

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re Application of

CHEVRON CORPORATION,

Petitioner.

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In re Application of

M-19-111

RODRIGO PEREZ PALLARES, et ano.

Petitioners.

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MEMORANDUM OPINION

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LEWIS A. KAPLAN, *District Judge*.

On May 6, 2010, the Court granted petitioners' applications for the issuance of subpoenas requiring respondent Berlinger to produce the video he shot in the course of filming for the production of his documentary, *Crude*, that was not included in the publicly released production (the "Outtakes") and respondents to appear for a deposition solely to authenticate the Outtakes. Mr. Berlinger and the respondents affiliated with him (collectively, "Berlinger") then were served with subpoenas returnable on May 21, 2010. Berlinger and the other respondents (the "Lago Agrio Plaintiffs") now move for a stay pending appeal from the order granting the applications to issue subpoenas. The Court assumes familiarity with its previous opinion.¹

I

In considering whether to issue a stay pending appeal, courts consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."² "The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other [stay] factors."³

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In re Application of Chevron Corp., No. M-19-111, ___ F. Supp.2d ___, 2010 WL 1801526 (S.D.N.Y. May 6, 2010, corrected May 10, 2010) ("*Chevron P*").

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In re World Trade Ctr. Disaster Site Litig., 503 F.3d 167, 169 (2d Cir. 2007) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

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Mohammed v. Reno, 309 F.3d 95,101 (2d Cir. 2002) (quoting *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir. 1977)) (internal quotation marks omitted)).

II

A. *Likelihood of Success*1. *Appellate Jurisdiction*

In evaluating a litigant's likelihood of success on appeal, a court is obliged to consider the likelihood that the Court of Appeals has jurisdiction over the order appealed from as well as the prospects for reversal assuming the existence of appellate jurisdiction.⁴

Berlinger neither has refused to comply with the subpoenas nor been held in contempt for refusing. This raises a substantial question as to whether and to what extent the order appealed from is appealable. Moreover, the movants are not in all respects situated identically in this regard.

The Second Circuit has summarized the general rule as follows:

“Section 1291 permits review only of ‘final’ district court orders. *See* 28 U.S.C. § 1291. The general rule is that orders enforcing subpoenas issued in connection with civil and criminal actions, or grand jury proceedings, are not final, and therefore not appealable. *United States v. Ryan*, 402 U.S. 530, 532-33, 91 S.Ct. 1580, 1581-82, 29 L.Ed.2d 85 (1971); *Cobbledick v. United States*, 309 U.S. 323, 328, 60 S.Ct. 540, 542-43, 84 L.Ed. 783 (1940); *Reich v. National Eng'g & Contracting Co.*, 13 F.3d 93, 95 (4th Cir.1993); *Kemp v. Gay*, 947 F.2d 1493, 1495 (D.C. Cir.1991). To obtain appellate review, the subpoenaed party must defy the district court's enforcement order, be held in contempt, and then appeal the contempt order, which is regarded as final under § 1291. *Ryan*, 402 U.S. at 532, 91 S.Ct. at 1581; *Cobbledick*, 309 U.S. at 328, 60 S.Ct. at 543; *National Eng'g*, 13 F.3d at 95; *Kemp*, 947 F.2d at 1495.”⁵

This is true whether the person to whom the subpoena is addressed is a party or a non-party.⁶ It therefore follows that an order issuing subpoenas is not appealable. Yet there is some question

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E.g., *United States v. Stein*, 452 F. Supp. 2d 281, 285-86 (S.D.N.Y. 2006); *see In re Parmalat Sec. Litig.*, No. 04 MD 1653 (LAK), 2007 WL 2197057, at *1 (S.D.N.Y. July 24, 2007).

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United States v. Constr. Prods. Res., Inc., 73 F.3d 464, 468-49 (2d Cir. 1996).

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Dynergy Midstream Servs. v. Trammochem, 451 F.3d 89, 92 (2d Cir. 2006).

whether the general rule applies in this case.

The purpose of the general rule “is to discourage parties from pursuing appeals from orders enforcing . . . subpoenas, which would temporarily halt the district court’s litigation process or the grand jury process.”⁷ Accordingly, the Circuit has held that an order enforcing an administrative agency subpoena is “final” for purposes of appellate review on the theory that the enforcement of an agency subpoena concludes proceedings in the district court.⁸ The witness in such a case need not first be held in contempt.

