney or his work-product in furtherance of a crime or fraud. "The evidence must show that *the client* was engaged in

[19] Of the courts that have precipitously and improperly invoked the crime-fraud exception, not one has dealt with the issue of whether *Plaintiffs* are implicated in any crime or fraud.

or was planning the criminal or fraudulent conduct when it sought the assistance of counsel and that the assistance was obtained in furtherance of the conduct or was closely related to it." *In re Grand Jury Subpoenas*, 144 F.3d 653, 660 (10th Cir. 1998) (emphasis added). "In other words, 'it is the client's knowledge and intentions that are of paramount concern to the application of the crime-fraud exception.'" *United States v. Ruedlinger*, No. 96-40045-SAC, 1997 WL 161960, at *4 (D. Kan. Mar. 7, 1997) (quoting *In re Grand Jury Proceedings*, 87 F.3d 377, 381-82 (9th Cir. 1996)). *See also In re Sealed Case*, 223 F.3d 775, 778 (D.C. Cir. 2000) (explaining focus of crime-fraud inquiry is client's intent and/or general purpose in consulting the lawyer). Thus, as the First Circuit explained, relying on the Tenth Circuit's holding in *In re Grand Jury Subpoenas*, "the privilege is not lost solely because the client's lawyer is corrupt . . . . The crime-fraud exception requires the *client's* engagement in criminal or fraudulent activity and the *client's* intent with respect to attorney-client communications." *In re Grand Jury Proceedings*, 417 F.3d 18, 23 (1st Cir. 2005) (emphasis in original) (citing *In re Grand Jury Subpoenas*, 144 F.3d at 660). In that case, the First Circuit explained that the fact that a lawyer suborned perjury from one of his clients did not mean all privilege was vitiated. *Id.*

This focus on the client's intent has been repeatedly recognized in several other cases throughout the Tenth Circuit. *See, e.g.*, *In re Grand Jury Proceedings*, 857 F.2d 710, 712 (10th Cir. 1988) ("The attorney-client privilege does not apply where the *client* consults an attorney to further a crime or fraud.") (emphasis added); *Murphy v. Gorman*, --- F.R.D---, No. CIV 09-1184 JB/ACT, 2010 WL 2977711, at *15 (D.N.M. June 9, 2010) ("crime-fraud exception to the work-product doctrine [] applies upon a showing

that *a client* consulted with an attorney in furtherance of a crime or fraud") (emphasis added); *In re M & L Business Mach. Co., Inc.*, 167 B.R. 937, 942 (D. Colo. 1994) ("in order to successfully invoke the crime/fraud exception to the attorney-client privilege, the movant must make a prima facie showing that the attorney was retained in order to promote intended or continuing criminal or fraudulent activity."). Where, as here, there is no evidence of criminal or fraudulent intent by the clients, the privilege is simply not pierced.

B. Chevron Has Failed to Make a Prima Facie Showing of Crime or Fraud by Anyone

In any event, Chevron utterly fails to demonstrate any crime or fraud by the counsel who were involved with the Cabrera report. Although Chevron makes multiple accusations of broad misconduct and "collusion" between Stratus and Cabrera, that is not enough to invoke the crime-fraud exception. Unlike some other courts, the Tenth Circuit has explicitly held that the crime-fraud exception requires a prima facie showing of the elements of a crime or the elements of fraud, and cannot be invoked based upon a showing of some other tort or misconduct. *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1551 (10th Cir. 1995). *See also Hall v. Martin*, No. CIV. A. 99-1092-KHV, 1999 WL 760216, at *2 (D. Kan. Aug. 20, 1999) (allegations that attorney violated Kansas Rules of Professional Conduct are irrelevant to crime-fraud analysis). Thus, the Court is tasked with a simple inquiry: has Chevron made a prima facie showing of a specific crime or the elements of fraud? *See, e.g.*, *Hall*, *id.*; *Horizon Holdings, L.L.C. v. Genmar Holdings, Inc.*, No. 01-2193-JWL, 2002 WL 1822404, at *5 (D. Kan. Jun. 13, 2002). The answer is no.

