UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 13-2784-cv Caption [use short title]

Motion for: Leave to File Brief as Amicus Curiae [unopposed] Chevron Corporation v. Donziger

Set forth below precise, complete statement of relief sought:

The Republic of Ecuador seeks leave of this Court to file a brief as amicus curiae in support of the Non-Party Movants-Appellants.

MOVING PARTY: The Republic of Ecuador as Amicus Curiae **OPPOSING PARTY:** Chevron Corporation

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Gene C. Schaerr **OPPOSING ATTORNEY:** Randy M. Mastro

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Court-Judge/Agency appealed from: Lewis A. Kaplan, U.S.D.J., Northern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☑ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ Gene C. Schaerr **Date:** Nov. 7, 2013 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

Form T-1080 (rev. 7-12)

13-2784-cv

United States Court of Appeals For the Second Circuit

CHEVRON CORPORATION, PLAINTIFF-APPELLEE

v.

NON-PARTY JOHN DOE SIMEONTEGEL@HOTMAIL.COM, NON-PARTY JOHN DOE MEY_1802@HOTMAIL.COM, NON-PARTY JOHN DOE PIRANCHA@HOTMAIL.COM, NON-PARTY JOHN DOE DURUTI@HOTMAIL.COM, MOVANTS-APPELLANTS

v.

STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER, DONZIGER & ASSOCIATES, PLLC, JAVIER PIAGUAJE PAYAGUAJE, HUGO GERARDO CAMACHO NARANJO, DEFENDANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, CASE NO. 12-MC-65, JUDGE LEWIS A. KAPLAN

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF FOR THE REPUBLIC OF ECUADOR AS *AMICUS CURIAE*

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Pursuant to Fed. R. App. P. 29, the Republic of Ecuador hereby moves the Court for leave to file a brief as *amicus curiae* supporting the Appellants in favor of reversal. The Appellants consent to the Republic's request. Appellee Chevron Corporation has indicated that it does not oppose this motion.

The Court should grant this motion for the following reasons:

1. The Republic has a significant interest in the outcome of this appeal, which has enormous importance to Latin American countries and their citizens. *See* Fed. R. App. P. 29(b)(1). The Republic, like many other Latin American countries, is a constitutional democracy that guarantees the fundamental rights of its citizens to free expression and data privacy. Without regard for those rights, the court below upheld an extraordinarily overbroad subpoena by Chevron to reveal the identities and track the precise movements—over the course of nearly a decade—of 30 anonymous non-parties who have spoken out against Chevron's environmental destruction of the Ecuadorian Amazon. That decision impacts the rights and expressive activities of political activists and investigative journalists in Ecuador as well as the broader Latin American community.

2. Accordingly, an *amicus* brief is desirable in this appeal because the district court's ruling reaches far beyond the Appellants and adversely affects the privacy rights and interests of Latin Americans, including Ecuadorians. *See* Fed. R. App. P. 29(b)(2). Indeed, the information requested by Chevron's subpoena—

including when and where each of 30 anonymous non-parties logged into their email accounts over the last nine years—is not only irrelevant to the underlying litigation, but would allow Chevron to deduce the non-parties' most intimate habits, associations, and personal relationships. If companies like Chevron are allowed to discover such minute details about the private lives of their critics, important speech on matters of public concern will be chilled worldwide, including in Ecuador and the United States.

3. The accompanying brief will also assist the Court in its review of the decision below by addressing matters directly relevant to the disposition of this case. *See* Fed. R. App. P. 29(b)(2). Some of those matters have not been fully developed by the Appellants' counsel, who are understandably and correctly focused on obtaining relief for their clients, and less focused on the impact of the district court's decision on Latin American countries and their citizens. For example, one major contribution of the *amicus* brief is to elucidate how the district court's erroneous decision will chill speech and expressive association in Latin America—violating the First Amendment rights of U.S. audiences (including at least one of the Appellants) to receive information and ideas from abroad.

4. The *amicus* brief also shows how the subpoena will cause severe damage to the rights and interests of Latin Americans, who value data privacy very highly. Indeed, most Latin American constitutions, including Ecuador's, guarantee

robust data privacy protections as fundamental rights that either do not exist or are not as highly valued under U.S. law. As explained in the *amicus* brief, this Court can and should consider the subpoena's impacts on the fundamental rights of Latin Americans under principles of international comity and respect.

5. Because the accompanying *amicus* brief is timely filed within 7 days after the Appellants filed their principal brief, Chevron has ample time to consider and respond to the arguments made in the *amicus* brief. *See* Fed. R. App. P. 29(e). Accordingly, Chevron will not be prejudiced by this Court granting leave for the Republic to participate in this appeal as *amicus curiae*.

For these reasons, and because the accompanying brief satisfies all the requirements for *amicus* briefs in the Federal Rules of Appellate Procedure and this Court's Local Rules, the Court should grant this motion for leave and permit the Republic to file the accompanying brief.

Respectfully submitted,

NOVEMBER 7, 2013

/s/ Gene C. Schaerr

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United States Court of Appeals For the Second Circuit

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BRIEF FOR THE REPUBLIC OF ECUADOR AS *AMICUS CURIAE* IN SUPPORT OF MOVANTS-APPELLANTS

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INTEREST OF *AMICUS*[*]

This is a case of tremendous importance to Latin American nations and their citizens. That is why the Republic of Ecuador, a constitutional democracy in Latin America that recognizes data privacy as a fundamental right, seeks to participate. The Republic is not alone: Almost all Latin American countries today guarantee robust privacy protections in their constitutions and, as civil law jurisdictions, do not permit the type of broad discovery by private parties that is at issue in this case.