These subpoenas fall somewhere between process issued in an ordinary civil or criminal case and an administrative agency subpoena. As the Section 1782 application is a stand-alone proceeding ancillary to litigation in Ecuador and the arbitral tribunal, “the district court’s litigation process” is limited to the issuance and enforcement of the subpoenas. It therefore can be argued that the litigation in this Court is over and that an appeal would not delay any proceedings here.

Our Circuit indeed held in *In re Matter of Letters Rogatory*⁹ that an order denying a motion to quash the issuance of a Section 1782 subpoena was final and therefore appealable on the basis that “the proceeding before the district court to compel testimony [pursuant to Section 1782] stands separate from the main controversy.”¹⁰ In so doing, however, the court noted that the

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Nat’l Eng’g, 13 F.3d at 95.

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Constr. Prods. Res., Inc., 73 F.3d at 469.

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385 F.2d 1017 (2d Cir. 1967).

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Id. at 1018 (drawing analogy to the “appealability of an order in aid of foreign letters rogatory”); *see also In re Application of Silvia Gianoli Aldunate*, 3 F.3d 54, 56-57 (2d Cir. 1993) (holding that “denial of motion to vacate discovery order and to quash subpoena

witness from whom testimony was sought would be “unlikely” to “obtain review by allowing himself to be cited for contempt” because he was a third-party to the foreign proceeding and therefore had “no stake in the basic controversy.” This case, however, is different in that Berlinger, the subject of the subpoenas, is the holder of an alleged privilege and thus has an important incentive to allow himself to be cited for contempt in order to seek appellate review. This distinguishes *Letters Rogatory*, as indicated by our Circuit’s recent decision in *In re Air Crash at Belle Harbor, NY*.¹¹

In that case, the defendants served a subpoena on a non-party lawyer who represented a journalist and served also as a consultant to the plaintiffs’ attorneys. The lawyer objected to the subpoena on the grounds, among others, that it called for the production of materials protected by the attorney-client privilege and exempt from disclosure under reporters’ shield laws. The district court overruled the privilege claims and ordered the lawyer to produce the requested documents and to appear for a deposition. The lawyer appealed. But the Second Circuit dismissed the appeal on the ground that the order appealed from was not final. In so doing, it “decline[d] to dispense with the ordinary contempt requirement . . . in cases where a non-party lawyer asserts either his own or his client’s privileges” and made clear that the lawyer would have to “submit to contempt before the District Court’s order to appear for a deposition and produce documents [would] be appealable.”¹² It did so notwithstanding the lawyer’s assertion, on behalf of his journalist client, that the

issued pursuant to 28 U.S.C. § 1782 constitutes final, appealable decision”) (citing *In re Matter of Letters Rogatory*, 385 F.2d at 1018).

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490 F.3d 99 (2d Cir. 2007).

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Id. at 108.

information sought was protected under reporters' shield laws.

As in *Belle Harbor*, the privilege here is claimed by the non-party, Berlinger, who has both the ability and the incentive to place himself in contempt in order to appeal the decision in an effort to pursue his claim of privilege. While the issue of appealability in *Belle Harbor* arose in the context of a multidistrict litigation consolidated for pretrial proceedings in this district rather than an arguably stand-alone ancillary proceeding, *Belle Harbor* alone suggests that the order may not be final as to Berlinger. Moreover, two additional points, not mentioned in *Letters Rogatory*, suggest that *Letters Rogatory* and its progeny would not control here.

First, Section 1782(a) provides that "the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure." This suggests that the statute itself contemplates the issuance of a subpoena¹³ or an order to produce and then, in the event of noncompliance, an application for sanctions,¹⁴ which may include contempt.¹⁵ The significance of that fact is plain from *Stolt-Nielsen SA v. Celanese AG*,¹⁶ where the Circuit suggested, albeit without deciding, that an order enforcing an arbitration subpoena against a non-party might not be final in light of reference in the Federal Arbitration Act to enforcement of

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The statute actually does not mention subpoenas, speaking instead of orders to make disclosure. Neither Berlinger nor the Lago Agrio Plaintiffs resisted petitioners' application on that ground. Nor are any substantial rights affected by the fact that petitioners sought and obtained subpoenas. In substance, the opposition by Berlinger and the Lago Agrio Plaintiffs to the issuance of the subpoenas was indistinguishable from resistance to the issuance of an order to produce the same information. The subpoenas are equivalent to orders to produce.

