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. for Use in Foreign Proceedings, Petitioner.	No. 1:14-mc-00392-LAK

CHEVRON CORPORATION'S RESPONSE TO (1) MCSQUARED'S MOTION TO VACATE (DKT. 21); (2) MCSQUARED'S MOTION TO QUASH OR MODIFY SUBPOENA (DKT. 23); AND (3) PROPOSED INTERVENER THE REPUBLIC OF ECUADOR'S MOTION TO QUASH OR MODIFY SUBPOENA, FOR IN CAMERA REVIEW, AND, IN THE ALTERNATIVE, FOR RECIPROCAL DISCOVERY AND ISSUANCE OF A PROTECTIVE ORDER (DKT. 32)

GIBSON, DUNN & CRUTCHER LLP
RANDY M. MASTRO
ANDREA E. NEUMAN
ANNE CHAMPION
200 Park Avenue
New York, NY 10166-0193
Telephone: 212.351.4000
Facsimile: 212.351.4035

Attorneys for Petitioner Chevron Corporation

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ARGUMENT 5

A. The Requested Discovery Meets the Statutory Requirements and Discretionary Factors of Section 1782 5

1. MCS Is "Found" Within This District 5

2. The Information Sought Is Relevant to Whether the ROE Has Promoted Enforcement of the Judgment 8

a. The Discovery Is Relevant to the Foreign Proceedings 9

b. The Evidentiary Record Amply Supports the Likelihood That MCS Has Discoverable Information 10

c. The Discovery Requests Themselves Are Properly Tailored to the Relevant Subject Matters 16

3. Chevron's Application Does Not Circumvent Party Discovery in the Treaty Arbitration 18

4. The Discovery Is Not Intrusive, Unduly Burdensome, or Overbroad 20

B. The Discovery Sought Is Not Privileged or Protected 22

1. The ROE's Claims That MCS's Documents Are Protected Because They Are Purportedly the Property of the ROE Are Irrelevant 22

2. The Foreign Sovereign Immunities Act Has No Application Here 23

3. The ROE's Blanket Deliberative Process Privilege Objection Is Procedurally Improper and Without Merit 26

C. The ROE's Request for Reciprocal Discovery Is Beyond the Scope of This Action and an Improper Attempt to Circumvent the Treaty Arbitration Rules 29

D. A Protective Order Is Not Warranted 31

E. Rule 60 Does Not Provide a Basis to Vacate the Court's Order Granting Discovery 32

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

Cases

Aurelius Capital Master Ltd. v. Republic of Argentina,
No. 13–4054(L), — F. App'x —, 2014 WL 7272279 (2d Cir. Dec. 23, 2014) 26

Boss Mfg. Co. v. Hugo Boss AG,
No. CIV.8495(SHS)(MHD), 1999 WL 20829 (S.D.N.Y. Jan. 13, 1999) 21

Bridgeport Music Inc. v. UMG Recordings, Inc.,
No. 05 Civ. 6430(VM)(JCF), 2007 WL 4410405 (S.D.N.Y. Dec. 17, 2007) 21

Chevron Corp. v. Banco Pichincha, C.A.,
11-cv-24599-MGC (S.D. Fla. June 11, 2012) 2

Chevron Corp. v. Berlinger,
629 F.3d 297 (2d Cir. 2011) 19

Chevron Corp. v. Donziger,
974 F. Supp. 2d 362 (S.D.N.Y. 2014) 2, 10, 16, 31

Chevron Corp. v. Donziger,
No. 11 CIV. 0691 LAK, 2012 WL 6634680 (S.D.N.Y. Dec. 19, 2012) 16

Daimler AG v. Bauman,
134 S. Ct. 746 (2014) 7

Daval Steel Prods. v. M/V Fakredine,
951 F.2d 1357 (2d Cir. 1991) 9

EM Ltd. v. Republic of Argentina,
473 F.3d 463 (2d Cir. 2007) 26

EM Ltd. v. Republic of Argentina,
695 F.3d 201 (2d Cir. 2012) 23, 24

Export-Import Bank of the Republic of China v. Grenada,
768 F.3d 75 (2d Cir. 2014) 23, 26

Five Borough Bicycle Club v. City of New York,
No. 07 CIV. 2448 (LAK), 2008 WL 4302696 (S.D.N.Y. Sept. 16, 2008) 29

Grand Cent. P'Ship, Inc. v. Cuomo,
166 F.3d 473 (2d Cir. 1999) 28

TABLE OF AUTHORITIES
(continued)

Page(s)

Graziuso v. 2060 Hylan Blvd. Rest. Corp.,
300 A.D.2d 627 (2d Dep't 2002) 1, 6

Horizon Mktg. v. Kingdom Int'l Ltd.,
244 F. Supp. 2d 131 (E.D.N.Y. 2003) 7

In re Applic. of Bayer AG,
146 F.3d 188 (3d Cir. 1998) 9

In re Applic. of Chevron Corporation,
709 F. Supp. 2d. 283 (S.D.N.Y. 2010) 9, 19

In re Applic. of Christen Sveaas,
249 F.R.D. 96 (S.D.N.Y. 2008) 9, 11

In re Applic. of Euromepa S.A.,
51 F.3d 1095 (2d Cir. 1995) 20

In re Applic. of Malev Hungarian Airlines,
964 F.2d 97 (2d Cir. 1992) 20

In re Applic. of Winning (HK) Shipping Co. Ltd.,
No. 09–22659–MC, 2010 WL 1796579 (S.D. Fla. Apr. 30, 2010) 19

In re Applic. of Inversiones y Gasolinera Petroleos Venezuela, S. de R.L.,
No. 08-20378-MC, 2011 WL 181311 (S.D. Fla. Jan. 19, 2011) 6

In re Applic. of Time, Inc.,
No. 99-2916, 1999 WL 804090 (E.D. La. Oct. 6, 1999) 22

In re Consorcio Minero, S.A. v. Renco Group, Inc.,
No. 11 Mc. 354, 2012 WL 1059916 (S.D.N.Y. Mar. 29, 2012) 30, 31

In re Esses,
101 F.3d 873 (2d Cir. 1996) 30

In re Godfrey,
526 F. Supp. 2d 417 (S.D.N.Y. 2007) 1, 6

In re Grand Jury Subpoena Dated August 9, 2000,
218 F. Supp. 2d 544 (S.D.N.Y. 2002) 28

In re Mare Shipping Inc.,
No. 13 Misc. 238, 2013 WL 5761104 (S.D.N.Y. Oct. 23, 2013) 25

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Weatherford Int'l Sec. Litig.,
No. 11 Civ. 1646(LAK)(JCF), 2013 WL 2355451 (S.D.N.Y. May 28, 2013) 21

Intel Corp. v. Advanced Micro Devices, Inc.,
542 U.S. 241 (2004) 5, 18, 22

Langford v. Chrysler Motors Corp.,
513 F.2d 1121 (2d Cir. 1975) 21

LNC Invs. v. Republic of Nicaragua,
No. 96 Civ. 6360 JFK RLE, 1997 WL 729106 (S.D.N.Y. 1997)..................................... 27, 29

Mare Shipping Inc. v. Squire Sanders (US) LLP,
574 F. App'x 6 (2d Cir. 2014) 24, 25

Marko v. The Culinary Institute of America,
245 A.D.2d 212 (1st Dep't 1997) 6

Minatec Fin. S.À.R.L. v. SI Group, Inc.,
No. 08 Civ. 269, 2008 WL 3884374 (N.D.N.Y. Aug. 18, 2008) 31

Morse/Diesel, Inc. v. Fid. & Deposit Co. of Maryland,
122 F.R.D. 447 (S.D.N.Y. 1988) 9

New York ex rel. Boardman v. Nat'l R.R. Passenger Corp.,
233 F.R.D. 259 (N.D.N.Y. 2006) 29

NML Capital, Ltd. v. Republic of Argentina,
699 F.3d 246 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 201 (2013).. 25

Oppenheimer Fund, Inc. v. Sanders,
437 U.S. 340 (1978) 9

Reino De Espana v. Am. Bureau of Shipping,
No. 03 CIV 3573 LTS RLE, 2005 WL 1813017 (S.D.N.Y. Aug. 1, 2005) 29

Republic of Argentina v. NML Capital, Ltd.,
134 S. Ct. 2250 (2014).. 23, 24, 26

Royal & Sun Alliance Ins. Co. of Can. v. Century Int'l Arms Co.,
466 F.3d 88 (2d Cir. 2006) 27

Samad Bros. v. Bokara Rug Co. Inc.,
No. 09 Civ. 5843(JFK)(KNF), 2010 WL 5094344 (S.D.N.Y. Nov. 30, 2010)........................ 21

TABLE OF AUTHORITIES
(continued)

Page(s)

Texaco P.R. v. Dep't of Consumer Affairs,
60 F.3d 867 (1st Cir. 1995) 28

Thai Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic,
No. 10 Civ. 5256(KMW), 2011 WL 4111504 (S.D.N.Y. 2011) 26