Chevron's invocation of the crime-fraud exception is based upon its contention that, "Under U.S. law, there can be no dispute that Plaintiffs' and Stratus's collusion with a Special Master and ghostwriting of his report constitutes a crime or fraud, triggering the crime-fraud exception." Chevron Br. at 31. Chevron is mistaken. As a threshold matter, the United States criminal law does not govern the relationship between parties to an Ecuadorian litigation and an Ecuadorian court-appointed expert. *See, e.g.*, *Small v. United States*, 544 U.S. 385 (2005) (noting presumption that federal statutes do not have extraterritorial application); *Hemphill v. Moseley*, 443 F.2d 322, 323 (10th Cir. 1971) ("with few exceptions, the federal criminal statutes do not apply to extraterritorial acts"). Chevron is aware of the territorial limits of American law, as shown by its failure to come anywhere close to compliance with American environmental standards in its crude operations in Ecuador.[20] *See, e.g.*, Ex. 97 at 300:4-301:09 (explaining substandard processes used by Chevron).

[20] Chevron cites two sections of the Ecuadorian criminal law, one relating to false testimony and the other relating to acts of civil disobedience. Chevron Br. at 33. What Chevron actually claims is the "illegal" conduct here – "secretly" giving information to Cabrera for him to use in his report – has nothing to do with these two criminal code provisions. Chevron also vaguely suggests that the Plaintiffs "violated" the Court's orders stating that Cabrera would be "impartial" and "independent." *Id.* For this Court to determine that a vague Ecuadorian court order was violated, though the Ecuadorian court has been made entirely aware of the underlying facts and made no suggestion that any conduct was improper, would unnecessarily violate the principles of comity underlying section 1782. The Ecuadorian Court, which currently has the issue before it, *see, e.g.*, Ex. 12, not an American court sitting in the limited jurisdiction of a section 1782 proceeding, is in the best position to determine if its own order has been violated. As Magistrate Judge Brown of the Middle District of Tennessee recently noted, "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." Ex. 79 (Dkt. No. 241-1 (*In re Application of Chevron Corp.*, No. 3:10-cv-00686 (M.D. Tenn. Sept. 21, 2010)) at 2).

Chevron also never indicates what source of law it is using to define fraud, simply citing to another court's curious statement that "the concept of fraud is universal." Chevron Br. at 32, citing Dkt. 227-1 at 12; *contra* 37 Am. Jur. 2d Fraud and Deceit § 1 ("'Fraud' is an elusive and shadowy term. With reference to the general significance of the term, there can be no all-embracing definition of 'fraud' . . . .). Under American federal common law, fraud is defined as "(1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with action taken in reliance upon the representation." *Pence v. United States*, 316 U.S. 332, 338 (1942); *see also Marcus v. AT&T Corp.*, 138 F.3d 46, 63 (2d Cir. 1998); *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995). In all of its accusations of wrongdoing, Chevron fails to put forward a prima facie case as to these elements.

Chevron has failed to identify a false representation by Plaintiffs. Plaintiffs specifically told the Ecuadorian Court that they advocated "their own findings, conclusions, and valuations before Cabrera for him to consider their potential adoption," and provided him with "proposed findings of fact and economic valuations for the environmental and other damages caused by Texpet's practices and pollution," which he adopted. Ex. 11 (June 20, 2010 Submission of Pablo Fajardo Mendoza, Plaintiffs' Ecuadorian Counsel, to the Sucumbios Provincial Court) at 7.[21] Even if the Ecuadorian Court had, at some point, been under the impression that Plaintiffs would not be contributing materials to Cabrera, there has been no reliance on that mistaken impression.