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See Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 575 (2d Cir. 2005).

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FED. R. CIV. P. 37(b)(2)(A)(vii).

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430 F.3d 567 (2d Cir. 2005).

such subpoenas by contempt and the strong congressional policy against piecemeal appeals.¹⁷

Moreover, the broader context of a Section 1782 application is relevant also. The statute creates an ancillary remedy to further the just resolution of litigations and arbitrations in other *fora*. Just as the general rule requiring a contempt finding as a prerequisite to an appeal in an ordinary civil litigation in a district court promotes the progress of such a lawsuit by avoiding premature and possibly unnecessary appeals, so too would application of that rule where the order in question is issued in aid of a foreign litigation or arbitration.¹⁸ “Requiring the subject of a subpoena to submit to contempt before appealing [would] promote[] the ‘strong congressional policy’– embodied in 28 U.S.C. § 1291– ‘against piecemeal reviews, and against obstructing or impeding an ongoing . . . proceeding by interlocutory appeals.’”¹⁹ Thus, there is significant doubt as to the finality of the order appealed from insofar as it applies to Berlinger.

The situation of the Lago Agrio Plaintiffs is somewhat different. They correctly argue that, at least as far as the record discloses, they have no control over whether Berlinger will risk contempt in order to obtain a final order. Thus, without precisely saying so, they invoke “the so-called *Perlman* exception to the rule requiring the subject of a subpoena to submit to contempt before a district court’s order compelling compliance with the subpoena is appealable.”²⁰ As the Second Circuit held in *Belle Harbor*, however, “the *Perlman* exception is relevant only to appeals

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Id. at 575.

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See id.

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Belle Harbor, 490 F.3d at 105.

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Id.

brought by the holder of a privilege where the disputed subpoena is directed at *someone else*.”²¹ As the claim here is that Berlinger is the holder of the privilege, the foregoing analysis suggests that there is substantial doubt also that the order, insofar as it overruled the privilege claim, is final even as it relates to the Lago Agrio Plaintiffs.

This conclusion is not dispositive of the question whether the order is final as to the Lago Agrio Plaintiffs insofar as the order concluded that the Section 1782 prerequisites were satisfied and exercised its discretion to issue the subpoenas. But it is uncertain also whether the appellate court would apply *Letters Rogatory* to conclude that the order is final as to the Lago Agrio Plaintiffs in that respect. In view of the Circuit’s statements in *Stolt-Nielsen*, the reference in Section 1782 to the production of evidence “in accordance with the Federal Rules of Civil Procedure,” which include the remedy of contempt for non-compliance, could lead to a different outcome here. Thus, it is well within the realm of possibility that the order is not final in any respect even as to the Lago Agrio Plaintiffs.

Of course, the question whether the Court of Appeals has jurisdiction of respondents’ appeals²² is a matter for determination by that court, not this one. But this Court is obliged to consider how the Court of Appeals is likely to resolve the issue in determining whether respondents are likely to prevail in that Court. In all the circumstances, it is debatable whether respondents

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Id. at 106 (emphasis in original).

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If the Court of Appeals lacks jurisdiction over Berlinger’s appeal, it necessarily lacks jurisdiction over the appeal of the Lago Agrio Plaintiffs for the same reasons. In addition, it perhaps is arguable whether the Lago Agrio Plaintiffs are “aggrieved” by the order in question, as they must be in order to have standing to appeal from it. *See, e.g., Concerned Citizens of Cohocton Valley, Inc. v. New York State Dep’t of Env’tl. Conservation*, 127 F.3d 201, 204 (2d Cir.1997) (“standing to appeal is conferred only on parties ‘aggrieved’ by the judgment”). But there is no need to resolve that issue, as the motions are decided on other grounds.

would prevail on their contention that the order appealed from is final in any respect as to Berlinger or, insofar as the order overruled Berlinger's privilege claim, as to the Lago Agrio Plaintiffs. The Lago Agrio Plaintiffs' prospects for establishing appellate jurisdiction over the other aspects of the order are more favorable. These conclusions bear upon the Court's assessment of respondents' overall likelihood of success on appeal.