Tigue v. U.S. Dep't of Justice,
312 F.3d 70 (2d Cir. 2002) 28

Universitas Educ., LLC v. Nova Grp., Inc.,
No. 11 Civ. 1590(LTS)(HBP), 2013 WL 3328746 (S.D.N.Y. July 2, 2013) 21

Via Vadis Controlling GmbH v. Skype, Inc.,
No. Civ. A. 12–MC–193–RGA, 2013 WL 646236 (D. Del. Feb. 21, 2013) 7

Wertheim Schroder & Co. Inc. v. Avon Prods., Inc.,
No. 91 Civ. 2287 (PKL), 1995 WL 6259 (S.D.N.Y. Jan. 9, 1995) 22

Statutes

28 U.S.C. § 1602 23

28 U.S.C. § 1603 24

28 U.S.C. § 1604 23

28 U.S.C. § 1605 23

28 U.S.C. § 1606 23

28 U.S.C. § 1607 23

28 U.S.C. § 1609 23

28 U.S.C. § 1610 24

28 U.S.C. § 1611 24

28 U.S.C. § 1782 .... 1, 5, 23

5 U.S.C. § 552 27

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

Black's Law Dictionary (9th ed. 2009) 25

Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 Syracuse J. Int'l L. & Com. 1 (1998) 6

Rules

Fed. R. Civ. P. 26(b)(1) 4, 9

Fed. R. Civ. P. 60(b) 32

PRELIMINARY STATEMENT

Neither putative intervener the Republic of Ecuador ("ROE") nor respondent MCSquared PR, Inc. ("MCS") offers any basis upon which this Court should reconsider its order authorizing Chevron Corporation ("Chevron") to serve a subpoena on MCS, pursuant to 28 U.S.C. § 1782, or to quash or limit that subpoena. *See* Dkt. 8 (order). They have shown no basis to quash Chevron's subpoena or to vacate this Court's order granting leave to take discovery from MCS. Their motions have no merit and should be denied in their entirety.[1]

The ROE and MCS's principal contention is that MCS is not "found" in this District, notwithstanding MCS's contrary sworn statements to the U.S. Justice Department. But this is wrong, even if MCS supposedly made a "mistake" when it submitted a false sworn statement to the Justice Department identifying its address as Varick Street in Manhattan. In any event, MCS is incorporated in New York County, where this Court sits, and "[i]t is well settled that the sole residence of a domestic corporation for venue purposes is the county designated in its certificate of incorporation, despite its maintenance of an office or facility in another county." *Graziuso v. 2060 Hylan Blvd. Rest. Corp.*, 300 A.D.2d 627, 627 (2d Dep't 2002). Moreover, MCS, as a public relations firm, has engaged in "systematic and continuous" contact with this District, and it has certainly regularly conducted business here on behalf of the ROE, organizing multiple related media appearances and public demonstrations in this District, including an orchestrated "protest" outside this very courthouse on the first day of the RICO trial. *In re Godfrey*, 526 F. Supp. 2d 417, 422 (S.D.N.Y. 2007); *see* Dkt. 3 at 12–13. Nothing more is required to find MCS present in this District for these purposes.

---

[1] Pursuant to this Court's December 16 scheduling order (Dkt. 26), Chevron submits this consolidated brief in opposition to the motions of both MCS (Dkts. 21, 23) and proposed intervener the ROE (Dkt 32). It has previously submitted its brief in opposition to the ROE's motion to intervene. Dkt. 12 (ROE Motion); Dkt. 18 (Chevron Opposition).

The ROE and MCS's challenges to the relevance of the discovery Chevron seeks to the underlying foreign proceedings are equally unavailing. Contrary to MCS's protestations, the record of MCS's involvement with the ROE's anti-Chevron activities is well-documented, and the discovery sought here will reveal new details about the ROE's ongoing support of efforts by Steven Donziger and the Lago Agrio Plaintiffs (collectively, the "LAPs") to extort and defraud Chevron in connection with the $9.5 billion Ecuadorian judgment that this Court found to be "obtained by corrupt means." *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 644 (S.D.N.Y. 2014) ("RICO Decision").

The discovery Chevron seeks is relevant to both the Gibraltar Proceedings that Chevron initiated against financiers of this scheme, and to the LAPs' current and future proceedings to enforce their fraudulent judgment. In these actions, Chevron has argued or, at the appropriate juncture will argue, that the so-called "enforcement" attempts are part of an ongoing extortionate shakedown that, among other things, violates the enforcement jurisdiction's public policy.

In order to deflect the straightforward relevance analysis, MCS claims that discovery is not warranted because it was not knowingly and directly involved in extorting Chevron. But in order to obtain discovery from MCS, Chevron need not prove intentional propagation of an extortionate scheme, only that MCS is likely to have documents that may reveal new information about that ongoing extortion campaign. *See Chevron Corp. v. Banco Pichincha, C.A.*, 11-cv-24599-MGC, Dkt. 82 at 26 (S.D. Fla. June 11, 2012) (M.J. Turnoff) (granting Chevron's Section 1782 application for discovery from Ecuadorian bank, Banco Pichincha, despite noting that the bank "appear[ed] to be the unwilling vehicle used to perpetuate" the fraud conducted by Donziger and other LAPs' representatives). There is little doubt that MCS possesses such documents. Since 2013, it has been working for the ROE to organize protests against Chevron, plant

news stories against Chevron, and otherwise further the ROE's attacks on Chevron. Dkt. 27 (Garay Aff.) ¶¶ 7, 13, 14. The precise contours of MCS's role are unknown to Chevron, and MCS's submissions shed little light on what it did in exchange for the ROE's $6.4 million, but illuminating those questions is the purpose of discovery.

MCS and the ROE's discussions of the ongoing bilateral investment treaty arbitral proceeding between Chevron and the ROE (the "Treaty Arbitration") are also irrelevant. In that proceeding, the arbitral panel has ordered the ROE to prevent enforcement of the very judgment the LAPs seek to enforce—an order with which the ROE has not complied. Ex. 211 at 31.[2] But while both Chevron and the ROE have previously obtained extensive discovery under Section 1782 in support of the Treaty Arbitration, Chevron is not relying on that proceeding as a basis for discovery here. MCS and the ROE's arguments are thus both wrong and beside the point. For example, although the ROE has itself pursued discovery from Chevron in connection with the Treaty Arbitration in several pending Section 1782 proceedings, the ROE argues that Chevron's filing here is an attempt to evade the arbitration's discovery restrictions. But that is nonsense. Chevron is under no obligation to pursue this discovery from the ROE in the Treaty Arbitration, nor is there any mechanism for doing so at this time.

The ROE further makes the bizarre claim that it should get "reciprocal" discovery from Chevron if Chevron obtains discovery here from MCS, but cites nothing to support this notion. Moreover, the discovery that the ROE seeks is in no way "reciprocal." Chevron's public relations activities are not at issue in any foreign proceeding, and there is no equivalence between Chevron's lawful and routine public relations activities and the ROE's use of fake protests,

[2] Exhibits 1–210 are attached to the Declaration of Anne Champion filed in support of Chevron's petition (Dkt. 4); Exhibits 211–226 are attached to Declaration of Anne Champion filed in connection with this response.

trumped up criminal charges, and allegations of treason to pursue a windfall from the enforcement of a fraudulent judgment issued by its own court.

MCS and the ROE's remaining arguments are similarly meritless. Vague, unsubstantiated assertions of burden are not a basis upon which to quash a subpoena, and MCS makes no serious effort to carry its burden to demonstrate with specificity how compliance would unduly burden it. The equally vague and unsubstantiated assertions of immunity and privilege made by both MCS and the ROE are not supported by the law and are premature and insufficient grounds to quash this subpoena. Neither MCS nor the ROE identifies specific documents, or provides the information necessary to establish any privilege or immunity over any document. They thus provide no plausible basis on which to conclude that documents held by a public relations agency could be subject to attorney-client privilege, the deliberative process privilege, or the Foreign Sovereign Immunities Act.

Finally, MCS cannot evade discovery through the untested assertions of its Executive Director—the same individual who now claims the very specific MCS Manhattan business address she swore to the federal government was a "mistake." Dkt. 27 (Garay Aff.) ¶ 3. Her self-serving assertions come nowhere near relieving MCS of its obligation to produce any documents in its possession, custody, or control "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). For example, Ms. Garay, choosing her words very carefully, asserts that MCS did not "play a role" in the design of various websites that have been used to harass and intimidate witnesses and critics of the Correa regime in Ecuador. Dkt. 27 (Garay Aff.) ¶ 10. But she does not say that MCS does not possess documents that could shed light on who did prepare those websites, who paid for those websites, and other factual issues relevant to the foreign proceedings.

Accordingly, the Court should deny the ROE and MCS's motions in their entirety.