While the Republic has no interest in the underlying racketeering and environmental litigations that led to this appeal, it does have a legitimate sovereign interest in promoting free expression—both within and flowing across its borders—and in ensuring that the privacy rights of its citizens and residents are respected.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises from an unprecedented subpoena by Chevron Corporation that tramples on those very rights. With its subpoena, Chevron seeks to reveal the identities of 30 anonymous non-parties and track their precise movements over the course of nearly a decade. The non-parties are environmental activists, public ser-

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[*] No party opposes the filing of this brief, which the Republic of Ecuador seeks leave of the Court to file pursuant to Fed. R. App. P. 29(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person other than the Republic of Ecuador or its counsel made a monetary contribution to the preparation or submission of this brief.

vice attorneys, bloggers, and investigative journalists in Latin America who have spoken out against Chevron's environmental destruction of the Amazon.

They moved to quash Chevron's subpoena, which seeks their names, billing information, and email usage histories—including the date, time, and location of each log-in to their email accounts for the last nine years—as overbroad and a violation of their First Amendment rights to anonymous speech and association. Without reaching the merits of their constitutional arguments, the district court denied the non-parties' motion because it found "no evidence that they are U.S. citizens." JA240. As for their overbreadth arguments, the court noted vaguely that "[m]ost" of the information requested by the subpoena is "at a high level of generality" and "only from the period of the alleged fraud" that forms the basis for Chevron's underlying racketeering claims. JA245.

The district court's decision should be reversed for three reasons. *First*, the court's conclusions about the information Chevron seeks are contradicted by its own factual findings, which required it to quash Chevron's subpoena or, at a minimum, substantially limit its scope. Indeed, this Court does not even need to reach the non-parties' constitutional arguments because their personal information is not relevant to Chevron's lawsuit. That suit alleges that plaintiffs in Ecuador and their attorneys fraudulently obtained a judgment against Chevron for its pollution of the Amazon. But as the district court acknowledged, the non-parties were neither

plaintiffs nor attorneys in the Ecuadorian litigation. And Chevron, which has repeatedly argued that it knows exactly who the non-parties are, has never sought to add them as defendants in the racketeering case it filed two years ago, in which trial is reaching its conclusion. Nor could it, since the non-parties' media activities criticizing Chevron had nothing to do with the alleged fraud.

Even if some information about how the non-parties used their email accounts were relevant, Chevron cannot show that it needs *nine years* of data. The district court apparently agreed—noting that "[n]ot all of the subpoenaed information … is significant" (JA254)—yet it limited the subpoena only for *one* of the 30 non-parties. Moreover, since Chevron has already obtained all the emails of the Ecuadorian plaintiffs and their attorneys—including any they exchanged with the non-parties—any more discovery about those emails (let alone unrelated emails) is needlessly cumulative. At a minimum, Chevron could easily limit its subpoena to the particular days or weeks surrounding any purportedly relevant emails—a simple task the district court never requested.

Second, while Chevron cannot use the non-parties' identities and email usage records to support its racketeering claims, it *can* use those records to retaliate against the non-parties for supporting the Amazonian plaintiffs and for exposing its environmental crimes. Armed with a nine-year itinerary of everywhere the non-parties have been, Chevron will be able to deduce their most intimate habits, asso-

ciations, and personal relationships. Indeed, the non-parties produced evidence in the court below that disclosing that information would deter them, and others, from criticizing Chevron and other influential companies—evidence the district court ignored.

Unless this Court intervenes, parties like Chevron will continue to use this type of abusive discovery to silence their opponents, chilling speech on important issues of public concern in both the United States and abroad. Like the non-parties, political advocates and journalists worldwide will be discouraged from criticizing powerful corporations if they know that their identities and email histories can be so easily discovered. And because so much of that critical speech is published internationally and online, a global audience that includes Ecuadorian as well as U.S. audiences will be deprived of its benefits—violating the First Amendment rights of U.S. citizens (including at least one of the non-parties) to receive information and ideas, a right that applies equally to foreign speech.

Third, the subpoena infringes data privacy rights that are recognized as fundamental in Latin America. Today, the constitutions of nearly all Latin American countries, including Ecuador, guarantee the confidentiality of personal data and provide private causes of action to protect it—rights that are not recognized or not as highly valued under U.S. law. These constitutional provisions reflect a deep-seated cultural commitment to privacy in Latin America that results both from civil

law traditions (which do not allow discovery by private parties) and the region's 20th-century transition to democracy.

To be sure, this Court is not bound by Latin American laws, but it should prevent court-ordered discovery from encroaching upon the values they reflect. Indeed, it would be manifestly unfair to deny Latin Americans *any* privacy protections whatsoever merely because they do not live in the United States, where nearly all companies that operate email services are based. This Court's intervention is badly needed to prevent that injustice.

BACKGROUND

A proper understanding of the issues presented in this appeal requires some familiarity with (a) the underlying case and Chevron's history of abusive discovery; (b) its subpoenas to the non-parties; and (c) the robust privacy protections in Latin America, where many of the non-parties live and work.