[21] Even if they had not, as the Ninth Circuit has held in refusing to apply the crime-fraud exception, "A party's failure to disclose information, or even a party's perjury, does not ordinarily constitute fraud on the court." *In re Napster Copyright Litig.*, 479 F.3d 1078, 1090 (9th Cir. 2007) (abrogated on other grounds by *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599 (2009)).

Both Plaintiffs and Chevron's voluminous submissions to the Ecuadorian Court thus far make clear that Plaintiffs took advantage of the opportunity to submit evidence to Cabrera. *See, e.g., id.*; Ex. 56 (July 12, 2010 Submission of Adolfo Callejas Ribadeneira, Chevron's Ecuadorian Counsel, to Lago Agrio Court). As the Ecuadorian Court has noted, "the judge is not required to agree with the opinion of the experts," including Cabrera. Ex. 12 (August 2, 2010 Order of the Lago Agrio Court).

This case is thus entirely distinguishable from *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), relied upon heavily by Chevron throughout its brief. That case did not involve the crime-fraud exception or privilege issues at all; rather it involved the vacatur of a patent and judgments of infringement, on the basis that they had been obtained through fraudulent means – namely, the submission of a journal article, claimed to be authored by a neutral expert, that had actually been written by the patent seekers' attorneys. The facts presented there differ from this case in a number of fundamental respects. First, the entire premise of the case was that there had been reliance upon a misrepresentation in granting the patent and judgment – a vital element absent here. Second, the interaction between the patent seeker's lawyers and the expert was completely hidden and only discovered years later. Here, the fact that the parties would be making submissions to Cabrera was explicitly condoned by the Court. *See, e.g.*, Ex. 17 (April 14, 2008 Order of the Lago Agrio Court) at 9 ("The parties may submit to the expert whatever documentation they believe may be useful in preparing his report."). Additionally, it was understood by both parties that materials they submitted to independent court experts might be incorporated into those expert reports. Chevron knew this because materials drafted by its own privately hired expert, John Connor, were

incorporated verbatim into the independent expert report of Mr. Barros. *Compare* Ex. 67 (Connor Report) at 1-2, 19 *with* Ex. 68 (Barros Report) at 3-4, 7. In addition to all else, *Hazel-Atlas* did not deal with the orders, rules or laws of a foreign court, or purport to graft American principles of jurisprudence on a foreign court.

Chevron's citation of its two "experts" to prove a violation of Ecuadorian law fares no better. First, these are simply two lawyers who practice in Ecuador, paid by Chevron to be "experts." What qualifies them to opine on the meaning and import of the Lago Court's orders is a mystery. In any event, it is telling that Chevron is reduced to relying on lengthy "expert" opinions to resolve what it had claimed was a cut and dry example of fraud under Ecuadorian law. It is a tacit acknowledgment of Chevron's failure to cite any rule, any regulation, any law, or any order in this case prohibiting "*ex parte*" contact or the submission of materials to a court expert. Chevron has not cited any such order, rule, regulation, or law, and neither have their "experts." Perhaps after five months of wild accusations and incriminations, hundreds of docket entries, and thousands of pages of submissions, Chevron will finally, in its reply brief, share with plaintiffs and the Court the order, rule, regulation, or law that prohibits *ex parte* contact or submissions to a court expert in Lago Agrio.

Chevron and its "experts" also fail completely to address the most obvious and central point here: *this issue is before the Court in Lago Agrio*. Are two Ecuadorian lawyers in a better position than the Lago Court to opine on the meaning of the Lago Court's orders? The suggestion is absurd. If, as the court in Tennessee recently held, "it is not within the power of this court" to opine on alleged fraud in Ecuador, Ex. 79 at 2, it is certainly not within the power of two, random Ecuadorian lawyers.

Even more tellingly, Chevron's own "experts" admit that Ecuadorian law does not speak clearly to the issue at all. Mr. Jones states, at footnote seven of his declaration, that there is a "scant amount of Ecuadorian literature available," and therefore he relies on "doctrine developed by Chilean, Colombian, Spanish and French authors." Dkt. # 237 at 6 n. 7. We thus have the unseemly specter of an American company successfully escaping American justice for nine years, but then asking an American judge to rule on the meaning of Ecuadorian court orders, as interpreted by Ecuadorian lawyers citing Chilean, Colombian, Spanish and French doctrine, no less to make the dramatic finding of crime-fraud. The effort is absurd.