ARGUMENT

A. The Requested Discovery Meets the Statutory Requirements and Discretionary Factors of Section 1782

MCS and the ROE argue that Chevron has failed to satisfy the statutory requirements of Section 1782, *see Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246 (2004), but their motions provide no evidence to support this. Chevron has met the statutory factors by showing that its application (1) is directed at someone "found" within the District; (2) is intended for use before a foreign tribunal; (3) is based upon the application of a person interested in the foreign proceeding; and (4) does not seek privileged materials. *See* 28 U.S.C. § 1782(a). Chevron has also met the factors that the Supreme Court set out in *Intel*, showing that the foreign tribunals are receptive to this type of discovery, that the requests are not an attempt to circumvent foreign proof-gathering restrictions, and that the requests are not unduly intrusive or burdensome. Dkt. 3 at 19–22. Chevron's application was therefore properly granted.

1. MCS Is "Found" Within This District

To support its assertion that MCS resides in this District, Chevron relied in part on statements made under penalty of perjury to the U.S. Department of Justice by MCS's Executive Director, Maria Garay, that MCS had an office in Manhattan. Dkt. 3 at 20. The ROE confirmed in its motion to intervene that MCS had an office in this District. Dkt. 12 at 4 ("MCSquared maintains a place of business within this judicial district where it can easily accept service of process."). But MCS now says it provided the federal government with false information, and that it does not have—and supposedly never had—an office at the Varick Street address in Manhattan, despite what it swore in its Foreign Agents Registration Act ("FARA") filing. MCS has the chutzpah to blame Chevron for using this sworn information—which MCS itself provided to the

federal government—in its petition for discovery. None of this matters, however, because this Court can order discovery from MCS under Section 1782 because MCS is and has been at all times a New York corporation, incorporated in *New York County*, and thus is, as a matter of law, "found" in this District. Moreover, MCS ignores its extensive contacts and business activity with this District, which alone would be dispositive of whether it is "found" here.

Section 1782 authorizes federal courts to compel discovery from persons who "reside" or are "found" in the court's district. A corporation is "found" in a judicial district for these purposes where it undertakes "systematic and continuous local activities"—including, but not limited to, where it is incorporated, where it maintains headquarters, or where it regularly transacts business. *In re Godfrey*, 526 F. Supp. 2d 417, 422 (S.D.N.Y. 2007) (quoting Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 Syracuse J. Int'l L. & Com. 1, 10 (1998)); *see also In re Applic. of Inversiones y Gasolinera Petroleos Venezuela, S. de R.L.*, No. 08-20378-MC, 2011 WL 181311, at *7–*8 (S.D. Fla. Jan. 19, 2011).

MCS is found in this District because it is *incorporated* in New York County. Ex. 148 (Certificate of Incorporating noting that "The county, within this state, in which the office of the corporation is to be located is: New York"); Ex. 212 (New York State Department of State "Entity Information" look-up showing MCSquared PR Inc.'s County of Incorporation as "New York"). New York courts strictly apply the "County" designation listed on a company's Certificate of Incorporation, and "[t]his is true regardless of the location of [the corporation's] actual principal office in the State[.]" *Marko v. The Culinary Institute of America*, 245 A.D.2d 212, 212 (1st Dep't 1997); *see also Graziuso v. 2060 Hylan Blvd. Restaurant Corp.*, 300 A.D.2d 627, 627 (2d Dep't 2002) ("It is well settled that the sole residence of a domestic corporation for ven-

ue purposes is the county designated in its certificate of incorporation, despite its maintenance of an office or facility in another county."). Thus, MCS's designation of New York County as its place of incorporation is dispositive. Incorporation is, by itself, sufficient to satisfy the "resides or is found in" requirement of Section 1782. *See Via Vadis Controlling GmbH v. Skype, Inc.*, No. Civ. A. 12–MC–193–RGA, 2013 WL 646236, *2 (D. Del. Feb. 21, 2013). Indeed, incorporation alone is sufficient even in the more-demanding personal jurisdiction context, where "a corporation's place of incorporation" is one of the "paradigm all-purpose forums for general jurisdiction." *Daimler AG v. Bauman*, 134 S. Ct. 746, 749 (2014).

MCS's legal presence in the Southern District is not incidental, but rather reflects a systematic effort by MCS to conduct business in and associate itself with the Southern District. The corporation's designated agent for the service of process is in the Southern District. Ex. 212; s*ee Horizon Mktg. v. Kingdom Int'l Ltd.*, 244 F. Supp. 2d 131,138 (E.D.N.Y. 2003) (for purposes of venue in federal cases, corporation resides in county identified for office of incorporation and used for Secretary of State to mail process received). Its primary banking relationship is with a bank in the Southern District. Ex. 66 at 14–15. And it holds itself out as having a business presence in the Southern District on its web site, which contains two "Video Previews" presumably intended to promote the firm's services. One of the videos is labeled "NYC" and opens with sweeping views of Manhattan, followed by clips of iconic locales and street scenes within the Southern District. Exs. 213, 214 at 7.

Furthermore, MCS's Southern District connections are apparent in its specific work for the ROE that is the subject of the present action. MCS's FARA filing identifies disbursements to Manhattan entities, including Columbia University (in Manhattan), and a "Media Contact List" dominated by journalists who work in Manhattan, including Jon Stewart of Comedy Central,

Andrew Marantz of the New Yorker, New York One, Leonard Lopate of WNYC, and Chris Hayes of MSNBC. Ex. 132 at 65. MCS does not dispute that it organized or promoted at least two "protests" in the Southern District, both aimed at the RICO case decided by this Court—including one outside this very courthouse on the first day of the RICO trial, and another in Union Square. Dkt. 3 at 12–13; Ex. 132 at 21. MCS also organized and promoted multiple events within this District for Ecuadorian President Rafael Correa and other Ecuadorian government officials. These include "a two-day trip to New York City" for President Correa "where he will talk to Spanish-language media reporters and will offer individual interviews to various English-language media outlets," and "TV appearances at PBS with Charlie Rose and MSNBC's All In With Chris Hayes." Ex. 132 at 20. They also include events at the Pierre Hotel and a conference at the New School in Manhattan, at which an Ecuadorian government official addressed, among other things, "the environmental impact left by oil drilling operations in the Ecuadorian Amazon." Ex. 132 at 12, 55. MCS reported spending at least $160,000 in connection with this event. Ex. 132 at 5. Finally, as a firm billing itself as specializing in public relations, it necessarily follows that MCS would have to have "systematic and continuous" contacts with the Southern District in the ordinary course of its business, as Manhattan is "unquestionably the global media capital." *See* Ex. 226 (noting that "Of the world's 10 biggest media companies, five . . . are based in New York. No other city has more than one.").

This publicly available information is more than sufficient to establish that MCS "resides or is found in" the Southern District of New York.

2. The Information Sought Is Relevant to Whether the ROE Has Promoted Enforcement of the Judgment

Both MCS and the ROE claim that discovery under Section 1782 from MCS is not relevant and that therefore the subpoena should be quashed. But although "relevance" is not the

standard under Section 1782, *see In re Applic. of Chevron Corporation*, 709 F. Supp. 2d. 283, 305 (S.D.N.Y. 2010) (noting required showing is "likely relevance"), where the information sought is indeed relevant, as it is here, it is "presumptively discoverable" under Section 1782. *In re Applic. of Bayer AG*, 146 F.3d 188, 196 (3d Cir. 1998) ("[R]elevant evidence is presumptively discoverable under § 1782."). The discovery sought here is undoubtedly relevant to the identified foreign proceedings. This is sufficient to permit discovery, even if it conceivably could *also* be relevant to other proceedings.

a. The Discovery Is Relevant to the Foreign Proceedings

Relevance is construed broadly "to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." *In re Applic. of Christen Sveaas*, 249 F.R.D. 96, 106–07 (S.D.N.Y. 2008) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). The Rule 26 relevance standard to which MCS alludes merely requires that discovery "appears reasonably calculated to lead to the discovery of admissible evidence" (F.R.C.P. 26(b)(1)), a standard which this court interprets to mean "'any possibility' that the information sought may be relevant." *In re Applic. of Christen Sveaas*, 249 F.R.D. at 107 (quoting *Morse/Diesel, Inc. v. Fid. & Deposit Co. of Maryland*, 122 F.R.D. 447, 449 (S.D.N.Y. 1988)); *see also Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1367 (2d Cir. 1991).

The information Chevron seeks more than meets this standard. As Chevron has already explained in detail (Dkt. 3 at 26–30), the discovery sought will likely reveal information regarding the ROE's promotion of enforcement of the Lago Agrio judgment, support for the LAPs, and whether it engaged in witness tampering. Chevron's discovery requests are therefore appropriately focused on such topics as MCS's work on campaigns related to Chevron and its relationships with the LAPs and the ROE.

b. The Evidentiary Record Amply Supports the Likelihood That MCS Has Discoverable Information

MCS claims that discovery from it cannot be relevant to the enforcement proceedings because it was not hired until after the Ecuadorian judgment was issued. This is incorrect. The LAPs' *Invictus* enforcement strategy—still in play—is itself a part of the extortionate scheme. The Ecuadorian judgment is just one aspect of that scheme, so the distinction between pre- and post-judgment conduct is immaterial. And MCS's employees involved themselves in the campaign well before MCS was officially retained by the ROE by, among other things, writing open letters in support of the LAPs' cause (Ex. 150 (Borja letter to the *New York Times*); Ex. 152 (Borja letter to Sen. Patrick Leahy)), and circulating anti-Chevron content (Ex. 154 (Borja posting a link to a video titled, "Fix It, Chevron" on Facebook)). Moreover, the promotion of enforcement of the judgment and financial support for the LAPs remain live issues in the ongoing and threatened enforcement proceedings, where Chevron will be challenging the judgment on public policy grounds, including that it was procured by fraud and is the subject of an extortionate scheme against Chevron. MCS's conduct is also relevant to the Gibraltar Proceedings against the primary funders of the LAPs' scheme. Likewise, the potential for witness tampering by the ROE did not end with the completion of the Ecuadorian trial proceedings, as witness testimony may be at issue in the enforcement proceedings and the Gibraltar Proceedings.