2. *The Merits*

Berlinger argues that this Court erred in determining that all of the Outtakes are relevant and that the material is not obtainable from other available sources. He contends that it erred also in "completely disregarding Second Circuit precedent" in overruling his claim of journalist privilege. The Lago Agrio Plaintiffs join in the journalist privilege argument and contend that the Court abused its discretion in granting relief under Section 1782 and that the arbitral panel is not a "foreign or international tribunal" within the meaning of the statute. These contentions are unpersuasive. In light of the Court's earlier opinion, it is unnecessary to treat them at length. But a few words are in order on certain points.

As initial matter, it is well to bear in mind that a district court's decision to grant discovery under Section 1782 is reviewed for abuse of discretion.²³ This means that appellate review of the Court's construction of the statute is reviewed *de novo*, but review of a decision to grant discovery, assuming no error of law, is much more deferential.²⁴

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In re Euromepa, S.A., 154 F.3d 24, 27 (2d Cir. 1998).

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E.g., id.

(a) *Relevance*

Berlinger argues that this Court erred in “ruling that the Chevron Parties established the relevance of *all* of the undisclosed outtakes, based solely on its finding that the distributed film includes three scenes depicting relevant material.”²⁵ But that is not an accurate account of the decision. Nor does it give due regard to the consequences of the position taken here by Berlinger.

As an initial matter, Berlinger overstates both the showing required by *Gonzales v. National Broadcasting Co.*²⁶ and this Court’s holding. *Gonzales* does not require a showing that all subpoenaed material is relevant. Rather, it held that a claim of journalist privilege with respect to nonconfidential material is overcome, insofar as is pertinent to this point, upon a showing that “the materials at issue are of *likely relevance* to a significant issue in the case.”²⁷ It was that standard that this Court held was satisfied. Berlinger’s repeated assertions, on this motion, that the Court determined that every inch of the Outtakes is relevant are inaccurate.

Nor did this Court rest its finding of likely relevance – which Berlinger conceded at argument of this motion is reviewable only for clear error of fact or abuse of discretion – solely on the three segments to which Berlinger refers. It described the three segments, but it stated also:

“Any interaction between plaintiffs' counsel and a supposedly neutral expert in the Lago Agrio Litigation would be relevant to whether the expert is independent and his damages assessment reliable. Plaintiffs' counsel's interactions with the Ecuadorian judiciary and government officials likewise would be relevant to Chevron's Arbitration claims for denial of due process and violations of the

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Berlinger Br. 6 (emphasis in original). *See also* Lago Agrio Br. 3 (arguing that Court erred in concluding that petitioners “overcame the journalists’ privilege by proving the relevance of any non-confidential materials sought from Berlinger”).

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194 F.3d 29 (2d Cir. 1999).

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Id. at 36 (emphasis added).

Settlement and Release agreements and the BIT [Bilateral Investment Treaty]. The fact that *Crude* contains only excerpts of footage depicting such interactions amply supports an inference that the outtakes contain additional relevant material.

“Further, Donziger [one of the Lago Agrio Plaintiffs’ lawyers] in fact solicited Berlinger to create a documentary of the litigation from the perspective of his clients. Berlinger in turn was given ‘extraordinary access to players on all sides of the legal fight and beyond.’ Plaintiffs’ counsel indeed are on the screen throughout most of *Crude*, which contains less than one percent of the total footage Berlinger shot in connection with the litigation. Berlinger concededly removed at least one scene from the final version of *Crude* at their direction. In these circumstances, there is considerable reason to believe that the outtakes are relevant to significant issues in the Lago Agrio Litigation and the Arbitration, including whether plaintiffs’ counsel improperly influenced expert witnesses and the GOE.”²⁸

The finding of likely relevance accordingly rests on a far broader base than Berlinger acknowledges. The probability that it will be overturned, particularly the deferential scope of appellate review, therefore does not appear to be at all strong.