A. Chevron's environmental liability and its retaliatory tactics

This Court is familiar with the "conflict between Chevron and residents of the Lago Agrio region of the Ecuadorian Amazon," one of "the most extensively told" stories "in the history of the American federal judiciary." *Chevron Corp. v. Naranjo*, 667 F.3d 232, 234 (2d Cir. 2012); *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011); *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir.

2011); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

In brief, that story "arise[s] in the context of three decades of oil exploration and extraction in Ecuador by Texaco …, which became a wholly-owned subsidiary of Chevron in 2001." *Berlinger*, 629 F.3d at 300. In 1993, "residents of the Oriente region of Ecuador brought a class action suit" in the Southern District of New York seeking damages for Chevron's (then-Texaco's) "pollut[ion] [of] the rain forests and rivers in Ecuador" and to "redress contamination of [its] water supplies and environment." *Id.* at 301 (citation omitted).

That pollution is largely undisputed: "Chevron's own representatives conceded" that its predecessor "spilt oil, dumped 'produced water,' and operated dangerous unlined pits," releasing "harmful substances into the environment of Ecuador." Kendal Payne, Aguinda v. Chevron: *The Potential Rise and Fall of Mass Toxic Tort Claims Against U.S. Companies*, 46 Int'l Law. 1067, 1071-73 (2012). Indeed, Chevron not only "does not deny 'the presence of pollution'" in the Amazon, but admits "'that there were impacts'" of that pollution on the health of the Amazonian inhabitants.[1]

[1] Frank Bajak, *Amazon Pollution Case May Cost Billions*, Boston Globe (Associated Press) (Dec. 21, 2008), *available at* http://www.boston.com/news/world/latinamerica/articles/2008/12/21/amazon_pollution_case_may_cost_billions/.

Rather than litigate its liability for that pollution and the resulting health impacts in the United States, however, Chevron "worked in earnest to transfer" the suit "to the courts of Ecuador," "tout[ing] the ability of the Ecuadorian courts to 'provide a fair and alternative forum' for the plaintiffs' claims." *Berlinger*, 629 F.3d at 301. Chevron's efforts succeeded, and the plaintiffs re-filed their suit in Lago Agrio, Ecuador, in 2003. *Id.* at 302.

After eight years of litigation, "in a 188-page opinion containing extensive findings of fact and detailed conclusions of law," the Ecuadorian court found "that Chevron was liable for widespread environmental degradation of the Lago Agrio region" of the Amazon. *Naranjo*, 667 F.3d at 237. That decision, which Chevron has appealed to Ecuador's highest court, was upheld by an intermediate court *de novo*. *Id.* Chevron could have halved the original $17.2 billion award against it by apologizing for its environmental destruction, but it refused to do so. *Id.* at 236.

Instead of apologizing or paying the damages, Chevron filed a complaint in the Southern District of New York in February 2011, alleging that the judgment in Ecuador resulted from a conspiracy by the Lago Agrio plaintiffs and their lawyers, including Steven Donziger, to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. *Id.* at 237-38. Specifically, Chevron alleges that the RICO defendants:

1. "bribed the Ecuadorian judge to obtain the result they wanted and, as part of the deal, wrote the Judgment to which the judge put his name";

2. "coerced the … judge to terminate judicial inspections of alleged pollution sites, to replace that process with a global expert charged with making an independent evaluation, and to appoint the [plaintiffs'] candidate … to that position";

3. "planned and wr[ote]" the "independent" report of that court-appointed expert;

4. "obstructed justice … by submitting to a court in Colorado a deceptive account of [their] relationship with" the expert; and

5. "filed two site inspection reports with the trial court over the signature of one of their experts that the expert neither adopted nor agreed with."

Chevron Corp. v. Donziger, 2013 WL 1087236, at *2 (S.D.N.Y. Mar. 15, 2013).[2]

Even before the Ecuadorian judgment had issued, however, Chevron began "an aggressive lobbying and public relations campaign" to attack anyone who supported the Lago Agrio plaintiffs.[3] Since then, Chevron has "launched dozens of discovery proceedings" in "an effort … aptly characterized as 'unique in the annals of American judicial history.'" *Naranjo*, 667 F.3d at 236 (citation omitted). Among other tactics, Chevron has used subpoenas that courts have held to be overbroad and abusive. *E.g.*, *Chevron Corp. v. Salazar*, 2011 WL 7112979, at *3

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[2] Chevron sought a worldwide injunction against enforcement of the Ecuadorian judgment based on the same allegations—a request this Court dismissed as legally baseless. *Naranjo*, 667 F.3d at 247.

[3] Kenneth P. Vogel, *Chevron's Lobbying Campaign Backfires*, Politico (Nov. 16, 2009), *available at* http://www.politico.com/news/stories/1109/29560.html. Among others who worked with the Lago Agrio plaintiffs, Chevron has attacked their experts at Stratus Consulting Inc., which it publicly accused of fraud in a letter-writing campaign and on at least 15 different websites. *See Chevron Corp. v. Donziger*, No. 11-cv-691, Dkt. 694-1, 694-4, 1002 (S.D.N.Y.).

(D. Or. Nov. 30, 2011) ("Chevron's subpoena … was, at least in part, meant to harass") (ordering sanctions under Fed. R. Civ. P. 45(c)).