The ROE's motion is similarly disingenuous. President Correa has previously referred to Chevron as an "enemy of our country" and to Ecuadorian attorneys representing Chevron as "homeland-selling lawyers." RICO Decision at 452, 616; Dkt. 3 at 7. Petroecuador—Ecuador's state-owned oil company—has been the sole operator in the area where TexPet used to operate for more than two decades. The ROE thus has a vested interest in shifting responsibility to Chevron for any environmental problems there. And as this Court is aware, the ROE and the

LAPs' representatives long ago agreed to not seek any recovery for their claims from the ROE, despite its status as sole operator since 1990 and the majority owner of the consortium for more than a decade before that. Dkt. 3 at 6. The ROE hired MCS to promote the interests of the LAPs in enforcing a fraudulent $9.5 billion judgment and to scapegoat Chevron for damage caused by Petroecuador's ongoing poor environmental practices in the Oriente.

MCS also cites to the affidavit of Maria Garay to argue that it "has no knowledge" about what it identifies as the three major issues to which Chevron's discovery requests are relevant—promoting enforcement of the judgment, witness tampering, and financing of the LAPs. Dkt. 23 at 4. As addressed below, the Garay Affidavit raises more questions than it answers and Chevron should not be denied the opportunity for discovery simply because the facts are in dispute. *See In re Applic. of Christen Sveaas*, 249 F.R.D. 96, 107 (S.D.N.Y. 2008).

MCS dismisses the extensive factual background set forth in Chevron's petition, which demonstrates MCS's orchestration of a public relations campaign designed to pressure Chevron into paying the Ecuadorian judgment, a campaign that appeared to be coordinated with and carried out in conjunction with representatives of the LAPs. *See, e.g.*, Dkt. 3 at 27–29; Ex. 224 (Twitter page for JusticiaParaEcuador demanding that "Chevron must pay for the environmental damage to the Amazon Region. We will not give up until justice is done."). MCS claims that it "has no connection to the underlying global litigation between Chevron and the Lago Agrio Plaintiffs' ('LAPs') efforts to enforce a judgment they obtained in Ecuador against Chevron." Dkt. 21 at 1.[3] But MCS either concedes or does not deny many of Chevron's allegations regard-

[3] In its motion to vacate, MCS objected to several of the documents (mostly relating to Ecuadorian migration and labor records, Exs. 147, 155, 195, 198) submitted with Chevron's application, claiming, erroneously, they must have been illegally obtained. *See* Dkt. 21 at 4–7. To the contrary, they were legally obtained, and the one email that MCS's counsel speculates must have been "hacked" (Ex. 190) was found on a public Google forum using an ordinary Google search

ing its coordination with the ROE and the LAPs. For example, MCS does not deny that it participated in the campaign against Chevron by organizing celebrity trips to Ecuador and issuing articles and press releases in support of the "Dirty Hand" campaign. Indeed, MCS's assertion that it did not support the *LAPs*' public relations campaign appears to be disingenuous wordsmithing; the ROE's entire "Dirty Hand of Chevron" campaign—in which MCS has played a central role—was at least officially aimed at pressuring Chevron to pay the *LAPs*' fraudulent judgment, and supports the *LAPs*' public relations efforts. MCS does not deny its central role, nor could it: Immediately after President Correa launched the "Dirty Hand" campaign on September 17, 2013—the same period in which the websites and social media accounts linked to MCS and the ROE were being set up—MCS began organizing trips for celebrities and public figures to Ecuador, and explicitly tied the trips both to the ROE's Dirty Hand campaign *and* to the LAPs' lawsuit against Chevron in press releases and news articles. Although MCS may dispute its level of involvement, the evidence leaves little doubt that it is or was an important component of the ROE's participation in the LAPs' pressure campaign.

Moreover, despite MCS's claims to the contrary, the evidence that MCS is behind (or at least has discoverable information regarding) a series of anti-Chevron websites and social media accounts is compelling. The carefully worded Garay Affidavit denying MCS's involvement un-

(*see* Exs. 222–223), although as with the disappearing website domains (*see infra* at 13), MCS now appears to have taken steps to remove the email from the forum. Nonetheless, in order to address MCS's professed confidentiality concerns regarding these migration and labor records, Chevron proposed to MCS to stipulate to the sealing of those records. In response, MCS's counsel insisted that such a stipulation would have to include an acknowledgment of MCS's "rights" to file suit against Chevron and others over the filing of these documents, the authenticity and accuracy of which MCS has never disputed. Chevron obviously did not agree to acknowledge any such "rights," advised MCS's counsel it would seek to have the documents in question sealed on its own, and then, within hours, saw MCS's counsel file its own motion to seal them. Dkt. 35.

derscores the need for discovery. For example, Garay states that MCS did not "play a role" in "registering, designing and/or maintaining" the websites, Twitter accounts, and Facebook accounts mentioned in Chevron's petition (Dkt. 27 (Garay Aff.) ¶ 10) but is silent as to whether it hired another company to do these things on its behalf or is otherwise linked to them, and MCS's own public statements link it to these properties. MCS's FARA filing discloses advertisements that MCS purchased on behalf of the ROE, which state on their face that they were "Issued by the Government of Ecuador," and link to some of the very websites MCS disclaims any knowledge of, including www.justiceforecuador.com and www.thedirtyhand.com. Ex. 132 at 43. Moreover, www.justiceforecuador.com was identified as the property of the ROE before the reference was removed from the site. *Compare* Ex. 108 *with* Ex. 178. The coordinated registration of these domains and social media accounts with others—including www.thetoxiceffect.org, www.losvendepatria.com, www.chevroff.org, and others—as well as their shared content, suggests that they are linked. *See* Dkt. 3 at 11–12. As further evidence of MCS's connection to these domains, since Chevron filed this petition, someone has begun taking these domains offline, *see, e.g.*, Exs. 218–220, and the Twitter account for one of these coordinated websites, "Los Vendepatria" ("Homeland Sellers"), was used to castigate the heretofore little-known Ecuadorian lawyer who legally and properly obtained the Ecuadorian migration records attached to Chevron's petition, calling him a "secret informant" for Chevron, after MCS falsely accused him in its motion to vacate of engaging in "fraud" in obtaining those documents. *See* Ex. 221; Dkt. 21 at 6–7 & Ex. A.

Moreover, responding to the criticism that the ROE had paid MCS $6.4 million for a "website," President Correa *admitted* that MCS had created a "series of products," not just a website. Dkt. 3 at 11. Even if MCS itself did not create the websites it identifies, its principals

created several third-party entities that it could have used as fronts to do so. For example, MCS's Lady Zuñiga created a corporation called Left2Right Media Inc. in New York in March 2013, and initially listed its address as 649 Morgan Avenue in Brooklyn—the same address as MCS. Ex. 162. On April 24, 2013, the same day President Correa's office approved the proposed $6.4 million budget for the MCS contract, Left2Right changed its address to 33 Nassau Avenue in Brooklyn, the location of a facility leasing temporary office space. Ex. 164. In an April 2014 filing, Garay's husband Danilo Roggiero was identified as a Director of Left2Right Media, and replaced Zuñiga as the contact person for the company. *Id*. Further, Garay and Roggiero formed another public relations company in February 2014 called Maverickcom (*d/b/a* Elipsis Comunicaciones in Ecuador). Exs. 181–183. Garay does not testify as to the role, one way or the other, of these third party entities in the social media component of the campaign against Chevron, and the available evidence is sufficient to justify allowing Chevron's proposed discovery of MCS. At a minimum, this information demonstrates that Garay's declaration does not include a complete account of MCS's involvement or knowledge and that discovery is warranted.

Garay's statement that MCS "did not spend $200,000 on the Twitter hashtag #AskChevron" also does not appear to tell the full story. Dkt. 27 (Garay Aff.) ¶ 15. Although Toxic Effect was reportedly the group responsible for paying $200,000 to make #AskChevron a Twitter "promoted trend" on May 28, 2014—the day of the Chevron shareholder meeting in Midland, Texas—the hashtag was used by a number of related persons and entities before it was promoted, indicating advance planning and coordination. These include Natalie Cely, the Ecuadorian ambassador to the United States who signed the contract with MCS, longtime LAP ally Simon Billenness, Toxic Effect, Chevroff, and ApoyaalEcuador. *See* Dkt. 3 at 13–14. The hashtag was

used to promote the Midland protest, which Garay admits she attended along with "other representatives of MCSquared" and representatives of the LAPs. Dkt. 27 (Garay Aff.) ¶ 13.