The chance of reversal on this point, in this Court’s view, is diminished by Berlinger’s stance with respect to the Outtakes. He complains that the petitioners did not identify relevant Outtakes with particularity. Not only does that argument disregard the fact that *Gonzales* requires only a showing of likely relevance, but it ignores the fact that Berlinger failed “to provide any information whatsoever as to the content of the outtakes.”²⁹ As the Court explained previously, “[p]etitioners cannot reasonably be expected to identify with particularity the outtakes that they seek where knowledge of their content lies exclusively with Berlinger.”³⁰ This principle is common in

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Chevron I, at *10-11 (footnotes omitted).

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Id. at *11.

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Id.

our law.³¹

(b) *Other Sources*

Berlinger next attacks a straw man by arguing that “[t]here is nothing in the film or the Footage that would not be cumulative or duplicative of the decades-worth of scientific reports and analyses performed by Chevron and the plaintiffs” depicting the environmental harm attributed to Chevron and its impact on the indigenous population.”³² But this Court never suggested the contrary, and Berlinger ignores the basis for the Court’s conclusion that there is no alternative source for information contained in the Outtakes.

Berlinger was invited by plaintiffs’ counsel to make this film in order to “document[] . . . the [Lago Agrio] litigation from the perspective of” the plaintiffs.³³ As his press package for the film stated, he was given “extraordinary access to players on all sides of the legal fight and

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For example, a plaintiff obliged to plead fraud with particularity under FED. R. CIV. P. 9(b) is subjected to a more lenient standard where the facts are exclusively within the control of the defendant. *See, e.g., Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 664 (2d Cir. 1997); *SEC v. Espuelas*, No. 06 Civ. 2435(RJH), 2010 WL 1189639 (S.D.N.Y. Mar. 29, 2010); *In re BISYS Sec. Litig.*, 397 F. Supp. 2d 430, 438 (S.D.N.Y. 2005).

The same principle applies where knowledge of the content of subpoenaed documents or other material lies exclusively with the person from whom discovery is sought. *See* 7 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 34.11[4] (“It is clear that the intent of the Rules as they have evolved is to give a party a great deal of leeway in framing a [document] request, and to prevent the party from whom documents are requested from using the particularity requirement as a vehicle to avoid discovery when the party knows full well what is being requested.”); *see also* 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2211 (“Particularity of designation . . . turn[s] on the degree of knowledge that a movant in a particular case has about the documents it requests.”).

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Berlinger Br. 9.

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Chevron I, at *11.

beyond.”³⁴ Plaintiffs’ counsel are on screen through much of the film in what obviously are excerpts of more footage of the events in which they are shown, including among other things meetings with the president of Ecuador on a government helicopter and with a Philadelphia class action lawyer who is said to be financing the litigation. The film depicts also portions of events pertinent to the neutrality of at least one expert and attempts by plaintiffs’ counsel to exert or benefit from perhaps improper political and other interference with the judicial process in Ecuador. In fact, Berlinger acknowledges that he removed at least one scene from the final version of *Crude* at the direction of plaintiffs’ counsel.³⁵ The Court therefore held that:

“The raw footage he compiled would be ‘unimpeachably objective’ evidence of any misconduct on the part of plaintiffs’ counsel, expert witnesses, or the GOE. Petitioners therefore have shown that the material they seek would not reasonably be obtainable from other sources.”³⁶

Contrary to Berlinger’s present argument, the Court did not even remotely suggest that there was no alternative source of information about the environmental conditions in Ecuador or their effect on the population.

(c) *Journalist Privilege*

The Lago Agrio Plaintiffs argue that the Court erred in finding that the material in

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Id.

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Id.

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Id. *12.

question is not confidential.³⁷ Berlinger contends that it did so “by completely disregarding Second Circuit precedent that recognizes the significant burden that will be imposed on Berlinger and his future work . . . if he is required to produce the Footage.”³⁸ They are not likely to prevail on these contentions.

Under *Gonzales*, the showing required to overcome the journalist privilege depends upon whether the material in question is confidential. The burden of establishing confidentiality rests with the proponent of the privilege,³⁹ here Berlinger. This Court held that the burden was not sustained here. In arguing the contrary, both respondents ignore the record before the Court.

First, Berlinger’s evidentiary showing with respect to assurances of confidentiality was weak, to say the least.⁴⁰ He stated:

“I entered into agreements with some of my sources, promising that I would not use certain footage in which they appeared without first obtaining their express authorization. Other times, there was a standing agreement with my subjects that they could request that the camera be turned off if they became uncomfortable. With respect to this footage, there also was an implicit understanding that the moments leading up to the request to turn off the camera would not to be [*sic*] included in the

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Lago Agrio Br. 3.