For example, Chevron served a subpoena on Amazon Watch, an environmental advocacy group that had been "critical of Chevron's former operations in the Ecuadorian Amazon" and "use[d] media coverage … to educate and lobby for social and environmental accountability." *Chevron Corp. v. Donziger*, 2013 WL 1402727, at *1 (N.D. Cal. Apr. 5, 2013). Chevron argued that "the RICO defendants used Amazon Watch as a mouthpiece for pressure and smear campaigns … against Chevron, in furtherance of their conspiracy to defraud Chevron." *Id.* In quashing the subpoena, however, the Northern District of California held that "none of th[e] five instances" of fraud alleged by Chevron in the RICO action "had anything to do with the alleged pressure campaign." *Id.* at *4.[4]

B. Chevron's subpoenas for non-parties' identities and email data

This case involves a similar subpoena—one of three served on Google, Microsoft, and Yahoo!, which together seek non-public personal information associated with 101 email addresses that Chevron found on Mr. Donziger's computer hard drive. JA21. In addition to the identities of the individuals who opened those

[4] Chevron even served a subpoena on one of its own shareholders that had "questioned how Chevron has handled" the Lago Agrio matter. Gretchen Morgenson, *Chevron Aims at Activist Shareholder*, N.Y. Times (Dec. 8, 2012), *available at* http://www.nytimes.com/2012/12/09/business/chevron-takes-aim-at-an-activist-shareholder.html?pagewanted=1&_r=0.

email accounts, the subpoenas seek "the usage of the … email addresses, including but not limited to documents that provide IP logs, IP address information at time of registration and subsequent usage, computer usage logs, or other means of recording information concerning the email or Internet usage of the email address." JA92-93.

The term "IP address" refers to the "numeric value used to identify the network location" of a device that is connected to the Internet, such as a notebook computer, tablet, or smartphone. JA237-38. When that device "moves from an Internet connection on one network … to an Internet connection on another network," its IP address "changes to reflect that the device" is in a new location. *Id.* "Many host computers of websites, including popular web-based email services" like those operated by Google, Microsoft, and Yahoo!, maintain "IP logs," which "list the IP address of visitors along with … the date and time of log-in and the duration of time the user visited the website." *Id.*

This appeal concerns the subpoena to Microsoft as it relates to 30 email accounts belonging to persons who are not parties to the underlying litigation, many of whom live and work in Latin America. Br. 10-11.[5]

[5] The subpoenas to Google and Yahoo! are being litigated in the Ninth Circuit. That court recently stayed enforcement of a motion to compel compliance with those subpoenas, finding "a substantial question on the merits under the First Amendment" on whether they should be quashed. *Chevron Corp. v. Donziger*, No.

C. Data privacy protections and expectations in Latin America

Because the non-parties live in Latin America, it is also important to understand how U.S. discovery practices are perceived there, and how those practices may conflict with the laws of Latin American countries.

1. Latin America is made up exclusively of "civil law countries," where "evidence-gathering … [is] a sovereign act" and thus "private parties are not allowed to collect evidence on their own." Lauren Ann Ross, *A Comparative Critique to U.S. Courts' Approach to e-Discovery in Foreign Trials*, 11 Duke L. & Tech. Rev. 313, 318 (2012). This "huge difference[ ] … in the way discovery is conducted" results from "cultural differences in the way that privacy is viewed." Kersten Roehsler Kortbawi & Henal Patel, *Ethical Issues in e-Discovery, Social Media, and the Cloud* (Symposium), 39 Rutgers Computer & Tech. L.J. 125, 135 (2013). Indeed, civil law countries not only "do not have the breadth of discovery that [exists] in the United States," but their laws "are also much stricter regarding personal privacy." *Id.*

Citizens of civil law countries thus often "react to the notion of discovery, … American style, as an invasion of privacy by the court." Claude Reymond, *Civ-*

13-16920, Dkt. 10 at 2 (9th Cir. Oct. 25, 2013). The court also held that "the record does not establish the involvement of these [email] addresses in any of the five areas as to which the trial court in New York found that Chevron had established probable cause to believe there was fraud or other criminal activity." *Id.*

il and Common Law: Which is the Most Inquisitorial? A Civil Lawyer's Response, 5 Arb. Int'l 357, 359 (1989). They have been particularly "appalled" when U.S. courts "purport to authorize or even order an investigative process that extends, vigilante-like, into other countries." Robert Hardaway, *e-Discovery's Threat to Civil Litigation: Reevaluation of Rule 26 for the Digital Age*, 63 Rutgers L. Rev. 521, 524 (2011).

2. Data privacy, in particular, is immensely important to Latin Americans. Nearly all Latin American constitutions today include data privacy protections as fundamental rights that either do not exist or are not as highly regarded under U.S. law. For example, Ecuador's Constitution guarantees the "secrecy of … virtual correspondence" and "[t]he right to protection of personal data, which includes access and right of decision on information and data of this nature, and the corresponding protection." Add. 2, Constitution of the Republic of Ecuador, art. 66, nos. 19, 21 (Oct. 20, 2008). These rights, like all rights under Ecuador's Constitution, apply equally to citizens and "[f]oreigners who are in Ecuadorian territory." *Id.*, arts. 9, 11.