Finally, Chevron's argument that "independence" "neutrality" and "transparency" precluded private contacts, collaboration, or submissions to an expert in a civil law system such as Ecuador (even though Chevron engaged in private contacts, collaboration, and submissions to a court expert) is, at a minimum, a legal question of sufficient complexity that Chevron is forced to submit thirty-one pages of opinion on the topic from two hired experts – opinions better filed in the Lago Court, if at all. Missing entirely from Chevron's presentation, however, is the plain fact that, in Ecuador (unlike the general practice in the United States), parties do not share submissions to court experts with their adversaries. Ex. 43 at ¶ 9; Ex. 46 at ¶ 9. Also missing from Chevron's brief is the plain fact that Chevron requested this very discovery – plaintiffs' submissions to Cabrera – but the Lago Court rebuffed it. Ex. 47 at 4; Ex.17 at 9; Ex. 12. If, as Chevron claims, it is entitled to these documents under the Lago Court's own orders, why did the Lago Court deny Chevron's application? "Transparency" in a civil law system such as Ecuador's plainly means something different than it does here, and this Court should

reject the invitation (hastily and imprudently accepted by a few magistrates) to opine on the meaning of the Lago Court's prior rulings to make a finding, of all things, of a "crime/fraud."

Where the party seeking to invoke the crime-fraud exception fails to make a prima facie showing of each of the elements of common law fraud, the privilege may not be pierced, as illustrated by numerous courts in this Circuit. *See, e.g., Lifewise Master Funding v. Telebank*, 206 F.R.D. 298, 304 (D. Utah 2002); *Berroth v. Kansas Farm Bureau Mut. Ins. Co., Inc.*, 205 F.R.D. 586, 590 (D. Kan. 2002); *Horizon Holdings, L.L.C.*, 2002 WL 1822404 at *5; *Transonic Sys., Inc. v. Non-Invasive Med. Tech.*, 192 F.R.D. 710 (D. Utah 2000); *Hall*, 1999 WL 760216, at *2. *See also In re* Napster, 479 F.3d at 1090 (analyzing elements of fraud and declining to find exception); *Tara Woods Ltd. P'ship v. Fannie Mae*, No. 09-cv-00832-MSK-MEH, 2010 WL 3322709 (D. Colo. Aug. 19, 2010) (Hegarty, J.) (finding party failed to meet burden in showing actual crime or fraud had been attempted or committed). The Court should reach the same conclusion here.

C. Chevron's Broad Invocation Fails to Demonstrate the Required Connection Between the Purported Crime or Fraud and the Documents Sought

Finally, even assuming, *arguendo*, some crime or fraud by someone, the crime-fraud exception only applies to particular documents and communications – not to all potentially privileged documents. Chevron has the burden to show "the documents containing the privileged materials bear a close relationship to the client's existing or future scheme to commit a crime or fraud." *In re Grand Jury Proceedings #5 Empanelled Jan. 28, 2004*, 401 F.3d 247, 251 (4th Cir. 2005); *see also In re Richard Roe,*

Inc.,, 68 F.3d 38, 40 (2d Cir. 1995) ("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.") "It does not suffice that the communications may be related to a crime. To subject the attorney-client communications to disclosure, they must actually have been made with an intent to further an unlawful act." *In re M&L Business Mach. Co., Inc.*, 167 B.R. 937, 941 (D. Colo. 1994) (quoting *United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989) (Ginsburg, J.)). *See also United States v. Mower*, No. 2:02CR787DAK, 2004 WL 2348067, at *3 (D. Utah Oct. 15, 2004) (citing *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002)) ("There must be some relationship between the communications and the illegality."). In applying the crime-fraud exception, "district courts should define the scope of the crime-fraud exception narrowly enough so that information outside of the exception will not be elicited." *In re Grand Jury Subpoenas*, 144 F.3d 653, 661 (10th Cir. 1998).