MCS's denial of its involvement in anti-Chevron protests also appears to be another iteration of the LAPs' longstanding shell game for evading accountability. Karen Hinton, the LAPs' public spokesperson, told a reporter that MCS organized the Midland shareholder protest. Ex. 60 ("We were not involved at all. Call MCSquared. They handled."). Hinton's claim cannot be squared with Garay's claim that MCS did not organize the protest but only accompanied the LAP representatives to the protest "*pro bono*." Moreover, Garay is conspicuously silent about who the "pro bono" work was for and whether MCS attended the protest at the direction of the ROE or the LAPs, the types of details that Chevron's petition seeks to discover. If the LAPs' team did not organize the protest, and MCS did not organize it despite the LAPs' claim that it did, this simply begs the question of who did, and how representatives of both the LAPs and MCS came to attend, topics that are appropriate subjects for discovery here.

Although MCS denies having provided financial support to the LAPs, it does not provide an explanation for the material support it does appear to have provided, including assisting with the organization of a protest on the opening of the RICO trial. Dkt. 21 at 19. Chevron is entitled to discovery to uncover the nature of any such support. Moreover, MCS's brief parrots the LAPs' talking points, providing unwitting evidence of its likely collaboration with them. For example, MCS sets forth the same tired and debunked claims made by the LAPs with regard to the state of the Ecuadorian Oriente, including the absurd claim that the region is a "Rainforest Chernobyl."[4]

[4] According to MCS, "experts" have dubbed "Texaco's irresponsible approach to oil exploitation in Ecuador" the "Rainforest Chernobyl." Dkt. 21 at 2. But the "experts" to which MCS refers consist of one person, David Russell, whom the LAPs' hired to come up with a remediation

Not only are MCS's claims regarding Chevron's purported responsibility for contamination in Ecuador untrue and misleading,[5] they have no bearing on Chevron's application, are contrary to this Court's previous findings,[6] and should be disregarded in their entirety. In any event, this Section 1782 action and the international cases that this action is in aid of are about the LAPs' extortionate scheme, and not about the state of the environment in Ecuador. *See Chevron Corp. v. Donziger*, No. 11 CIV. 0691 LAK, 2012 WL 6634680, at *4 (S.D.N.Y. Dec. 19, 2012). Accordingly, because MCS's environmental claims are irrelevant to this proceeding, Chevron will not rebut them in detail here.

c. The Discovery Requests Themselves Are Properly Tailored to the Relevant Subject Matters

In view of this largely undisputed factual background, there can be no serious question that the discovery requests about which MCS complains are highly relevant and appropriately tailored to these issues:[7]

- **Requests for Production Nos. 1, 3, and 7:** MCS objects that these requests seek "all documents concerning MCSquared's work on behalf of Ecuador." Dkt. 23 at 4. Requests 1 and 7, however, are specifically tailored to request documents related to "CHEVRON, the CHEVRON LITIGATIONS, or the RELATED CAMPAIGNS," and Request 3 identifies a specific agreement that delineates the scope of the request. These requests go to the heart of the three key topics identified above.

- **Request for Production No. 2:** MCS argues that documents related to the negotiation of MCS's contract with the ROE are not relevant to the litigations pending in Argentina and Gibraltar. But documents related to contract negotiations between MCS

estimate. Since first coining the phrase, Russell has repeatedly renounced it, including in live testimony before this Court. Ex. 215 (Tr. (Russell)) 392:3–393:20; *see also* Ex. 216 at 2. Donziger and the LAPs, however, have continued to use the phrase as part of the extortionate scheme. MCS's reference to the "Rainforest Chernobyl" is straight out of the LAPs' playbook, along with the rest of MCS's unsupported smears against Chevron.

[5] As Chevron has repeatedly shown, TexPet's practices in the Oriente were legal and in accordance with then-prevailing industry standards. *See, e.g.*, Ex. 217 ¶¶ 18–24 (common use of unlined earthen pits); *id.* ¶ 34, Figure 9A (production water discharges widely used).

[6] *See* RICO Decision at 386–91.

[7] With respect to the requests not addressed here, MCS has not stated any particular objections and therefore cannot have met its burden to show that they should be quashed.

and the ROE are highly relevant to such issues as the purpose and scope of MCS's engagement with the ROE and the degree to which the ROE was involved in planning work in support of the LAPs.

- **Request for Production No. 5:** MCS objects to Chevron's request for MCS's financial records on the grounds that Garay's affidavit states that MCS did not finance the LAPs. Given the significant amount of money unaccounted for in MCS's FARA disclosures (Dkt. 3 at 15), as well as the evidence of coordination between MCS and persons with ties to the LAPs, Chevron is entitled to test this assertion through discovery. In addition, MCS's financial records are relevant to show what activities it conducted and on whose behalf. Accordingly, even if MCS did not *financially* support the LAPs—a tenuous proposition—this request is nonetheless reasonably calculated to lead to information regarding projects undertaken to help the LAPs promote enforcement of the judgment.

- **Requests for Production Nos. 16–17:** MCS attempts to characterize inquires about MCS's FARA registration as irrelevant. But MCS's initial failure to register under FARA may reflect efforts to conceal the role of the ROE in assisting the LAPs' efforts to enforce the judgment. *See* Dkt. 3 at 2, 14-15.

- **Requests for Production Nos. 19–21:** These requests seek information regarding the establishment of certain websites and media campaigns (No. 19), the visit of Richmond, California Mayor Gayle McLaughlin to Ecuador in 2013 (No. 20), and the visits to Ecuador of Antonia Juhasz, Roberto Pizarro, Mia Farrow, Calle 13, Danny Glover, and Alexandra Cousteau in 2013 and 2014 (No. 21). Chevron has thoroughly explained the relevance of the topics addressed by these requests (Dkt. 3 at 11–14), and MCS's attempt to characterize them as "documents concerning financial matters irrelevant to any of Chevron's proffered reasons for seeking discovery from MCSquared" is highly misleading.

- **Requests for Production Nos. 27-28:** MCS describes requests seeking information about investigations by the ROE's Attorney General and General Comptroller into MCS's activities as irrelevant. But, as Chevron has already stated, comments by an Ecuadorian legislator that the MCS contract "smells like filth and corruption," as well as statements by Correa that an investigation "could even betray one's country, brothers and sisters," suggest that this request is likely to lead to relevant information about the activities of the ROE in support of the LAPs and the fraudulent judgment. Dkt. 3 at 15–16.

- **Deposition Topic No. 1:** MCS argues based on Garay's affidavit that its contract is not relevant to the key topics Chevron has identified. But Chevron has provided ample evidence supporting its belief that the contract *does* relate to these topics (Dkt. 3 at 10–14). In light of the disputed factual questions at issue, Chevron should be allowed an opportunity to develop lines of inquiry and ask follow-up questions at a deposition.

- **Deposition Topic No. 2:** MCS challenges a deposition topic relating to MCS's work on behalf of the ROE, asserting that "none of the work performed by MCSquared bears any relationship to the Lago Agrio litigation saga." Dkt. 23 at 5. But Chevron has presented substantial evidence that MCS's work for Ecuador *does* relate to the Lago Agrio litigation; and even Garay's own affidavit states that MCS's work on behalf of Ecuador related to a "strategy to bring awareness to the environmental damage caused by [Texaco] . . . in the Northeast Amazon region of Ecuador and the lack of remediation of such damage by Chevron." Dkt. 27 (Garay Aff.) ¶ 7.

- **Deposition Topic No. 4:** MCS again seeks to argue that financial information is irrelevant. But MCS's compensation is highly relevant to understanding the projects MCS has undertaken on behalf of the ROE and even possibly the LAPs.

- **Deposition Topic No. 6:** As with Deposition Topic No. 2, MCS argues that its work for the ROE is not related to the Lago Agrio litigation. As discussed above, Chevron has provided ample evidence to the contrary.

- **Deposition Topic Nos. 12, 16, and 17:** MCS attempts to characterize topics related to its FARA registration, the Ecuadorian Attorney General's investigation, and the Ecuadorian Comptroller's investigation as unrelated to the pending litigations. But, as explained above, MCS's delayed FARA registration points to concealment of the activities of the ROE, and information regarding the investigations of MCS in Ecuador is likely to lead to relevant information regarding corrupt activities in support of the LAPs and the fraudulent judgment.