Latin American countries have also pioneered a "new type of privacy protection in the form of habeas data," a constitutional provision that "creates a private cause of action to insure compliance with constitutionally protected rights of 'privacy'" and "to assure that personal data is being responsibly maintained." Maxim

Gakh, *Argentina's Protection of Data: Initiation and Response*, 2 I/S: J. L. & Pol'y for Info. Soc'y 781, 781-83 (2006). Habeas data provisions, which have their "roots" in "Europe's [famously strict] privacy notions," were "incorporated into the Constitutions of Argentina, Brazil, Paraguay, Peru, Ecuador, and Colombia during Latin America's post-Cold War democratization." *Id.* These protections apply equally to intrusions by private entities, which can be just as dangerous as overreaching governments. *E.g.*, Add. 2, Constitution of the Republic, *supra*, art. 92 (guaranteeing right of habeas data for "personal data files … held by public or private organizations").

Those privacy concerns are at their zenith when invasions implicate the freedoms of speech, association, and the press—freedoms that are protected in Ecuador's Constitution by "[t]he right to hold opinions of one's choice and to express them freely" and "[t]he right to associate, assemble, and protest on a free and voluntary basis." *Id.* at Add. 1, art. 66, nos. 6, 13. Further, Ecuador's Constitution "ensure[s] the … professional secrecy and confidentiality of sources who inform, give their opinions through the media or other forms of communication, or work in any communication activity." *Id.*, art. 20. Any "[e]vidence obtained or applied in violation of" these provisions, moreover, "will be null and void and without evidentiary effect" in Ecuadorian courts. *Id.* at Add. 2, art. 76, no. 4.

As in other countries with strong privacy traditions, most Latin Americans were shocked and outraged by recent revelations of spying and dragnet data collection by the U.S. government in a way that many U.S. citizens do not appreciate or understand.[6] Those sentiments reflect the privacy rights guaranteed in most Latin American countries, where such practices would be unthinkable.

D. The district court upholds Chevron's lawless subpoena.

The proceedings below, by contrast, focused on protections under the U.S. Constitution and the Federal Rules of Civil Procedure.

1. In October 2012, the non-parties moved to quash the subpoena to Microsoft, arguing primarily that it (1) violates their First Amendment rights to anonymous speech and expressive association and (2) is overbroad because it seeks irrelevant information. JA24-37.[7] The non-parties also submitted evidence that disclosing their identities and nine years of email usage data to Chevron would chill their speech on important matters of public concern. JA20-21.

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[6] *E.g.*, *Merkel Calls Obama to Complain About Surveillance*, NPR (AP) (Oct. 23, 2013) ("As details of National Security Agency spying programs have become public, citizens, activists and politicians in countries from Latin America to Europe have lined up to express shock and outrage at the scope of Washington's spying."), *available at* http://www.npr.org/templates/story/story.php?storyId=240213341; *see also NSA spying in Latin America: Snoops and Snubs*, Economist, 2013 WLNR 22130637 (Sept. 7, 2013).

[7] The RICO defendants also moved to quash the subpoena. They, too, argued that the subpoena is overbroad, but they have not appealed the denial of their motion.

"John Doe," the owner of "simeontegel@hotmail.com" and a U.S. citizen, explained that he is a professional journalist in Latin America who has advocated on behalf of the Amazonian communities that were affected by Chevron's predecessor's pollution. JA11. As a journalist, Doe has a professional need and duty to maintain the confidentiality of his sources. *Id*. And because he often works in places where security is lax and corruption is rampant, his personal security (as well as the security of his confidential sources) can depend on his anonymity. *Id*. Doe concluded that his advocacy and journalistic activities would be chilled if Chevron or other entities could discover his identity and email usage records. JA12.

In response, Chevron argued that the information requested by the subpoena is relevant to its RICO claims because the non-parties allegedly "managed legal and public relations strategies" in support of the Lago Agrio plaintiffs. JA18. Chevron also insisted that the non-parties "are not anonymous," claiming to know each of their real names. *Id.*; JA31. It further argued, without elaboration, that "[e]ach of the individual email account owners … was intimately involved with the fraud alleged." JA18. In the ten months since Chevron made that statement, however, it has never sought to join the non-parties in its RICO action.

2. In June 2013, the district court issued a memorandum opinion denying the motion to quash. In its findings of fact, the court noted that "Chevron believes

that it knows who owns the email addresses of the Does and many others." JA240. But the court found no "competent evidence indicating that the email addresses belong to any of the [Lagio Agrio plaintiffs'] lawyers or the [plaintiffs] themselves." JA244.

The court further found that the subpoena would allow Chevron to "learn the IP address associated with every login for every account" and thus "identify the countries, states, … cities … [and] in some instances … the actual building addresses" where the non-parties have been "over a nine-year period." JA239. The court found that this information, in turn, could "allow Chevron to infer the movements of the users over the relevant period" and "permit Chevron to make inferences" about their "professional and personal relationships." *Id.*

Despite these findings, the court held—without the benefit of any briefing on the issue—that the non-parties have no standing to assert First Amendment violations "in the absence of evidence" that they are U.S. citizens. JA243. In a five-sentence footnote, the district court acknowledged that the non-parties had also "forcefully argued … that the subpoena is overbroad." JA245. But the court was "not persuaded" by that argument because, in its view, "[m]ost of what Chevron could learn from the subpoenaed IP logs about the Does' movements would be only at a high level of generality," and "[t]he subpoena requests account activity information only from the period of the alleged fraud." *Id.*