Berlinger purports to reserve the issue for appeal, but does not contend on this motion that he is likely to prevail on it. Berlinger Br. 6 n.4.

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Id. 10.

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Gonzales, 194 F.3d at 36; *see von Bulow v. von Bulow*, 811 F.2d 136, 145-46 (2d Cir. 1987).

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Nor did Berlinger submit any particularized claims that any specific portions of the Outtakes were confidential notwithstanding the well known requirement that he do so. *E.g.*, FED. R. CIV. P. 26(b)(5)(A); S.D.N.Y. CIV. R. 26.2. The failure to do so generally constitutes a waiver of any claim of privilege. *See generally, e.g., One Beacon Ins. Co. v. Forman Int’l, Inc.*, No. 04 Civ. 2271(RWS), 2006 WL 3771010, at *7-8 (S.D.N.Y. Dec. 15, 2006) (collecting cases).

film. I offered these or other confidentiality arrangements to representatives of the plaintiffs and Chevron.

* * *

“There was an implicit (and sometimes explicit) understanding that the materials I decided to leave out of the finished product would remain confidential and not be turned over to third parties for a purpose other than the making of the film.”⁴¹

But this was far from sufficient to sustain his burden.

As an initial matter, Berlinger submitted no evidence that any person whose authorization he promised to obtain before using footage in which that person appeared is depicted in the Outtakes, let alone that he did not obtain such authorization. Nor did he submit any evidence that any person who is depicted in the Outtakes ever became uncomfortable or asked him to turn off his camera. Even if he had, there was no evidence, other than Berlinger’s legal conclusion, that “there . . . was an implicit understanding that the moments leading up to the request to turn off the camera would not . . . be included in the film.”⁴² Likewise, there is no evidence that the Outtakes contain material depicting any person with whom Berlinger had an explicit agreement that materials left out of the finished product would remain confidential. And there most assuredly is nothing concrete to support the view that there was “an implicit . . . understanding” with anyone that materials left out of the film would be held in confidence.

The significance of Berlinger’s own statements is plain. *Everyone* whom Berlinger taped understood that Berlinger was making a film for public release *and that Berlinger was free to use any and all depictions of his subjects, in his uncontrolled discretion*, with “some” exceptions

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Berlinger Decl. ¶¶ 19, 21.

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Berlinger of course has no personal knowledge of what his subjects “implicitly” understood.

in the cases of persons with whom he agreed first to obtain authorization. Certainly the persons who received no right of prior approval had no expectation of confidentiality. And while persons who received such a right might have had such an expectation, but for the important qualification discussed below, there is no evidence that depictions of any such persons actually appear in the Outtakes or that their authorization was not obtained. Berlinger’s own statements demonstrate that this Court’s finding as to confidentiality was not clearly erroneous. Berlinger’s statements, moreover, do not stand alone on this point.

Berlinger submitted to persons whom he filmed a form of release that provides in pertinent part as follows:

“STANDARD RELEASE

“I hereby confirm that I willingly participated in a documentary film production about the Ecuadorian class action lawsuit against Chevron-Texaco (my ‘Contribution’). I understand and acknowledge that the filmmakers may use my Contribution in connection with the creation of a nonfiction production (the ‘Production’) *which may be released or licensed theatrically, non-theatrically, on television, on home video or similar viewing devices, on the Internet and/or in any media now known or hereafter invented.*

“For good and valuable consideration, receipt of which is hereby acknowledged, *I hereby irrevocably grant to @radical.media, inc. (the “Producer”) and its successors, licensees and assigns (the ‘Licensed Parties’)* . . . *the unrestricted right to use any interview(s) of me as well as my name, picture, likeness, image, biography and record voice in the Production, and in advertising and publicity in connection therewith.* This grant applies to all media now known or hereafter invented throughout the universe in perpetuity. I acknowledge that the Producer and/or Licensed Parties may edit or alter my Contribution to the Production as they wish, and that they are under no obligation whatsoever to use my Contribution.”⁴³

Given the entire record, there is little likelihood of reversal with respect to the finding that

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Veiga Decl. Ex. A (emphasis added). Berlinger indeed concedes that he retained “complete editorial control” over his documentary, Berlinger Decl. ¶ 33, a concession inconsistent with any claim that he was free to use certain of the materials only with the consent of others.

respondents failed to demonstrate that the Outtakes, or any part of them, are confidential.