Chevron ignores this requirement in seeking a blanket determination that the crime-fraud exception applies, instead arguing that the Plaintiffs are "collaterally estopped" from arguing that the crime-fraud exception does not apply based on other courts' determinations that the crime-fraud exception applies in other 1782 proceedings seeking *other* documents from *other* respondents. As set forth *supra*, since the issue before those courts was not identical to the one before this Court, and involved different parties, there can be no collateral estoppel. *Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir. 2009). Nor would the decisions cited by Chevron have any greater preclusive effect than that of the Middle District of Tennessee, which held that the crime-fraud exception did

not apply to the documents Chevron sought from another of Plaintiffs' consulting experts, Mark Quarles. Dkt. No. 241-1 at 5.

By its motion, Chevron suggests that every document in Stratus's possession – and perhaps the possession of anyone who ever worked on this case – relating to Lago Agrio was in "furtherance" of a fraud. This sweeping statements is without any basis. At the least, the District Court is required to make a threshold, *in camera* determination as to the specific documents to which privilege is claimed. As the Tenth Circuit has explained, where there is a "possibility" that some of the documents "may fall outside the scope of the exception to the privilege," the court is to conduct an in camera inspection of the documents at issue. *In re Grand Jury Subpoenas*, 144 F.3d 653, 661 (10th Cir. 1998) (quoting *In re Grand Jury Proceedings (Vargas)*, 723 F.2d 1461, 1467 (10th Cir. 1983)). Only then can the Court determine if there is "probable cause to believe the *particular* communication with counsel or attorney work product was intended to facilitate or to conceal the criminal activity." *In re Richard Roe*, 68 F.3d at 40 (emphasis added); *see also In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 643 (8th Cir. 2001) (reversing district court based on its assumption, "without any further showing by plaintiffs, that all contemporaneous attorney-client communications 'could be construed' as in furtherance of the alleged fraud"). Chevron cannot escape this precedent with its blunderbuss allegations of fraud.

IV. Chevron's Ancillary Argument that "Other" Categories of Documents are Not Privileged is Both Overbroad and Irrelevant, as these Documents Chevron References are Not Within the Scope of this Proceeding

In Section III.E of its Memorandum of Law, Chevron contends that it is entitled to "billing statements, cost estimates and information about compensation" and "Stratus's

retention agreements with subcontractors, documents identifying persons who contributed to the Cabrera Report and communications about their scope of work," because such documents are not subject to the attorney-client or work-product privilege. Chevron Br. at 36.

This argument is overbroad in both its characterization of the law and its application to this proceeding. First, Chevron fails to identify what, if any, items in the privilege log it is attacking with this argument, citing only its broad document requests, making it difficult to respond to its far-reaching statements. For example, the category "communications about their scope of work" is far too broad to defend, and certainly includes materials within the traditional ambit of the work-product and attorney-client privilege. Discussions between an expert and an attorney about the "scope" of work to be performed clearly implicate an "attorney's strategies," and thus privileged. *See Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995).

Second, many of these document requests have little or nothing to do with the discovery authorized in response to Chevron's Section 1782 petition. In its December 18, 2009 *ex parte* petition Chevron requested only "limited" discovery on the theory that respondents' "work product appears to have been adopted (absent attribution) by a testifying expert in the Lago Agrio litigation." Dkt. #1 (Ex Parte Petition), at 1-2; Dkt. #2 (Chevron's *ex parte* Section 1782 brief), at 1 (Cabrera "adopted Stratus's work as his own"); *id.* at 6-9, 12-13, 18 ("The discovery this Petition requests goes to the data and methods underlying the Stratus opinions adopted by Cabrera").