3. One of the non-parties, the owner of the email account "simeontegel@hotmail.com," moved for reconsideration because he is, in fact, a U.S. citizen. JA246. Nevertheless, the district court again declined to quash the subpoena, finding that it did not infringe his First Amendment rights. JA254. The court explained that "the First Amendment does not shield fraud," and that "[w]hether and how the defendants in th[e] [RICO] action and co-conspirators engaged in a media campaign to pressure Chevron into settling the allegedly fraudulent litigation in Ecuador is quite relevant to Chevron's RICO claims." *Id.*

However, the court conceded that "[n]ot all of the subpoenaed information … is significant," and that "Chevron has offered no argument why it has any compelling need for … IP logs" for the periods "before 2005 and after 2008." *Id.* The court also noted that "[a]llowing disclosure of the IP address information for any period other than 2005 through 2008 could intrude upon certain protected activities." *Id.* Accordingly, the district court limited the subpoena to that time period—but only for "John Doe," the owner of simeontegel@hotmail.com. *Id.*

ARGUMENT

The issue in this appeal is whether the district court erred in upholding a subpoena that seeks the identities and precise movements of 30 anonymous non-parties over a period of nine years, where there is no evidence that they were involved in the defendants' alleged fraud. As we show in Part I, most if not all of the

information requested is irrelevant to those fraud claims, and the subpoena is overbroad and needlessly cumulative. As we show in Part II, moreover, upholding the subpoena and others like it would chill speech and expressive association on important issues of public concern in both the United States and Latin America—violating the First Amendment rights of at least one non-party to receive ideas and information. Finally, in Part III, we show how the subpoena would violate the privacy rights of Latin Americans—an outcome this Court should prevent out of comity and respect.

I. Chevron's subpoena is well outside the scope of permissible discovery.

Federal Rule of Civil Procedure 26 limits discovery to "nonprivileged matter that is relevant" to a "party's claim or defense" and is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351-52 (1978) (any other matter is "not within the scope" of permissible discovery). "The burden of demonstrating relevance is on the party seeking discovery." *E.g., U.S. Bank Nat'l Ass'n v. PHL Variable Ins. Co.*, 288 F.R.D. 282, 284 (S.D.N.Y. 2012). Even relevant discovery, however, "must" be limited by the district court if it is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient [or] less burdensome." Fed. R. Civ. P. 26(b)(2)(C).

Here, Chevron failed to meet its burden to show relevance, and the district court abdicated its gatekeeping role in a clear abuse of discretion.

A. The information requested by the subpoena is irrelevant.

For starters, the identities of 30 non-parties and nine years of their email usage history is not relevant to any party's claim or defense and cannot lead to the discovery of admissible evidence. The district court's only finding to the contrary was that "[w]hether and how the defendants in the[ ] [RICO] action and co-conspirators engaged in a media campaign to pressure Chevron into settling the allegedly fraudulent litigation in Ecuador is quite relevant." JA254. But as the court noted, there is no "competent evidence indicating that the email addresses belong to any of the [Lago Agrio plaintiffs'] lawyers or the [plaintiffs] themselves." JA244. And tellingly, while Chevron claims to know the non-parties' identities and their roles in media campaigns about its environmental crimes (JA240), it has never sought to sue any of them in the two years since it filed its RICO claims.[8]

Nor could it. The pollution in the Amazon is an undisputed fact (*supra* at 6), and there is nothing "fraudulent" about exposing it to the public. Even assuming that a fraud can be perpetrated through "a media campaign"—a strategy Chevron itself has used in its war against anyone who supported the Lago Agrio plaintiffs—

[8] Nor has Chevron ever sought to expedite this appeal—even though trial is almost over—belying its claim that it has any legitimate need for these records.

there is not a shred of evidence that the non-parties spoke out against Chevron with the "intent to deceive," which is "an essential element of fraud." *Cluett, Peabody & Co., Inc. v. CPC Acquisition Co., Inc.*, 863 F.2d 251, 255 (2d Cir. 1988). The same is true for a conspiracy to violate the RICO, which requires "inten[t] to further an endeavor" to "satisfy all of the elements" of fraud or some other "substantive offense." *Salinas v. United States*, 522 U.S. 52, 65 (1997).

More importantly, neither Chevron nor the district court has ever articulated a rational connection between the non-parties' "media campaign" and the RICO defendants' alleged fraud. Thus, even assuming that they campaigned "to pressure Chevron into settling" a lawsuit that turned out to be fraudulent, Chevron still has no claim against the non-parties because "none of th[e] five instances" of fraud asserted in the RICO case "had anything to do with the alleged pressure campaign." *Donziger*, 2013 WL 1402727, at *4 (quashing Chevron's subpoena to Amazon Watch).[9]

In any event, email usage data cannot show "whether and how" anyone "pressure[d] Chevron into settling." What it *will* show are irrelevant, minute details about the non-parties' private lives. In a footnote, the district court dismissed

[9] The RICO defendants' five alleged fraudulent acts are: (1) bribing the Ecuadorian judge and ghost-writing his opinion; (2) coercing him to appoint their choice for an "independent" expert; (3) writing that expert's report; (4) misrepresenting their relationship with the expert in a U.S. court; and (5) filing environmental inspection reports their own expert disagreed with. *Supra* at 7-8.

these "forcefully argued" concerns because "[m]ost" of the requested data would be "at a high level of generality." JA245. According to the court's own findings, however, the subpoena would reveal "the IP address associated with every login for every account over a nine year period," as well as "the date and time of log-in and the duration of time the user visited the website." JA238-39.

