

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Docket Nos. 10-1918; 10-1966

IN RE: APPLICATION OF CHEVRON

**Joe Berlinger; Crude Productions, LLC; Michael Bonfiglio;
Third Eye Motion Picture Company, Inc.; @radical.media,**
Respondents-Appellants,

Lago Agrio Plaintiffs,
Appellants,

v.

**Chevron Corporation; Rodrigo Pérez Pallares;
Ricardo Reis Vega,**
Petitioners-Appellees.

**Reply Memorandum in Further Support of Respondents-
Appellants' Emergency Motion for Stay and Expedited Appeal**

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I.

BERLINGER WILL SUFFER IRREPARABLE HARM AND WILL EFFECTIVELY LOSE HIS RIGHT TO APPEAL ONCE THE PRIVILEGED FOOTAGE IS DISCLOSED

There can be no doubt that Judge Kaplan’s Order compelling Berlinger to produce the Footage “brushing aside [Berlinger’s] claim of privilege not to disclose, leaves only an appeal after judgment as a remedy.” *In re Bulow*, 828 F.2d 94, 98 (2d Cir. 1987). It is equally clear that, in the absence of a stay, “such a remedy is inadequate at best [because] compliance with the order destroys the right sought to be protected.” *Id.* (recognizing that compelled disclosure of privileged material constitutes irreparable harm and justifies issuance of stay).

The Chevron Parties’ counter-argument with respect to irreparable harm brings front and center the core issue presented on Berlinger’s appeal: the District Court’s error in holding that the disclosure of non-confidential outtakes will not impose a burden on Berlinger.¹

The Chevron Parties argue that the Footage contains only non-confidential material,² and, thus, “the only ‘harm’ to [Berlinger] is the cost of gathering and copying the footage – hardly substantial, much less irreparable, harm.” *See* PV Br. at 16-19; C. Br. at 13-14.³ This argument is adopted directly from the District Court, which stated that it “does not credit any assertion that

¹ Although a district court order under 28 U.S.C. § 1782 is generally reviewed for abuse of discretion, this Court should apply a heightened standard of review to Judge Kaplan’s decision to the extent it addresses the journalists’ privilege because Berlinger’s First Amendment rights are at issue. *See, e.g., Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (“In cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.”) (brackets and quotation marks omitted).

² The District Court erred when it held that the Footage from *Crude* does not contain any confidential material. See Point IV herein.

³ “C. Br.” refers to Chevron’s opposition brief and “PV Br.” refers to the opposition brief of Messrs. Pallares and Veiga.

the discovery of the outtakes by petitioners would compromise the ability of Berlinger *or, for that matter, any other film maker*, to obtain material from individuals interested in confidential treatment.” 5/10/10 Order at 18.

Judge Kaplan’s holding (and the Chevron Parties’ argument on this motion) directly contradicts this Court’s ruling that both confidential *and non-confidential* materials are protected by the journalists’ privilege. *See Gonzales v. NBC*, 194 F.3d 29, 35 (2d Cir. 1998). In *Gonzales*, this Court expressly rejected the suggestion that only the disclosure of confidential material will impair a journalist’s future ability to gather news and recognized that the very concerns and principles protected by the privilege are “relevant regardless whether the information sought from the press is confidential.” *Id.* Judge Leval, in a case involving non-confidential outtakes, described “the *symbolic harm of making journalists appear to be an investigative arm of the judicial system*, the government, or private parties” and went on to detail precisely how “the resulting wholesale exposure of press files to litigant scrutiny would burden the press.” *See id.* at 35-36.

In a declaration to the District Court, Berlinger explained that allowing the Chevron Parties to subpoena all of the Footage will – in fact – cause him to suffer the same harm recognized in *Gonzales* by directly interfering with his ability to make this type of documentary film in the future.⁴ Judge Kaplan, however, refused to “credit any assertion” that the disclosure of non-confidential materials in this case would impose a burden on Berlinger – or “any other film maker.” 5/10/10 Order at 15. The District Court’s holding goes directly against *Gonzales* and constitutes reversible error.

