UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Application of CHEVRON CORPORATION for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery from MCSquared, PR, Inc. Petitioner.	:	No. 14 MC 392 (LAK)

CHEVRON CORPORATION'S OPPOSITION TO THE REPUBLIC OF ECUADOR'S MOTION TO INTERVENE AND FOR BRIEFING ORDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. PRELIMINARY STATEMENT

The Republic of Ecuador's (the "ROE") Motion to Intervene and for a Briefing Order (Dkt. 11) should be denied because the ROE cannot satisfy the criteria for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure or permissive intervention under Rule 24(b). While Chevron could imagine circumstances where ROE intervention would be justified, here the ROE has identified no cognizable interest justifying intervention as of right in this proceeding, where the target of the subpoena is a public relations firm that did not perform any legal function for the ROE, and where the documents are being sought for use in proceedings in which the ROE is not a party. But even if the documents were to be used in a proceeding in which the ROE is a party, it would not matter. The ROE's contract with MCSquared generally provides that the ROE would pay MCSquared $6.4 million for a year of services including "conduct[ing] studies and formulat[ing] strategies of communication, information, image and communication publicity at an international level." Dkt. 4-65 (Ex. 66) at 10. The ROE does not claim that MCSquared has provided legal services to the ROE or acted at the direction of the ROE's counsel, and it identifies no relevant attorney-client relationship or communications or documents reflecting legal advice. Therefore, no possible privilege could shield any of MCSquared's materials.

Likewise, the ROE's vague reference to "sovereign immunity" is inapposite. Sovereign immunity operates to protect foreign sovereigns *against* lawsuits filed in U.S. courts, not to give foreign sovereigns the right to *intervene* in them or to provide third parties with immunity from discovery simply because they have performed work for a sovereign. Chevron's petition does not seek to subject the ROE to suit or to seize its assets but simply seeks discovery from a non-sovereign third party, a New York-based public relations firm.

There is also no reason to grant permissive intervention. The ROE does not seek to assert a claim or defense that shares common questions of law or fact with Chevron's petition against MCSquared. Instead, the ROE rests its motion on vague notions of privilege and sovereign immunity, without articulating any colorable bearing on Chevron's petition for discovery. Without a cognizable interest in this proceeding, permitting the ROE to intervene for the purpose of filing a motion to quash would only introduce undue delay into these proceedings. That may, of course, be the ROE's true objective, but it is not a proper basis for intervention. The ROE's motion should be denied.

II. BACKGROUND

On November 24, 2014, Chevron filed a petition pursuant to 28 U.S.C. §1782 seeking discovery from MCSquared PR, Inc. ("MCSquared"), a New York public relations company that entered into a $6.4 million contract with the ROE in 2012 for the apparent purpose of designing and implementing an anti-Chevron campaign. *See* Dkt. 3 at 10. Chevron seeks discovery from MCSquared relevant to ongoing proceedings the Lago Agrio Plaintiffs ("LAPs") have brought in Brazil and Argentina seeking to enforce the Ecuadorian judgment (the "Enforcement Proceedings") and proceedings pending in the Supreme Court of Gibraltar against funders of the LAPs. *See id*. at 16. The ROE is not a party to these proceedings. The ROE's support for and collusion with the LAPs is, however, relevant to all of them. *See id*. at 26.

On December 4, 2014, the ROE moved to intervene. Dkts. 11–12. In its motion, the ROE admits that MCSquared "maintains a place of business within this judicial district" and that MCSquared's work "concern[s] the highest echelons of the government of the Republic of Ecuador." Dkt. 12 at 4.[1]

[1] The ROE makes false assertions regarding the filing of this petition. It claims, for example, that Chevron filed its petition *ex parte* when it did not, and complains that it was not served and did not have access to the fil-

III. ARGUMENT

A. The ROE Does Not Have Grounds to Intervene as of Right

An applicant may intervene as a matter of right only when he or she: (1) files a timely motion; (2) asserts an interest relating to the property or transaction that is the subject of the action; (3) is so situated that without intervention the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and (4) has an interest not adequately represented by the other parties. *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994). Failure to satisfy any of these requirements warrants denial of intervention. *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 176 (2d Cir. 2001). The ROE's petition to intervene fails because its vague assertions of privilege and sovereign immunity do not demonstrate a cognizable interest warranting intervention.