These records provide "a detailed picture of [each] person's location and movements over a nine year period"—at least "in some instances" down to "the actual building addresses" they visited. *Id.* As the district court recognized, the sheer volume and granularity of that data would "permit Chevron to make inferences" about the non-parties' "professional and personal relationships." JA239. Far from being at a "high level of generality," therefore, this (entirely irrelevant) information is at the highest level of specificity.

B. The subpoena is overbroad and unreasonably cumulative.

Even if some limited portion of the non-parties' personal information were relevant, *nine years*' worth is plainly not. Again, the district court's own findings contradict its conclusion that Chevron seeks data "only from the period for the alleged fraud." JA245. On reconsideration, the court acknowledged that "[n]ot all of the subpoenaed information … is significant" and that "Chevron has offered no argument why it has any compelling need" for data from before 2005 or after 2008. JA254. Yet, the court failed to limit the scope of the subpoena for all but one of

the non-parties. Nor did it ever require Chevron to specify any relevant dates. Having found that documents for other time periods are irrelevant, the court abused its discretion by ordering their production. *In re Refco Secs. Litig.*, 759 F. Supp. 2d 342, 345 (S.D.N.Y. 2011).[10]

The information sought by the subpoena is also unreasonably cumulative. If, as Chevron claims, it knows exactly who owns the email addresses (JA18, JA31), then it has no need for their identifying information. And if any questions remain about their identities, answers "can be obtained from some other source that is more convenient"—either from Mr. Donziger (the party whose hard drive supplied the email addresses) or by simply contacting the addresses themselves. Fed. R. Civ. P. 26(b)(2)(C); *Haworth, Inc. v. Herman Miller, Inc.*, 998 F.2d 975, 978 (Fed. Cir. 1993) (a party should "seek discovery from its party opponent before burdening [a] nonparty").

Moreover, Chevron has already obtained the entire contents of Mr. Donziger's hard drive as well as his and the other RICO defendants' emails regarding the Ecuadorian litigation. Thus, even assuming there were any relevant emails to or from the non-parties, Chevron has likely already discovered them—including their actual substantive content. *See* JA36 ("Chevron already has obtained thou-

[10] Any information that postdates the 2011 verdict against Chevron, moreover, cannot be relevant to whether that verdict was procured by fraud.

sands of emails sent to and from the RICO defendants and those associated with them, including the Does."). Chevron should thus have no problem narrowing its requests to the particular days or weeks surrounding those emails. Receiving another "data dump" to sift through, however, will do nothing to help Chevron's RICO case, where trial is almost over.

II. The subpoena and others like it will have devastating effects in both Latin America and the United States.

Stripped of any pretense that its subpoena serves a legitimate purpose, Chevron's motive is laid bare: to harass, intimidate, and ultimately silence the activists, attorneys, bloggers, and journalists who stood up to Chevron and sympathized with the inhabitants of Lago Agrio. Indeed, Chevron admits that it seeks the identities and email histories of anyone who participated in the "legal and public relations strategies" against it. JA18. But it is axiomatic that "discovery should be denied when a party's aim is to … harass" its opponents. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 353 n.17 (1978); *Hickman v. Taylor*, 329 U.S. 495, 507-08 (1947) ("ultimate and necessary boundaries" of discovery are crossed where it is "conducted in bad faith or in such a manner as to annoy, embarrass or oppress."). Here, Chevron's harassment is especially dangerous because it adversely impacts First Amendment rights.

A. The subpoena will chill speech and expressive association.

Indeed, Chevron's subpoena targets political activists and journalists, including "John Doe" (a U.S. citizen), whose activities are "at the heart of what the Bill of Rights was designed to safeguard." *Jones v. Parmley*, 465 F.3d 46, 56 (2d Cir. 2006). He and the other non-parties regularly engage in "political conversations and the exchange of ideas," which courts must be "vigilant … to guard against undue hindrances." *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 192 (1999); *Baker v. F & F Investment*, 470 F.2d 778, 782 (2d Cir. 1972) (recognizing "a paramount public interest in the maintenance of … robust, unfettered debate over controversial matters").

Accordingly, this Court has not hesitated to limit discovery "where the disclosure sought will compromise the privacy of individual political associations, and hence risk[ ] a chilling of unencumbered associational choices" and expression. *Fed. Election Comm'n v. Larouche Campaign*, 817 F.2d 233, 234-35 (2d Cir. 1987). In particular, "[a]wareness" that someone "may be watching" one's movements "chills associational and expressive freedoms." *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring). An "unrestrained power to assemble data that reveal private aspects of identity" is thus highly "susceptible to abuse." *Id.*

That "unrestrained power" is exactly what Chevron seeks here. As the district court acknowledged, the information requested in the subpoena would paint "a detailed picture of [each] person's location and movements over a nine-year period," which in turn would "permit Chevron to make inferences" about the non-parties' "professional and personal relationships." JA239. Other courts, too, have recognized that "prolonged surveillance of a person's movements may reveal an intimate picture of his life," including, his "'associations—political, religious, amicable and amorous, to name only a few—and … [his] professional and avocational pursuits.'" *United States v. Maynard*, 615 F.3d 544, 562-63 (D.C. Cir. 2010) (citation omitted).

