

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re Application of RODRIGO PEREZ
PALLARES and RICHARD REIS VEIGA for an
Order to Conduct Discovery for Use in Foreign
Proceedings

No. 10-1918-cv (L)
No. 10-1966-cv (CON)

In re Application of CHEVRON CORPORATION
for an Order Pursuant to 28 U.S.C. § 1782 to
Conduct Discovery for Use in Foreign Proceedings

MEMORANDUM IN SUPPORT OF LAGO AGRIO APPELLANTS-RESPONDENTS'
EMERGENCY MOTION FOR AMENDMENT OF THE INTERIM ORDER
OR, IN THE ALTERNATIVE, FOR A STAY

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The Lago Agrio Appellants-Respondents (“plaintiffs”) move for the Court to reconsider and amend its interim Order dated July 15, 2010, or in the alternative, for a stay pursuant to Fed.R.App.P. 41(d) pending its Opinion in this case, so that plaintiffs’ opportunity to seek appropriate review of the Opinion is not potentially mooted by the Order.

ARGUMENT

By Order dated July 15, 2010, the Court ordered Berlinger to produce all footage not in *Crude* “showing (a) counsel for the plaintiffs in the case of *Maria Aguinda y Otros v. Chevron Corp.*; (b) private or court-appointed experts in that proceeding; or (c) current or former officials of the Government of Ecuador,” with an “Opinion to follow.” Dkt. #277 (the “Order”). While the Order is narrower than the district court’s order, plaintiffs believe the interim Order runs afoul of *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999) for two principal reasons, and suggest alternatives that would be more closely tailored to the *Gonzales* test.

First, *Crude* contains many scenes with judges, experts, and/or plaintiffs in which Chevron itself was present, often with its own cameras: for example, all the public judicial inspections as well as the field inspections by Court expert Richard Cabrera. This is plainly “information . . . reasonably obtainable from other available sources,” including Chevron itself. *Gonzales*, 194 F.3d at 36.¹ The Order, however, compels production of *all* footage in which any government official or expert or plaintiffs’ counsel appears on screen, which would include, *inter alia*, footage where Chevron was present. Information from these scenes is not only “reasonably obtainable from other available sources,” it is actually obtainable from Chevron. On its face, the Order contains no exclusion of footage “reasonably obtainable from other available sources.” The Order is therefore much broader than what *Gonzales* permits.

¹ For purposes of this motion, plaintiffs assume, *arguendo*, that all of the footage is non-confidential, and refer to *Gonzales*’ test for discovery of non-confidential outtakes.

Second, *Crude* contains personal scenes of a type encompassed in the Order that are not “of likely relevance to a significant issue in the case.” *Gonzales*, 194 F.3d at 3. For example, *Crude* contains scenes of plaintiffs’ counsel Pablo Fajardo, in which he describes his desire to learn English, his impoverished childhood, and the death of his brother. *See, e.g., Crude* at 21:25, 47:50. Remaining footage of the scene where Mr. Fajardo talks about his childhood is not “of likely relevance to a significant issue in the case.” Remaining footage of the scene where Mr. Fajardo talks about the death of his brother is not “of likely relevance to a significant issue in the case.” Unused footage from these and other such scenes is not only not likely relevant “to a significant issue in the case,” *Gonzales*, 194 F.3d at 36, it is not relevant to the case at all. The mere presence of a plaintiffs’ lawyer in footage does not mean that the footage meets the *Gonzales* test. Similarly, the mere presence of an expert or a judge in footage does not mean that the footage meets the *Gonzales* test.

Although plaintiffs believe that the petition is not proper under 28 U.S.C. § 1782 and that none of the footage meets *Gonzales*, plaintiffs respectfully submit that a number of alternatives to the Order would be considerably more tailored to the petition and to *Gonzales*. For example, petitioners have consistently pointed to three scenes as the basis for the petition: the scene with Mr. Beristain, the judicial application in Quito (part of which Chevron’s lawyers attended), and the scenes in which counsel meets President Correa. Plaintiffs respectfully submit that an order compelling production of the remaining footage from those scenes, except to the extent Chevron’s own lawyers was present, would be a more careful and narrowly crafted order tailored to the petition and much closer to meeting the *Gonzales* test. Even an order compelling production of footage depicting contacts between plaintiffs’ counsel and court experts or government officials (except to the extent Chevron was itself present for such contacts, such as at

the public judicial inspections, which Chevron attended with its own cameras) would come considerably closer to *Gonzales*. Or, as the Court was contemplating at oral argument, a special master could be appointed to review the footage to ensure faithful application of *Gonzales*.

The current Order, however, is much too broad to satisfy even the *Gonzales* test for non-confidential footage. Unless the panel intends to reverse *Gonzales*, plaintiffs respectfully submit that the Order should be amended. In the alternative, plaintiffs request that the Court stay the Order pursuant to Fed.R.App.P. 41(d) pending its Opinion in this case, so that plaintiffs' opportunity to seek appropriate review of the Opinion is not potentially mooted by the Order itself.

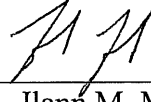
Preserving plaintiffs objections set forth above, and given the Court's inclination to issue an interim order or production, plaintiffs therefore propose that the Court limit the interim Order either to production of (1) "All footage not in *Crude* of the scene with Mr. Beristain, the scene with the Quito judge (except to the extent Chevron was present), and the scenes of plaintiffs' counsel interacting with President Correa"; or (2) "All footage not in *Crude* depicting contacts between plaintiffs' counsel in *Maria Aguinda y Otros v. Chevron Corp.* and either court-appointed experts in that proceeding or current or former officials of the Government of Ecuador." In the alternative, plaintiffs propose that a special master be appointed to review the footage prior to any order of production.

Given that the Order requires "prompt[]" production by Berlinger, and given our understanding the Berlinger may be able to produce footage as early as today, plaintiffs request expedited treatment of this application.

Respectfully Submitted,

Dated: New York, New York
July 19, 2010

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