3. Chevron's Application Does Not Circumvent Party Discovery in the Treaty Arbitration

Chevron does not rely on the Treaty Arbitration as a basis for discovery here. Rather, it bases this petition on the enforcement proceedings which the LAPs have filed and plan to file in multiple foreign jurisdictions, and the Gibraltar Proceedings.[8] *See, e.g.*, *Intel*, 542 U.S. at 258–59 (holding that "Section 1782(a) does not limit the provision of judicial assistance to 'pending' adjudicative proceedings" and "requires only that a dispositive ruling . . . be within reasonable

[8] MCS argues that "to the extent that Chevron seeks to obtain discovery . . . in aid of the BIT Arbitration, the Application cannot succeed because the BIT Arbitration is not a 'tribunal' . . . under § 1782." Dkt. 21 at 23. This argument is meritless as well as irrelevant because Chevron is not seeking discovery from MCS for use in the Treaty Arbitration. Dkt. 2 at 1. This Court has already rejected the argument that the Treaty Arbitration panel is not a "foreign tribunal" for purposes of Section 1782, and MCS provides no basis to revisit that law here. *See In re Applic. of Chevron Corp.*, 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010), *aff'd sub nom. Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011).

contemplation"); *In re Applic. of Winning (HK) Shipping Co. Ltd.*, No. 09–22659–MC, 2010 WL 1796579, at *1 (S.D. Fla. Apr. 30, 2010) (granting Section 1782 application for use in "proceedings that [Petitioner] *intended* to commence") (emphasis added). Neither the ROE nor MCS dispute that the enforcement proceedings or Gibraltar Proceedings are valid bases for discovery under Section 1782. *See* Dkt. 21 at 17–20; Dkt. 32.

MCS and the ROE nonetheless both assert that Chevron impermissibly seeks to evade limits on party discovery in the Treaty Arbitration by means of this petition and that Chevron was required to seek this discovery there.[9] But MCS's argument that Chevron "should" seek this discovery from the ROE through the Treaty Arbitration is misleading. Chevron seeks information from *MCS*, not the ROE, and its petition does not relate to the Treaty Arbitration. Further, even if Chevron's petition *did* relate to the Treaty Arbitration, MCS's argument relies on a reading of Section 1782 that the Second Circuit has consistently rejected. A party seeking discovery under Section 1782 is not required to first request the discovery in the foreign proceeding. *See*, *e.g.*, *In re Applic. of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992) (reversing

---

[9] The ROE also asserts that Chevron's petition somehow violates an order on interim measures issued by the BIT Tribunal regarding public statements "tending to compromise" the Treaty Arbitration. Dkt. 32 at 3–4. But this order was expressly directed to counsel—not the parties—and is not relevant here. Dkt. 33-8 (Ex. 8) ¶ 4 ("[f]or the time being, the Tribunal does not intend to record here any criticism of that member of **the Respondent's legal team**. For present purposes, it can be assumed that the journal misquoted or misunderstood him. In the event of any future complaint, however, it may be necessary for the Tribunal to return to this incident and to inquire why **any Party's outside counsel** should speak to journalists during these arbitration proceedings, on or off the record, in a manner calculated to aggravate the Parties' dispute or, indeed, at all. There should also be no doubt in anyone's mind, in the event of any willful breach of the Tribunal's order by **any Party's counsel**, that the Tribunal will not hesitate to impose sanctions for such breach, including the exclusion of **such counsel** from these arbitration proceedings.") (emphasis added); Ex. 225 at 630:13–21 ("It was never our purpose, it is not our purpose to stop, if you like, the leading individuals on both sides from speaking in public in any way they choose. That would include the Attorney General, it would include Mr. Page, Chevron's General Counsel. But what we are concerned about, and we were at the beginning, and we still are, is that we need to keep the atmosphere in this room, in this hearing, in the relationships between counsel and with counsel and the Tribunal at a level which doesn't impede our work.").

district court's conclusion that the petitioner should have first sought the requested discovery from the Hungarian court because "nothing in [Section 1782] would support a quasi-exhaustion requirement of the sort imposed by the district court"); *In re Applic. of Euromepa S.A.*, 51 F.3d 1095, 1098 (2d Cir. 1995) ("Relying on the plain language of the statute, this Court has also refused to engraft a 'quasi-exhaustion requirement' onto section 1782 that would force litigants to seek 'information through the foreign or international tribunal' before requesting discovery from the district court."). Accordingly, both Chevron and the ROE have sought discovery through Section 1782 from third parties for use in the Treaty Arbitration that they may also have been able to obtain through party discovery in the Treaty Arbitration.

Moreover, MCS's contention that the foreign tribunals would not be receptive to this discovery because MCS disputes its relevance is without merit. *See* Dkt. 21 at 24–25. To obtain discovery under Section 1782, Chevron need not show that the foreign tribunals would accept the discovery, only that they have not foreclosed it. *See* Dkt. 3 at 23–24. MCS's conclusory statements regarding relevance are addressed in Section A.2.

4. The Discovery Is Not Intrusive, Unduly Burdensome, or Overbroad

The discovery sought is not overbroad. As Chevron has already explained in detail, the discovery sought is highly relevant, and therefore presumptively discoverable. Dkt. 3 at 26–30. Moreover, Chevron's requests are reasonably tailored to the information sought and do not pose an undue burden to MCS.[10]

MCS makes vague assertions that Chevron's requests are "extremely burdensome" but makes no effort to provide an explanation, much less evidence, of the burden it alleges. Dkt. 23 at 6; Dkt. 21 at 25. Such bare assertions are insufficient: "A party resisting discovery has the

[10] The ROE does not have standing to assert undue burden. *See Samad Bros. v. Bokara Rug Co. Inc.*, No. 09 Civ. 5843(JFK)(KNF), 2010 WL 5094344, at *4 (S.D.N.Y. Nov. 30, 2010); *cf Langford v. Chrysler Motors Corp.*, 513 F.2d 1121, 1126 (2d Cir. 1975).

burden of showing specifically how, despite the broad and liberal construction afforded the federal discovery rules, each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive, . . . submitting affidavits or offering evidence revealing the nature of the burden." *In re Weatherford Int'l Sec. Litig.*, No. 11 Civ. 1646(LAK)(JCF), 2013 WL 2355451, at *4 (S.D.N.Y. May 28, 2013) (internal quotation marks omitted).

MCS does not even attempt to provide such evidence, instead asserting simply that responding to Chevron's requests would require MCS to spend "money and employee time" searching for and reviewing documents (Dkt. 23 at 6), a statement that could be made in response to *any* discovery request. Simply identifying "the same sort of burden that any non-party faces in responding to a subpoena" does not demonstrate a burden so substantial as to require the subpoenas to be quashed. *Universitas Educ., LLC v. Nova Grp., Inc.*, No. 11 Civ. 1590(LTS)(HBP), 2013 WL 3328746, at *7 (S.D.N.Y. July 2, 2013). MCS's failure to provide evidence of the claimed burden is alone reason enough to deny its motion. *Id.*; *Boss Mfg. Co. v. Hugo Boss AG*, No. CIV.8495(SHS)(MHD), 1999 WL 20829, at *1 (S.D.N.Y. Jan. 13, 1999).

MCS's status as a nonparty does not lead to a different conclusion. *See Bridgeport Music Inc. v. UMG Recordings, Inc.*, No. 05 Civ. 6430(VM)(JCF), 2007 WL 4410405, at *3 (S.D.N.Y. Dec. 17, 2007); *Wertheim Schroder & Co. Inc. v. Avon Prods., Inc.*, No. 91 Civ. 2287 (PKL), 1995 WL 6259, at *6 (S.D.N.Y. Jan. 9, 1995). Indeed, the need for discovery under Section 1782 is *more* apparent when evidence is sought from a nonparty to the foreign proceeding because the nonparty may be beyond the reach of the foreign tribunal. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004).

MCS's reliance on *In re Application of Time, Inc.* is misplaced. The *Time* subpoena sought information regarding a large number of individuals and companies related to General

Suharto of Indonesia (including seventeen listed individuals and approximately eighty companies, as well as other unnamed persons and entities) over a thirty-two year period. *In re Applic. of Time, Inc.*, No. 99-2916, 1999 WL 804090, at *7 (E.D. La. Oct. 6, 1999). In contrast, Chevron's subpoena covers only a two-year period—or less, if MCS's statement that it performed work for the ROE for only a year is accurate. Ex. 1 at 13. Moreover, the respondent in *Time* did not merely assert that the subpoena was burdensome, but rather provided evidence (in the form of an affidavit regarding the quantity of records likely to be responsive and the corresponding costs of production). *Time*, 1999 WL 804090, at *7.

B. The Discovery Sought Is Not Privileged or Protected

1. The ROE's Claims That MCS's Documents Are Protected Because They Are Purportedly the Property of the ROE Are Irrelevant

Referring to language in its contract with MCS, the ROE claims that the discovery sought by Chevron belongs to the ROE and that the documents are therefore protected from discovery from MCS. Dkt. 32 at 20. But not only has the ROE failed to show that any responsive document is actually owned by the ROE, its argument to that effect is misplaced.[11] Section 1782 discovery is taken "in accordance with the Federal Rules of Civil Procedure," 28 U.S.C. § 1782(a), and thus what matters is not who "owns" a particular document, but who has possession, custody or control of it. Whether the ROE owns the document is thus irrelevant to the question of whether discovery may be had from MCS; what matters is that the documents at issue are in the possession, custody, or control of MCS.

[11] MCS also argues that Chevron should have sought this discovery directly from the ROE in the Treaty Arbitration. Chevron, however, could not do so, as the Treaty Arbitration is not currently in a disclosure phase, and Chevron thus cannot request production of these documents in that proceeding.