⁴ *See* Declaration of Joseph A. Berlinger dated April 22, 2010 (“Berlinger I”), attached as Exhibit B to the Declaration of Maura J. Wogan, filed in support of this motion on May 20, 2010, at ¶¶ 26-30. Berlinger is submitting herewith an additional declaration in further support of this motion, which is referred to as “Berlinger II.”

Thus, the Chevron Parties miss the point when they argue that there is no irreparable harm because Berlinger will not be required to disclose his “sources who never again could regain their anonymity.” PV Br. at 19. Rather, Berlinger argues that, absent a stay, he will be required to turn over confidential *and non-confidential* Footage that is protected by the journalists’ privilege. Once the materials are produced to the Chevron Parties, it will be impossible to undo that disclosure in the likely event that the Court ultimately determines that the journalists’ privilege protected all, or a portion of, the Footage. Without a stay, Berlinger’s appeal will be moot.

II.

BERLINGER IS LIKELY TO SUCCEED ON THE APPEAL BECAUSE THE DISTRICT COURT’S ORDER IS OVERBROAD AND INCONSISTENT WITH *GONZALES*

The District Court’s refusal to recognize or “credit” the burden identified by this Court in *Gonzales* was exacerbated when it applied the two-part *Gonzales* test for non-confidential information in an erroneous manner that rendered the test itself and the journalists’ privilege practically meaningless. The result is a vastly overbroad Order that neither limits the scope of the subpoenas nor restricts the Chevron Parties’ use of the Footage.⁵ Instead, it directs Berlinger to produce *all* of the Footage, which allows the Chevron Parties to engage in a fishing expedition through hundreds of hours of material without having established its relevance to the foreign

⁵ A recent press release by Chevron makes clear that it is using this proceeding not to obtain discovery “for use in a proceeding,” 28 U.S.C. § 1782, but to obtain information for its massive public relations campaign to blunt the bad press it has received by reason of the Lago Agrio Litigation. *See* “Proceedings Reveal New Evidence of Fraud and Plaintiffs’ Undisclosed Links to Ecuadorian Court Expert Richard Cabrera,” at <http://www.chevron.com/news/press/release/?id=2010-05-24>. Berlinger’s counsel raised this concern with the District Court and requested that an order to protect the material “from further dissemination or use beyond the limited purpose in these foreign proceedings for which they’re sought.” *See* C. Br., Ex. H at 48. The District Court declined the request.

proceedings. We have found no case – and neither the District Court nor the Chevron Parties cite to a single case – in which a journalist was required to produce *all* of the outtakes from a documentary or television news program based on the purported relevance of a handful of released scenes.

A. Relevance

As previously argued, the District Court’s finding that *all* 600 hours of the Footage are likely relevant to the foreign proceedings was based on an unwarranted and speculative leap of logic. The court erred because, in *Gonzales* and in all other cases in this Circuit concerning a request for outtakes, a finding of relevance with respect to a particular scene in a released film or news program led to an order to produce only the outtakes *from that scene*, not an order to produce *all* of the journalists’ outtakes, whether or not they relate to that scene.

The District Court found that there were essentially three categories of scenes that were likely relevant to the foreign proceedings: scenes showing interactions between Plaintiffs’ counsel, on the one hand and, on the other, (i) an individual later appointed by the court as an expert, (ii) Ecuadorian government officials, and (iii) an Ecuadorian judge. 5/10/10 Order at 25-29. Instead of ordering Berlinger to produce the outtakes from those three categories, the court ordered that he disclose the entirety of the raw Footage. There was no basis to infer that the hundreds of hours of remaining outtakes were of likely relevance.⁶

The Chevron Parties contend that, in finding that the Footage was “likely relevant,” the District Court also relied on its finding that Steve Donziger, counsel for the Lago Agrio

⁶ The Chevron Parties argue that they do not have access to the unreleased Footage and are therefore unable to particularize the outtakes they believe are relevant. C. Br. at 12; PV Br. at 14. Yet, this is exactly what they did when they identified particular scenes in the released version of *Crude* that they contend are relevant, and exactly what the requesting party in *Gonzales* did. See 194 F.3d at 30 (requesting outtakes from particular scene shown on *Dateline*).