1. The ROE Has No Cognizable Privilege Interest in the Documents Sought

Because MCSquared provided only public relations services to the ROE, the ROE has no basis to assert privilege as to evidence Chevron seeks. The ROE asserts that "Chevron's proposed subpoena requests discovery concerning the highest echelons of the government of the Republic of Ecuador." Dkt. 12 at 4. But the ROE does not identify who among this "echelon" worked with MCSquared and does not even attempt to demonstrate that it could satisfy the elements of privilege here—a confidential communication between attorney and client for the purpose of giving or seeking legal advice. Unless the ROE can identify a relevant attorney-client relationship, or make at least some showing that the work performed by MCSquared was done at the direction of attorneys, and that the documents and communications sought here were used for

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ing. Dkt. 12 at 2–4. Chevron did not provide counsel for the ROE with notice of the filing because, unlike with previous Section 1782 petitions, the ROE is not a party to any of the underlying actions for which this discovery is sought. Chevron did provide counsel for the LAPs with notice of the filing, as well as serving MCSquared by multiple methods, as soon as this petition was filed. Moreover, counsel for the ROE never contacted counsel for Chevron to request a copy of any part of the filing or the exhibits.

the purpose of giving or receiving legal advice, its vague claim of privilege cannot be credited. For example, who are these attorneys? When were they retained, and when did they communicate with MCSquared? What did this have to do with legal advice? What litigation do they claim this was in furtherance of? The ROE must already have the answers to these (and other) relevant questions since it premises its motion on just such claims. The ROE should explain in detail why it thinks there are any attorney-client or work-product issues implicated by the discovery served here. Without this, the motion should be summarily denied.

The available evidence shows that rather than pertaining to any legal advice, the ROE's contract with MCSquared required that MCSquared provide services including "conduct[ing] studies and formulat[ing] strategies of communication, information, image and communication publicity at an international level." Dkt. 4-65 (Ex. 66) at 10. This Court has rejected claims of privilege over communications or documents relating to public relations, even where they may touch on legal proceedings. As this Court noted, "public relations advice, even if it bears on anticipated litigation," is not privileged, because "the purpose of the [privilege] rule is to provide a zone of privacy for strategizing about the conduct of litigation itself, not for strategizing about the effects of the litigation on the client's customers, the media, or on the public generally." *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK)(JCF), 2013 WL 3805140, at *3 (S.D.N.Y. July 19, 2013); *see also Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 54–55 (S.D.N.Y. 2000) (rejecting claim of attorney-client privilege because, *inter alia*, the public relations firm was "simply providing ordinary public relations advice so far as the documents . . . in question [were] concerned."); *Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 432 (S.D.N.Y. 2013) (declining to extend privilege protection to a public relations firm that was retained merely to

"burnish[its client's] image" rather than perform "a specific litigation task that the attorneys needed to accomplish in order to advance their litigation goals").

The ROE provides no evidence that MCSquared was hired to provide any service that would implicate any privilege or work product. Indeed, the ROE's contract with MCSquared makes clear that MCSquared was not hired by counsel or engaged to perform litigation tasks at the direction of counsel. To the contrary, the ROE hired MCSquared to "realize the activities of international relations" (Dkt. 4–1 (Ex. 66) at 9), and to work on a "series of products" directed at furthering the campaign to enforce the fraudulent judgment against Chevron (Dkt. 4-94 (Ex. 95) at 3). The ROE's cryptic claim that privilege "might forever be lost" if MCSquared produces the requested materials does not establish an interest warranting intervention.

2. Sovereign Immunity Also Does Not Provide a Basis for Intervention

The ROE fails to provide any support or explanation as to how sovereign immunity could possibly be implicated by Chevron's subpoena to MCSquared. The ROE vaguely suggests that it is entitled to intervene to "protect its sovereign immunity" (Dkt. 12 at 1) and "claim immunity" (*id*. at 4) because, in the ROE's telling, "only the [ROE] may assert its own sovereign immunity" and "once waived, [sovereign immunity] cannot be reasserted" (*id.* at 5). But the ROE never explains why the ROE's sovereign immunity would have anything to do with Chevron's Section 1782 petition against MCSquared. Nor does the ROE direct the Court to analogous authority or provide the court with facts supporting its claim.

The principles of sovereign immunity do not apply here. Sovereign immunity protects foreign sovereign nations from *being sued* in U.S. courts. *See* Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–1611; *Capital Ventures Int'l v. Republic of Argentina*, 552 F.3d 289, 293 (2d Cir. 2009). Specifically, sovereign immunity makes foreign sovereigns "immune from the jurisdiction" of U.S. courts (28 U.S.C. § 1604), as well as from "attachment, arrest and

execution" (28 U.S.C. §§ 1604, 1609), among other things. Sovereign immunity does not apply to actions to which a foreign sovereign is not a party or to actions seeking discovery from a non-sovereign entity such as MCSquared. *See EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 209–10 (2d Cir. 2012) (holding that Section 1609 does not prohibit discovery from being directed to third-party banks because, among other things, it "involves discovery, not attachment of sovereign property, and because it is directed at third-party banks, not [the sovereign] itself."); *see also First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 177 (2d Cir. 1998) (holding that Section 1604 does not prohibit discovery requests directed at a non-sovereign entity because the "comity concerns" that would have been raised had the discovery been directed against the sovereign were not present). Here, Chevron does not seek to seize assets pertaining to the ROE or to subject it to suit, but simply seeks discovery from a non-sovereign, MCSquared.