2. The Foreign Sovereign Immunities Act Has No Application Here

The ROE's and MCS's assertion that the discovery Chevron seeks is prohibited under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, is foreclosed by both the text of the statute and clear Supreme Court and Second Circuit precedent. *See Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014), *aff'g EM Ltd. v. Republic of Argentina*, 695 F.3d 201 (2d Cir. 2012); *Export-Import Bank of the Republic of China v. Grenada*, 768 F.3d 75, 93 (2d Cir. 2014) ("[A]ny lingering concern that the FSIA alone might presumptively bar further discovery has been eliminated by the Supreme Court in *NML Capital*."). The FSIA "says not a word on the subject" of discovery from third-parties, and thus is irrelevant here. *See NML Capital*, 134 S. Ct. at 2256–57.

In *NML Capital*, the Supreme Court held that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text" or "it must fall." *NML Capital*, 134 S. Ct. at 2256. "The text of the Act confers on foreign states two kinds of immunity." *Id.* First, the FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States," 28 U.S.C. § 1604, subject to the exceptions in 28 U.S.C. §§ 1605–07. Second, the FSIA states that "the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution," 28 U.S.C. § 1609, subject to the exceptions in 28 U.S.C. §§ 1610–11. There are no other "immunity-granting sections" in the FSIA, such as a "provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets." *NML Capital*, 134 S. Ct. at 2256. As to discovery more generally, the FSIA lacks "the 'plain statement' necessary to preclude application of federal discovery rules," and the Supreme Court has therefore expressly held that courts may not fill any perceived discovery-related "gap[s] in the statute." *Id.* at 2256, 2258; *see also id.* at 2257 n.3

("[S]ince the Act does not contain implicit discovery-immunity protections, it does not 'apply' (in the relevant sense) at all.").

The ROE's and MCS's attempt to use the FSIA as a shield against Chevron's discovery requests has no basis in the statute's text, and thus it "must fall." *Id.* at 2256. Neither the ROE nor MCS expressly relies on § 1604's jurisdictional immunity (*see* Dkt. 21 at 26; Dkt. 32 at 21–24), and for good reason, as Chevron's petition is not an attempt to assert *jurisdiction* over the ROE. Chevron has neither brought suit against the ROE nor attempted to assert any claim against it. Rather, it seeks discovery from a non-immune third-party, not the ROE itself. *See, e.g.*, *EM Ltd.*, 695 F.3d at 210 (holding that third-party banks utilized by Argentina had no immunity from discovery under the FSIA); *Mare Shipping Inc. v. Squire Sanders (US) LLP*, 574 F. App'x 6, 9 (2d Cir. 2014) (holding that Section 1782 petition against law firm representing Spain was not a "request[] upon a foreign sovereign" and did not implicate immunity under the FSIA).

The ROE suggests that a subpoena to MCS "is tantamount to a subpoena to the Republic itself." Dkt. 32 at 22. But that argument ignores that the FSIA limits derivative immunity to an "agency or instrumentality of a foreign state" which is defined as "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2). As the Second Circuit recently held in *Mare Shipping*, this "explicit definition, by its plain text, excludes a foreign sovereign's U.S. counsel." *Mare Shipping*, 574 F. App'x at 9; *see also In re Mare Shipping Inc.*, No. 13 Misc. 238, 2013 WL 5761104, at *2 (S.D.N.Y. Oct. 23, 2013) ("The subpoena was directed to Respondents, a New York based law firm and one of its lawyers, who do not qualify as 'an agency or instrumentality' of the Kingdom of Spain."). The same is necessarily true of a foreign sovereign's U.S. public relations firm. MCS is not an "organ" or a "political subdivision"

of the ROE, and is not majority-owned by the ROE. It thus enjoys no sovereign immunity under the plain text of the FSIA.

The ROE's invocation of Section 1609's attachment immunity also fails for the simple reason that Chevron is not seeking an "attachment," "arrest," or "execution" of any ROE property. Even assuming that all relevant MCS documents are the "property" of the ROE (Dkt. 32 at 20–21)—a dubious claim at best—that fact is nonetheless irrelevant because Chevron's discovery requests are not acts of attachment, arrest, or execution of that property. "Each of these three terms refers to a court's seizure and control over specific property." *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 262 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 201 (2013); *see also, e.g.*, *Black's Law Dictionary* 152 (9th ed. 2009) (defining "attachment" as the "seizing of a person's property to secure a judgment or to be sold in satisfaction of the judgment"). Here, Chevron is not asking the Court to seize or exert control over the ROE's alleged property—it merely seeks the *information* contained in that property, which can be obtained via inspection or the provision of copies of the relevant documents. In other words, any discovery request or order relating to documents in MCS's possession "can be complied with without the court's ever exercising dominion" over anyone's property. *NML Capital*, 699 F.3d at 262.

The ROE cites no case holding that a mere request for discovery of information contained in a sovereign's alleged property is akin to an attachment or execution of that property. Its primary authority, *Thai Lao Lignite (Thailand) Co. v. Government of Lao People's Democratic Republic*, No. 10 Civ. 5256(KMW), 2011 WL 4111504 (S.D.N.Y. 2011), involved an actual attempt to attach funds in a sovereign's bank account. *See id.* at *3–4. The court's references to potential immunity from discovery were based not on a finding that the discovery sought was akin to an attachment, but rather that a sovereign's immunity from an attachment action under

Section 1609 includes protection from "'the costs in time and expense, and other disruptions attendant to litigation.'" *Id.* at *3 (quoting *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007)). Chevron, however, has not initiated any action against the ROE (for attachment or otherwise), and thus the concerns over the burdens of litigating such an action that are expressed in *Thai Lao* do not apply.[12]

At bottom, the ROE and MCS are attempting to revive the same flawed argument that the Supreme Court in *NML Capital* rejected. The FSIA does not shield third-parties from discovery—even discovery related directly to the interests of a sovereign. *See NML Capital*, 134 S. Ct. at 2256–57; *Grenada*, 768 F.3d at 93; *Aurelius Capital Master Ltd. v. Republic of Argentina*, No. 13–4054(L), — F. App'x —, 2014 WL 7272279, at *1 (2d Cir. Dec. 23, 2014) ("Argentina contends that the FSIA prohibits discovery of sovereign property that is potentially immune from attachment. . . . That argument, however, has already been rejected by the Supreme Court."). The Court should reject this impermissible attempt to expand the FSIA beyond its text.

3. The ROE's Blanket Deliberative Process Privilege Objection Is Procedurally Improper and Without Merit

The ROE's categorical assertion that "Chevron's subpoena cannot stand for the additional reason that it seeks documents protected from disclosure by the deliberative process privilege" (which the ROE also refers to as the "executive privilege") ignores both the limited nature of this privilege and the procedural requirements for invoking it. Dkt. 32 at 24.

Although some district courts have extended the deliberative process privilege to foreign governments, *see, e.g.*, *LNC Invs. v. Republic of Nicaragua*, No. 96 Civ. 6360 JFK RLE, 1997 WL 729106, at *3 (S.D.N.Y. 1997) (citing two early 20th-century district court cases to support

[12] Moreover, *Thai Lao* was decided prior to the Supreme Court's decision in *NML Capital*. To the extent *Thai Lao* or any other case has interpreted the FSIA as creating a generalized immunity from discovery under the FSIA, such an interpretation could not be reconciled with *NML Capital* and should not be followed.

assertion that "[c]ourts have long held that foreign governments are entitled to protect their executive deliberations"), the ROE has not cited (and Chevron has not identified) any Supreme Court or Second Circuit decision applying this privilege to foreign governments. Indeed, the bulk of the ROE's cases focus on interpreting the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, a statute that has no relevance here. Even assuming some sort of privilege can potentially apply to the deliberations of foreign governments, no reason exists to believe that those deliberations would enjoy the same level of protection as the deliberations of the United States government, as the ROE suggests. International comity does not demand such equal treatment, irrespective of the interests of the United States and its citizens. *See, e.g.*, *Royal & Sun Alliance Ins. Co. of Can. v. Century Int'l Arms Co.*, 466 F.3d 88, 92 (2d Cir. 2006) (doctrine of international comity "is not an imperative obligation of courts but rather is a discretionary rule of practice, convenience, and expediency" (quotation marks and citation omitted)).

And even assuming the deliberative process privilege applies equally to foreign governments, the ROE's expansive, absolute characterization of the privilege is incorrect. *See* Dkt. 32 at 24 (erroneously asserting that all "Internal Government Documents Are Off Limits"). "The deliberative process privilege is qualified; it may be overcome by a showing of need, which is determined *on a case by case basis*." *In re Grand Jury Subpoena Dated August 9, 2000*, 218 F. Supp. 2d 544, 553 (S.D.N.Y. 2002) (emphasis added). Indeed, a "discretionary . . . balancing of interests must occur to determine whether to apply it in the first instance, not just whether it has been overcome." *Id.* And "'where the documents sought may shed light on alleged government malfeasance'"—as is true here—"'the privilege is routinely denied.'" *Id.* (quoting *Texaco P.R. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995)).