Respondents cannot avoid this conclusion by suggesting, as Berlinger does, that *any* disclosure by a journalist of nonconfidential information would impose an undue burden and therefore run afoul of the journalist privilege.⁴⁴ *Gonzales* of course demonstrates that this is not the law. Disclosure of nonconfidential information may be required on a proper showing, which was made here. Moreover, Court does not, on this record, accept the suggestion that Berlinger's activities as a film maker would be unduly burdened by requiring disclosure.

Berlinger quite clearly was free to give all of his subjects an assurance that no footage in which they appeared would be used without their consent and to do his taping without getting the blanket releases that he did. Had he done so, he would have been in a much stronger position. But he wanted and got complete freedom to use whatever he shot. That freedom is not consistent with his claim that disclosure of what he did not use in the film would impose an undue burden on his or other journalists' activities.

It is important to recognize also that this case has little or nothing in common with the archetypal situations in which journalist privilege is claimed – an attempt by a reporter to protect the identity of a confidential source who has given the reporter otherwise unavailable information of public interest.⁴⁵ In those situations, it often is entirely reasonable to conclude that protection of the identity of the source is important to ensuring that other sources later will come forward with other information of public importance, secure in the knowledge that their identities will not be

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Berlinger Br. 10-12.

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This is not to say, of course, that the journalist privilege is limited to such cases. Rather, it is a recognition, consistent with *Gonzales*, that the interests at issue on claims of journalist privilege vary depending upon the circumstances.

revealed. Here, on the other hand, we deal not with the identities of sources who provided important information on an assurance of confidentiality. We are concerned instead with a claim of privilege with respect to depictions of persons who agreed to appear on camera and to the public use of their images and words in a film in the unlimited discretion of the film maker.

This Court certainly recognizes the utility of documentary films to public awareness of significant subjects and respects those who make such films. As a factual matter, however, it is not persuaded, given the evidence that Berlinger has adduced in this case, that disclosure of these Outtakes would impair the ability of Berlinger or other film makers to practice their craft and serve the public interest.

B. The Equitable Factors

The remaining factors pertinent to the stay request may be dealt with briefly.

Respondents are not threatened with irreparable injury absent a stay of the order appealed from. The order simply authorized issuance of subpoenas. As detailed above, Berlinger now has the option of complying or disobeying them. If he disobeys them, petitioners will have the option of moving to hold him in contempt. If he is held in contempt, he will have the option to appeal and to seek a stay of the contempt order. There can be no irreparable injury at least until that point. In any case, there is no evidence that anyone who appeared in *Crude* is a confidential source – so far as the record discloses, they all willingly appeared on camera. Their identities are readily discernable. Disclosure of the Outtakes by compliance with the subpoenas threatens them with no risk that they did not agree to bear when they agreed that Berlinger, in his sole discretion, could use

the footage in which they appeared.⁴⁶

Second, the petitioners are threatened with serious and, it appears, imminent adverse consequences if a stay were denied, as the context of these applications cannot be ignored. The Lago Agrio Plaintiffs are pushing the Ecuadorian court to close the evidentiary phase of that litigation and immediately enter a multibillion dollar judgment against Chevron, thus preventing Chevron from placing before that court the likely relevant evidence contained in the Outtakes. Those plaintiffs intend, if they succeed, to attempt to enforce such a judgment around the world. Moreover, on May 3, 2010, the Prosecutor General's office in Ecuador announced that it is asking the National Court of Justice to proceed with criminal fraud charges against petitioners Veiga and Pérez. The parties here thus are in a race – the Lago Agrio Plaintiffs seeking to obtain judgment against Chevron and criminal prosecution of Veiga and Pérez before the petitioners can obtain evidence which might prevent or help prevent these obviously threatening developments. And if this were not clear enough from the record, it would have been confirmed by the Lago Agrio Plaintiffs' position during the argument of this motion for a stay. When asked by the Court whether they would agree to a worldwide standstill – a freezing of the Ecuadorian litigation and efforts to have the Ecuadorian government suspend the threatened criminal proceedings against Veiga and