Plaintiffs, appears in numerous scenes throughout the released film. *See* C. Br. at 11. However, while Donziger does appear in many scenes, the vast majority of the footage used in *Crude* (and, presumably, the unreleased Footage) does not include him. Moreover, Donziger’s mere presence in the film cannot possibly suffice to establish the likely relevance of all the remaining Footage. Not everything Donziger does or says can be relevant to the underlying proceedings.

The Individual Applicants’ relevance argument is based entirely on a blatant misrepresentation of the content of *Crude*. Those parties tell this Court that *Crude* “is about the very process that resulted in the criminal charges against these Applicants,” including “the thoughts, the plans and the activities of those who devised the criminal charges as their scheme unfolded, and the behind-the-scenes influence they had on the civil litigation itself.” PV Br. at 13. This is simply and completely untrue. The only reference in the *entire film* to the specific criminal proceedings is a two-sentence “text card” appearing at the very end of the film explaining that fraud charges were brought against Mr. Veiga two weeks after the interview.

The only scene in the film that is even arguably relevant to the criminal prosecutions shows Mr. Donziger reacting to a public announcement by President Correa concerning the prosecution of officials *in the Ecuadorian government*. *Crude* at 1:05:32-1:05:44 (“Mr. Donziger: Correa just said that *anyone in the Ecuadorian government* who approved the so-called remediation is now going to be subject to litigation in Ecuador.”). There is no basis to infer from this clip of Mr. Donziger commenting on the anticipated indictment of government officials that any (much less all) of the outtakes are “of likely relevance” to the alleged collusion between the Lago Agrio Plaintiffs and the Government of Ecuador to bring false criminal charges against Messrs. Pallares and Veiga. Beyond what is already contained in the film, the unpublished footage contains no material regarding the criminal prosecutions in general or specifically the prosecutions against Messrs. Pérez or Reis Veiga. *See* Berlinger I, at ¶ 35.

B. Availability

As explained in our opening brief, the District Court applied the wrong standard when it found that the material sought by the Chevron Parties was not available from other sources -- the second requirement for overcoming the journalists' privilege under *Gonzales*. Rather than requiring the Chevron Parties to show that there is no alternative source for the *information* contained in the Footage, the District Court held that they satisfied this test merely by showing that the actual *footage* is not obtainable elsewhere. Chevron adopts this erroneous position in its brief. C. Br. at 13 (arguing that because "Berlinger admits that he is in sole possession of the outtakes," the Footage is "not reasonably obtainable" elsewhere). This interpretation of the standard virtually eviscerates the availability test, since, in almost every instance, a journalists' original materials, as opposed to the information contained in them, will not be available elsewhere.

Furthermore, the Chevron Parties misuse Berlinger's statement that he was given "unprecedented access" to events concerning the Lago Agrio Litigation as grounds for showing that there is "no substitute" for the Footage. *Id.*; PV Br. at 15. This argument fails to recognize that people grant Berlinger "unprecedented access" precisely because they trust him as a journalist. *See* Berlinger I, at ¶¶ 21, 27-30. Requiring Berlinger to disclose the Footage he was able to obtain by virtue of his relationships of trust would force him to violate those confidences and severely limit his ability to gain "unprecedented access" to sources in the future.⁷

⁷ In addition, the Chevron Parties' argument that they have no alternative source for the outtakes is significantly weakened by the fact that Chevron's attorneys, often accompanied by their own cameras and film crew, were present at every public event and hearing concerning the judicial inspections at which the *Crude* cameras were rolling. Berlinger I, at ¶ 34.