Moreover, as the ROE concedes (Dkt. 32 at 25–26), the privilege is limited to those subset of "'inter-agency' or 'intra-agency' documents" that are both "predecisional" and "deliberative." *Grand Cent. P'Ship, Inc. v. Cuomo*, 166 F.3d 473, 482–83 (2d Cir. 1999).[13] Although whether these requirements apply to a particular document inherently calls for a fact-specific analysis focused on each particular document, there is reason to doubt the ROE's assertions that its communications with MCS—a public relations firm—were "prepared in order to assist an agency decision maker in arriving at his decision" and were "actually related to the process by which policies are formulated," rather than communications "merely peripheral to actual policy formation" or containing unprotected "purely factual material." *Id.* at 482 (quotation marks and citations omitted).

In any event, as this Court has previously recognized, "a categorical approach to the deliberative process privilege seems inappropriate," as determining whether it applies requires "examining the documents in question." *Five Borough Bicycle Club v. City of New York*, No. 07 CIV. 2448 (LAK), 2008 WL 4302696, at *2 (S.D.N.Y. Sept. 16, 2008) (Kaplan, J.). For this reason, courts have adopted detailed procedural requirements governing invocations of the deliberative process privilege that focus on each particular document over which privilege is claimed. *See, e.g.*, *New York ex rel. Boardman v. Nat'l R.R. Passenger Corp.*, 233 F.R.D. 259, 269 (N.D.N.Y. 2006); *Reino De Espana v. Am. Bureau of Shipping*, No. 03 CIV 3573 LTS RLE, 2005 WL 1813017, at *12 (S.D.N.Y. Aug. 1, 2005); *LNC Invs.*, 1997 WL 729106, at *2. Specif-

---

[13] Although the Second Circuit has held that communications with certain consultants "charged with assisting [an] agency in developing its policy" can potentially fall within the scope of the deliberative process privilege, it is hard to imagine that MCS performed work akin to such a consultant. *Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 74 (2d Cir. 2002) (deeming an independent task force created by the IRS to make policy recommendations to be an agency consultant). A review of the relevant documents, however, is necessary before any definitive conclusion can be reached.

ically, "the claim of privilege must be asserted by the head of the governmental agency which has control over the information to be protected, after personal review of the documents in question" and "the information or documents sought to be shielded must be identified and described; the agency must provide precise and certain reasons for asserting confidentiality over the requested information." *Boardman*, 233 F.R.D. at 269 n.12; *see also In re Grand Jury Subpoena Dated August 9, 2000*, 218 F. Supp. 2d at 553 (noting that the "party asserting the privilege bears the burden of proof" and that the "privilege ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle") (quotation marks and citation omitted). The ROE's failure to comply with these procedural requirements is reason alone to reject its categorical assertion of the deliberative process privilege.

C. The ROE's Request for Reciprocal Discovery Is Beyond the Scope of This Action and an Improper Attempt to Circumvent the Treaty Arbitration Rules

The ROE also requests reciprocal discovery so that it may "maintain a level playing field in the arbitral proceeding." Dkt. 32 at 30. But, as noted above, Chevron's petition is not based on the Treaty Arbitration and there is currently no discovery in that action. Even if there were, the ROE's request would still be ill-taken. The ROE is not a party to any of the proceedings to which this petition relates, and identifies no authority permitting a non-party to a foreign litigation to obtain reciprocal discovery. Even where parties have been granted reciprocal discovery, it has been where there has been a showing that the sought-after discovery is appropriate. The ROE has made no such showing here.

The previous cases identified by the ROE all involve a Section 1782 respondent seeking reciprocal discovery for use in the foreign litigation that underlies the Section 1782 application. For example, in *In re Esses*, 101 F.3d 873 (2d Cir. 1996), the Second Circuit found that the district court was within its discretion in granting reciprocal discovery where the Section 1782 peti-

tioner and respondent were parties to the underlying foreign proceedings. Similarly, in *In re Consorcio Minero, S.A. v. Renco Group, Inc.*, No. 11 Mc. 354, 2012 WL 1059916, at *3 (S.D.N.Y. Mar. 29, 2012), the respondent sought reciprocal discovery for use in the same foreign actions as the petitioner and where respondent was also a party. Here, the ROE, which is not a party to either this Section 1782 proceeding or to any of the proceedings on which this action is based, now claims that it should nonetheless be permitted to insert itself into this proceeding and obtain discovery from Chevron to use in the Treaty Arbitration—a proceeding entirely separate from this application and, not incidentally, in which discovery is currently closed.

Such a request would reach beyond the scope of this action to encompass a proceeding that Chevron has not invoked at all. Moreover, providing "reciprocal discovery" to the ROE would in fact lead to the very result that the ROE complains of here (without merit): a circumvention of proof-gathering procedures. In the Treaty Arbitration, the ROE has already sought and obtained extensive discovery from Chevron, and the Tribunal rejected its efforts to obtain documents relating to Chevron's public relations operations. *See* Dkt. 29-16 (Ex. 16) (rejecting ROE's efforts to obtain discovery from Chevron's public relations firms). Disclosure in that action is now closed, and to allow the ROE to obtain discovery directly from Chevron through this Section 1782 proceeding is not only contrary to the statute itself but would be in fact a direct circumvention of the Treaty Tribunal's rules and orders.

Further, the ROE's description of the discovery it wants as "reciprocal" is inaccurate. Where courts have ordered "reciprocal" discovery, they have ordered the production of material "closely related to the [underlying foreign actions]." *Consorcio Minero, S.A.*, 2012 WL 1059916, at *3. Here, not only does the ROE seek documents for a wholly separate proceeding, it does not suggest how its vague request to obtain some ambiguous set of "Chevron's public re-

lations materials" is even relevant to the Treaty Arbitration or how it would support the ROE's claims or defenses in that action. *See Minatec Fin. S.À.R.L. v. SI Group, Inc.*, No. 08 Civ. 269, 2008 WL 3884374, at *9 (N.D.N.Y. Aug. 18, 2008) (granting reciprocal discovery to respondent, party in underlying foreign action, thereby allowing both parties "a reciprocal exchange of information" for use in the foreign action). But there is no aspect of "reciprocity" here—it is the ROE and the LAPs that are seeking to obtain billions of dollars from Chevron through, in part, a public relations barrage which has been found to incorporate knowing falsehoods. *See* RICO Decision at 582–87. And finally, the ROE's allies, the LAPs, obtained vast amounts of discovery into Chevron's public relations materials during the RICO case, at least some of which was disclosed to the ROE, and almost none of which was used in the *Donziger* action, belying the ROE's claim that such material would have relevance in the Treaty Arbitration.

D. A Protective Order Is Not Warranted

To the extent discovery is permitted here, the ROE seeks a "protective order requiring that the materials be filed only under seal and limited for use only in the designated proceedings identified in Chevron's Section 1782 Application." Dkt. 32 at 32–33. While Chevron does not oppose entry of an appropriate protective order to protect any legitimate confidentiality interest that the ROE or MCS may have (and is willing to meet and confer with MCS, and the ROE to the extent it is granted intervener status, regarding the form of such an order), no grounds exist to limit Chevron's use of any discovery it obtains in this proceeding. The LAPs have stated their intent to file additional enforcement actions and Chevron should not be foreclosed from using this evidence in the Treaty Arbitration should the evidence be relevant to issues to be decided there and an opportunity to submit the documents arises.

E. Rule 60 Does Not Provide a Basis to Vacate the Court's Order Granting Discovery

MCS claims that the Court's order granting leave to serve the subpoena should be vacated pursuant to Rule 60(b) of the Federal Rules of Civil Procedure because it was "based on an Application that contained substantial factual misstatements." Dkt. 21 at 27. Rule 60(b) is simply a procedural mechanism that permits a party to seek relief from an order in the event of "mistake, inadvertence, surprise, or excusable neglect," among other grounds. MCS does not identify any of the "misstatements" it alleges formed the basis for the Court's order, and Rule 60 does not provide grounds to vacate an order based on disputed factual issues—and Chevron does dispute the factual statements in Garay's Affidavit, at least as to whether they provide a complete account of MCS's involvement, as well as the inferences counsel seeks to take from those factual statements. Moreover, this Court has effectively granted the relief MCS seeks through Rule 60(b) by permitting motions to quash or modify. Dkt. 21 at 31. There is no "surprise" within the meaning of Rule 60(b) and no "extreme and unexpected hardship" to MCS due to service of the subpoena, as it claims. Dkt. 21 at 30. MCS's request for relief pursuant to Rule 60(b) should be denied.

CONCLUSION

For the foregoing reasons, Chevron requests that the Court deny the motions to quash and vacate filed by MCS and the ROE and allow document and deposition discovery from MCS to proceed.

Dated: New York, New York
January 14, 2015

Respectfully submitted,

By: */s/ Randy M. Mastro*
GIBSON, DUNN & CRUTCHER LLP

Randy M. Mastro
Andrea E. Neuman
Anne Champion
200 Park Avenue
New York, NY 10166-0193
Telephone: 212.351.4000
Facsimile: 212.351.4035

Attorneys for Petitioner Chevron Corporation