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The Lago Agrio Plaintiffs' claim of threatened irreparable injury is even more tenuous. Even if the risk of mootness, standing alone, technically constitutes a threat of irreparable injury, the seriousness of that threat "is inextricably related to the appellants' likelihood of success on the merits." *In re DBSD N. Am., Inc.*, Nos. 09 Civ., 10156 (LAK), 09 Civ. 10372 (LAK), 09 Civ. 10373 (LAK), 2010 WL 1838630, at *1 (S.D.N.Y. 2010). The Lago Agrio Plaintiffs therefore have shown little threat of irreparable injury in light of the debatable appealability of the order appealed from and the improbability of success on the merits, even assuming appealability.

Pallares – pending an expedited appeal, they refused.⁴⁷

The risk of imminent and perhaps irreparable harm to the petitioners if a stay were granted is palpable. The respondents' claims of undue delay by petitioners are unpersuasive in view of the changes in the political and litigation situation in Ecuador.

As for the public interest, the Court of course recognizes that the journalist privilege serves a public purpose as well as a private interest, at least where it is properly invoked. Nevertheless, this Court has held that the requirements of the journalist privilege have not been satisfied here, given the record that Berlinger placed before the Court. Moreover, public interests in justice, fair play, and full disclosure most certainly would be served by the disclosure of the evidence pertinent to the proceedings both in Ecuador and before the arbitration panel.

III

As the foregoing demonstrates, there is reason to doubt the finality of the order appealed from and hence its appealability, at least in central respects and even more broadly. Even if there were appellate jurisdiction, none of the respondents would be likely to prevail on the merits. The combination of these uncertainties makes the likelihood of success on appeal quite modest.⁴⁸

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Such a standstill also might include the arbitration brought by Chevron.

Petitions by The Republic of Ecuador and the Lago Agrio Plaintiffs to stay that arbitration have been dismissed. *Republic of Ecuador v. Chevron Corp.*, Nos. 09 Civ. 9958 (LBS), 10 Civ. 316 (LBS), 2010 WL 1028349 (S.D.N.Y. 2010). The dismissal has been appealed.

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“Under established principles of probability theory, the probability that both of two independent events will occur is the product of the probability of each. Put differently, if P(A) is the probability of the occurrence of event A and P(B) is the probability of the occurrence of event B, and if the occurrence of A is independent of the occurrence of event B, then the probability of the occurrence of both event A and event B is the product of the probabilities of the occurrence of each, or $P(A \& B) = P(A)P(B)$. TARO YAMANE,

The Court therefore would deny a stay pending appeal even if respondents had made a more convincing showing that the equities favored them. In fact, however, the equities cut against them. In all the circumstances, the equitable factors on balance strongly favor the petitioners. Respondents' motions for a stay pending appeal are denied.

On the other hand, the temporal exigencies do not appear to be so pressing that the Court of Appeals should be compelled to act on respondents' inevitable emergency motion without hearing petitioners. Accordingly, on the conditions that respondents (a) serve and file any stay motion in the Court of Appeals before 10 a.m. on May 21, 2010,⁴⁹ and (b) consent in that motion to petitioners serving and filing their opposition at or before 10 a.m. on May 24, 2010, then the time for the required compliance with the subpoenas is postponed from May 21, 2010 until 10 a.m. on May 31, 2010.

SO ORDERED.

Dated: May 20, 2010

Lewis A. Kaplan
United States District Judge

STATISTICS: AN INTRODUCTORY ANALYSIS § 5.7, at 107-10 (2d ed.1967). Thus, if it is barely more probable than not (e.g., 51 percent likely) that [Event A, here the establishment of appellate jurisdiction, will occur] and barely more probable than not that [Event B, here the respondents prevailing on the merits, will occur], the probability of [success on appeal] is 26.01 percent.” *United States v. Lavan*, 10 F. Supp.2d 377, 389 (S.D.N.Y. 1998) (relied upon in *United States v. Heath*, 455 F.3d 52, 59-60 (2d Cir. 2006)).

⁴⁹

Respondents have been aware for a week of the possible need to act in that time frame. Tr., May 14, 2010, at 2:14-3:9.