III.

ANY HARM TO THE CHEVRON PARTIES IS THE RESULT OF THEIR OWN DELAY IN BRINGING THE APPLICATIONS⁸

The Chevron Parties delayed in filing the Applications and Berlinger should not be denied an appeal because of their failure to act. *Crude* has been available to the public since its January 2009 premiere at the Sundance Film Festival, which Berlinger invited Chevron to attend. *See* Berlinger II ¶ 11, Exs. B & C.⁹ After Sundance, *Crude* was shown at over 80 film festivals around the country and the world. *Id.* The film was released in theaters on September 9, 2009. *Id.* Thus, the assertion that *Crude* “was not available to the public . . . until it was released on DVD on February 23, 2010” is blatantly false. PV Br. at 10 n.4. Chevron’s claim that it did not recognize the alleged relevance of the film until “carefully scrutinizing the DVD and Netflix versions of the film,” C. Br. at 18 n.16, is belied by the fact that counsel for Mr. Pallares requested the raw footage from Berlinger a month *prior* to the DVD release. Berlinger I, Ex. D.¹⁰

⁸ Although, as explained above, neither *Crude* nor the outtakes concern the criminal prosecutions of the Individual Applicants, Berlinger recognizes that the Individual Applicants are facing criminal charges in Ecuador and is sensitive to their position. In order to assuage their concerns during the pendency of this appeal, Berlinger has offered, with certain appropriate conditions, to grant the Individual Applicants access to all footage showing interactions between Plaintiffs’ counsel and President Correa or any prosecutor or official from the executive branch of the Ecuadorian government, which comprises less than 1% of the total Footage. *See* Berlinger II, Ex. N.

⁹ Although Chevron declined that invitation, a company representative attended a private screening in New York in March 2009. *Id.*

¹⁰ To the extent the Chevron Parties have demonstrated urgency to resolve this matter, the Court should grant an expedited appeal, not deny Berlinger’s motion for a stay.

IV.

THE FOOTAGE IS CONFIDENTIAL

Berlinger's appeal will demonstrate that the District Court erred in finding that none of the Footage is confidential. *First*, in his declaration to the lower court, Berlinger described the various types of confidentiality agreements he actually entered into with his subjects and that were a necessary part of the creation of *Crude*.¹¹ Thus, the suggestion that Berlinger offered only "conclusory" assertions of confidentiality is incorrect and the court's refusal to "credit" his declaration was erroneous. *See* PV Br. at 17; C. Br. at 10. *Second*, in an effort to protect the confidentiality of his sources, Berlinger offered to provide to the court, for *in camera* review, additional details with respect to those arrangements. C. Br., Ex. H, at 26:6-30:2. The District Court improperly rejected this offer. *Id.* *Third*, in finding that the Footage is non-confidential, the Court relied on an unsigned form release submitted by Chevron. C. Br., Ex. F. In fact, the vast majority of subjects in the film, including Chevron, were either not asked to or declined to execute a release. Berlinger II, at ¶ 12. Moreover, the Chevron Parties mischaracterize the release by omitting the language that limits Berlinger's use of the footage to "the creation of a nonfiction production." C. Br., Ex. F. The release is therefore entirely consistent with Berlinger's "understanding with [his sources] that the materials [he] decided to leave out of the finished product would remain confidential and not be turned over to third parties for a purpose other than the making of the film." Berlinger I, at ¶ 21.¹²

¹¹ *See* Berlinger I, at ¶ 20. The undisclosed Footage contains materials that Berlinger agreed never to use or disclose, including footage that required express authorization to use and footage recorded prior to a direction by the subject to turn off the camera. *Id.* ¶ 19; Berlinger II at ¶ 13.

¹² Finally, the Chevron Parties' argument that Berlinger was given a "second bite" or opportunity to provide additional detail about his confidentiality agreements is a flat-out lie. In fact, the day prior to the hearing on Berlinger's motion for a stay before the District Court,

V.