The only basis for Judge Kane's approval of the Section 1782 petition was the basis proffered by Chevron. *See* Tr. of March 4, 2010 Hearing, at 5 ("Chevron seeks to

subpoena these parties because it believes that their work product developed in relation to their retention as experts of the plaintiffs in the Ecuadoran proceeding was adopted and plagiarized in a report by a court-appointed expert."). There was and is no other basis for the Section 1782 order. *See also* Dkt. #50 (Order by Judge Hegarty, dated April 13, 2010), at 6 ("Petitioner seeks discovery regarding evidence of fraud on the Ecuadorian court through the plagiarizing of respondents' expert reports in the *Lago Agrio* litigation.") (citing Dkt. #2) (Chevron's Section 1782 brief); Dkt. #228 (Order by Judge Hegarty, dated Aug. 31, 2010), at 3 ("The evidence sought by Petitioner in this proceeding, as frequently explained, is purposed to expose Mr. Cabrera as producing a plagiarized damages report to the Lago Agrio court, arising from allegedly inappropriate communications with the named Respondents.").

Chevron now seeks documents that go far beyond Cabrera: any such documents are beyond the scope of this petition, and may not be demanded in this case.

V. Chevron's Concerns Regarding Privilege Log "Discrepancies" Are Misplaced

Instead of a meet and confer about its new privilege log complaints, Chevron prefers further allegations of malfeasance. As would have readily been plain had it asked, neither Chevron's complaint about document numbering nor its complaint about databases has any merit.

First, although Plaintiffs have used a new numbering system every week since July 23, Chevron now argues for the first time that "a disturbing number of entries that were included in earlier versions of the Stratus privilege log mysteriously disappeared or somehow metamorphosed into new and different entries with same document PD

numbers." Chevron Br. at 37. There is nothing "disturbing" about these changes; Chevron asked for them.

On July 16, 2010, Chevron raised several objections to the July 9, 2010 log, including the fact that "the log does not provide 'the number of pages per document'" and that "the log does not provide sufficient descriptions of the subject matter of each document" and "no information about the[ ] attachments." Ex. 80 at 2 (citation omitted). As an accommodation, Plaintiffs agreed that, beginning with the July 23, 2010 Log, "a page count will be provided for each document, including attachments to e-mails" and that "e-mail attachments will described in greater detail." Ex. 81 at 2. Plaintiffs told Chevron that they would "as a courtesy amend and re-submit the descriptions of documents" and the page numbering from its July 9, 2010 privilege log, (*see id*.), and did so. As part of the changes, Plaintiffs updated PD numbers to reflect the actual pages of documents and attachments in the form of a PD number range for each document. These are the same changes that Chevron improperly questions now.

Chevron's complaint about databases fares no better. Chevron argues that "Plaintiffs' log itself points to other documents that are unaccounted for," including "a number of entries discuss[ing] the construction of databases, but [where] the databases are not listed." Chevron Br. at 38. But the privilege log is replete with references to such materials. Plaintiffs logged 165 spreadsheets and databases as stand-alone privilege log entries that reflect their consulting experts' efforts to aggregate, organize, analyze, and assess scientific data to assist counsel for the Ecuadorian Plaintiffs in their provision of legal advice to their clients and as part of the Ecuadorian Plaintiffs' litigation strategy. *See, e.g.*, PD13973 ("Excel spreadsheet, prepared by Plaintiffs' consulting experts in

anticipation of litigation, aggregating information in table form related to lost interim value due to rainforest habitats."); PD16009 ("Spreadsheet prepared by Plaintiffs' consulting experts in anticipation of litigation, concerning analysis of data of aerial photographs of pit sites for Lago Agrio litigation."); PD00020939 ("Excel spreadsheet containing numerical calculations, prepared by Plaintiffs' consulting experts in anticipation of litigation, compiling information and calculating statistics related to various sites . . . . .").

CONCLUSION

For the foregoing reasons, the Lago Agrio Plaintiffs respectfully submit that Chevron's motion to compel be denied.

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