Sovereign immunity also does not give a foreign sovereign a basis to *intervene* in U.S. litigations given that its entire purpose is to insulate the foreign sovereign *from* the burdens of such suit. *See* 28 U.S.C. § 1602 ("immunity [for foreign states] from the jurisdiction of [U.S.] courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts").

Here, Chevron seeks discovery from MCSquared, not the ROE, and does not assert claims against either MCSquared or the ROE. If the ROE contends there is a sovereign immunity issue here, it should explain it in detail, not in slogans. And in any event, the ROE's sovereign immunity—to the extent it has any—is not implicated and does not provide a basis for intervention.

3. The ROE's Intervention in RICO Is Distinguishable From the Facts in This Case

In support of its motion to intervene, the ROE cites its intervention in the RICO case (11 Civ. 0691 (LAK)) for the limited purpose of asserting privilege over certain documents provided to Chevron by an independent third party that appeared to pertain to the ROE (the *Petito* documents). *See* Dkt. 12 at 6; 11 Civ. 0691 Dkts. 1545, 1546. But that situation is entirely distinguishable from the present situation.

First, in the *Petito* proceeding, there was some reason at the outset to think that at least some of the documents might be subject to a valid claim of privilege or other protection, and for that reason the ROE's intervention had some apparent basis. For this reason, Chevron did not oppose the ROE's intervention. And, as it turned out, although counsel for Chevron in this proceeding did not review the *Petito* documents except to the extent this Court ordered them produced, this Court upheld claims of privilege over some of those documents. For the reasons explained in Section A.1, there is no cognizable privilege claim here.

Moreover, this Court overruled the ROE's claims of privilege for certain documents that it found pertained solely to public relations, rejecting the very arguments the ROE makes here, noting that documents that "reference the media" were only privileged if "they involve[d] the provision of legal rather than public relations advice." 11 Civ. 0691 Dkt. 1546. The ROE has made no showing that any documents Chevron seeks from MCSquared here involve anything but the provision of public relations services. The documents are therefore not entitled to protection.

B. Permissive Intervention Is Also Not Warranted

Permissive intervention is only warranted where a party "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). The ROE does not state how it meets this requirement, merely asserting in conclusory terms that it

has "claims [that] share common questions of law and fact with those at issue here." Dkt. 12 at 2. But the only "questions of law and fact at issue here" are whether Chevron's petition meets the requirements of Section 1782, and whether MCSquared has any basis to challenge it. Without any basis to assert a privilege or other interest, the ROE has no "claim or defense" relevant to this action at all. *See In re Chevron Corp.*, 736 F. Supp. 2d 773, 779 n.20 (S.D.N.Y. 2010) ("The Lago Agrio plaintiffs however, lack standing to object to the [§ 1782] application . . . except to the extent, if any, that . . . they have a claim of privilege.").

The ROE's complaint that it is somehow improper for Chevron to seek evidence of the ROE's wrongdoing, rather than the wrongdoing of the parties to the foreign proceedings, is misleading. Section 1782 does not limit discovery to evidence of the wrongdoing of *the parties* to a foreign proceeding. Indeed, it does not make discovery of evidence contingent on the identity of the party to whom the evidence relates at all. Rather, it makes evidence presumptively discoverable if it is relevant, regardless of whom it relates to. Because evidence of the ROE's misdeeds is *relevant* to Enforcement Proceedings and Gibraltar Proceedings, it is fully discoverable, whether or not the ROE thinks it might also potentially be relevant to other proceedings. Indeed, information that the ROE has acted wrongfully by using MCSquared to coordinate an anti-Chevron campaign to secure enforcement of the fraudulent Ecuadorian judgment is highly relevant to the Enforcement Proceedings and Gibraltar Proceedings for which the discovery is sought as it establishes the ROE's involvement in the fraudulent scheme against Chevron that is a central issue in each of the proceedings.

IV. CONCLUSION

For the foregoing reasons, Chevron respectfully requests that the Court deny the ROE's Motion to Intervene.

Dated: December 12, 2014

Respectfully submitted,

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