THE ORDER IS IMMEDIATELY APPEALABLE

Despite Judge Kaplan's suggestion that "there is significant doubt as to the finality of the order appealed from," 5/20/10 Order at 6, Berlinger's right to appeal from an order to produce discovery under 28 U.S.C. § 1782 is firmly established by Second Circuit precedent.¹³

In *Gov't of India*, this Court concluded that § 1782 proceedings are unlike ordinary civil and criminal proceedings in which the subpoenaed party is generally required to be held in contempt before the order is considered final and appealable. *See id.* at 1018. The purpose of the rule requiring a finding of contempt is "to prevent the temporary halt of the litigation process that would be required by an appeal from an order enforcing a subpoena." *Dynergy Midstream Servs., LP v. Trammochem*, 451 F.3d 89, 93 (2d Cir. 2006). The Court observed that a § 1782 proceeding "stands separate from the main controversy" and is therefore analogous to other independent actions, such as proceedings to enforce administrative agency subpoenas, in which the subpoenaed party may appeal from a discovery order without first being held in contempt. *See Gov't of India*, 385 F.3d at 1018 (citing *Ellis v. I.C.C.*, 237 U.S. 434, 437 (1914)). In such cases, "there is not, as the case of a grand jury or trial, any further judicial inquiry which would be halted were the offending subpoenaed party permitted to appeal." *United States v. Constr.*

Chevron sent Berlinger's counsel a letter which proposed that Berlinger allow Chevron immediate access to *all* of the Footage. C. Br., Ex. M. In return, Chevron would consent to a stay pending appeal and agreed that it would only use confidential material, as defined by Chevron, in judicial proceedings, and all other material for any other purpose. *Id.* The letter was nothing more than a litigation ploy and further demonstrates Chevron's belief that it can use Berlinger's privileged materials for purposes other than a judicial proceeding.

¹³ *See In re Application of Silvia Gianoli Aldunate*, 3 F.3d 54, 57 (2d Cir. 1993); *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 104 (2d Cir. 1992); *In re Matter of Letters Rogatory Issued By the Director of Inspection of the Government of India*, 385 F.2d 1017, 1018 (2d Cir. 1967) ("*Gov't of India*").

Prods. Research, 73 F.3d 464, 469 (2d Cir. 1996) (quoting *Cobbledick*, 309 U.S. 323, 330 (1940)) (brackets omitted). As Justice Holmes succinctly put it: “It is the end of a proceeding begun against the witness.” *Ellis*, 237 U.S. at 437. Accordingly, there is no doubt this Court has appellate jurisdiction.¹⁴

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court enter an order granting a stay of the Order pending this Court’s determination of the appeal and an expedited appeal of this matter.

Dated: New York, New York
May 27, 2010

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¹⁴ Contrary to Judge Kaplan’s opinion, *In re Air Crash at Belle Harbor, NY*, 490 F.3d 99 (2d Cir. 2007), does not suggest that the Order may not be final as to Berlinger. See 5/20/10 Order at 5. In that case, the subpoenaed party sought to appeal a discovery order issued in an ordinary civil proceeding by arguing that he was exempt from the contempt pre-requisite under the so-called *Perlman* exception. *Id.* at 105. The *Perlman* exception is irrelevant here because the Second Circuit categorically disposes of the contempt prerequisite for self-contained actions like this § 1782 proceeding. See *Gov’t of India*, 385 F.3d at 1018. Moreover, although Berlinger “has both the ability and incentive to place himself in contempt” like the witness in *Belle Harbor*, the same was true of the party subpoenaed pursuant to § 1782 in *Silvia Gianoli Aldunate*, but in that case the Second Circuit held that the witness could immediately appeal without first being held in contempt. 34 F.3d at 47 (citing *Gov’t of India*, F. 2d at 1018).