The non-parties presented substantial evidence, which the district court ignored, that disclosing such intimate details to Chevron will chill their speech on important issues of public concern. *See supra* at 15. If upheld, therefore, the subpoena would not only tend to silence Chevron's political opponents, but embolden others to use this type of abusive discovery to do the same—further chilling expression on vital issues in both Latin America and the United States. *See Herbert v. Lando*, 441 U.S. 153, 192 (1979) (Brennan, J., dissenting) (if "journalists … fear reprisals for information disclosed during discovery" sought by a "powerful political figure," the "chilling effect might particularly impact on the press' ability to perform its 'checking' function"); *Perry v. Schwarzenegger*, 591 F.3d 1126, 1141

(9th Cir. 2009) (ordering entry of protective order where "the disclosure of … information" would "have a deterrent effect on participation in campaigns.").

B. By chilling speech, the subpoena infringes the First Amendment rights of U.S. citizens to receive information and ideas.

Allowing Latin American speech to be chilled, moreover, will harm not just Latin American speakers but U.S. audiences, which will be "deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citation omitted). In particular, the subpoena's chilling effects would violate the First Amendment rights of U.S. citizens to "receive ideas," which "is a necessary predicate to the … meaningful exercise of [their] own rights of speech, press and political freedom." *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982). Accordingly, at least Doe (if not others) has standing to challenge Chevron's subpoena, which chills not only his own speech, but the speech of Latin Americans—speech he has a constitutional right to receive. *Application of Dow Jones & Co.*, 842 F.2d 603, 607 (2d Cir. 1988) (non-parties have "standing to appeal [a district court's] order restraining speech" as would-be "recipients of speech").

That right "to receive information and ideas" applies no less forcefully to speech by "non-resident alien[s]." *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). Courts must therefore guard against "deterrent effect[s]" on the receipt of speech that is "'printed or otherwise prepared in a foreign country,'" which contributes equally to the "'uninhibited, robust, and wide-open' debate and discussion

that are contemplated by the First Amendment." *Lamont v. Postmaster Gen.*, 381 U.S. 301, 302, 305-07 (1965) (citations omitted); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (recognizing "the First Amendment rights of citizens to receive political publications sent from abroad").

Indeed, the geographic origin of expressive activity is increasingly irrelevant in a world where technology allows "speakers [to] engage in real-time interactions with audiences without regard to location." Timothy Zick, *Falsely Shouting Fire in a Global Theater: Emerging Complexities of Transborder Expression*, 65 Vand. L. Rev. 125, 175 (2012). Speech disseminated via the Internet, for example, is "located in no particular geographical location but available to anyone, anywhere in the world." *Reno v. ACLU*, 521 U.S. 844, 851 (1997).

Such speech, moreover, can lead to important benefits, which will also be lost if deterred by abusive discovery. For example, there is no doubt that the advocacy efforts and investigative reporting about Chevron's pollution in Ecuador have increased awareness in the United States about environmental issues and the suffering of indigenous peoples. In turn, that awareness can spur social and political change, like environmental regulations and increased corporate accountability. Especially in an age dominated by international crises like global warming, the

beneficial effect of speech in "the developing transborder marketplace of ideas" does not depend upon its place of origin. Zick, *supra*, 65 Vand. L. Rev. at 177.

III. The subpoena should be quashed under principles of comity and respect for the privacy rights of Latin American countries and their citizens.

Failing to quash or even limit the scope of the subpoena will also cause severe damage to the rights and interests of Latin American nations and their citizens, who value data privacy very highly. As civil law jurisdictions, Latin American countries do not permit discovery by private parties, let alone irrelevant or overbroad discovery that violates even U.S. rules. *See supra* at 11-12. Moreover, most Latin American constitutions provide robust data privacy rights, which apply equally to intrusions by governments and by private entities. *Id.* at 12-13. Such rights are particularly important where invasions of privacy implicate the freedoms of speech, association, and the press. *Id.*

Although these laws are not binding in the United States, they deserve considerable weight and respect where, as here, the effects of court-ordered discovery extend beyond U.S. borders. Indeed, such "comity and parity concerns may be important as touchstones for a district court's exercise of discretion" in resolving discovery disputes. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 261 (2004). And as this Court has long held, "a court of one country should make an effort to minimize possible conflict between its orders and the law of a foreign state affected by its decision." *United States v. First Nat'l City Bank*, 396 F.2d

897, 902 (2d Cir. 1968); *Application of Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962) ("We … have an obligation to respect the laws of other sovereign states even though they may differ in … legal philosophy from our own.").

Here, Chevron's subpoena squarely conflicts with the laws and legal philosophies of Latin American countries, including Ecuador, where many of the non-parties reside and much of the threatened speech and advocacy originated. As explained above, a subpoena to discover the identities and email histories of 30 non-parties unconnected to the underlying litigation fails even to meet U.S. discovery standards, much less the stricter rules of civil law countries where discovery is not allowed and privacy is highly prized. *See supra* at 11-14.

The district court dismissed concerns about the non-parties' privacy because, aside from Doe, it found "no evidence that they are U.S. citizens." JA240. But it makes no sense to punish Latin Americans and deprive them of all rights merely because they do not live in the country where their electronic data are stored. That fact is entirely beyond their control, since the companies that operate and maintain the Internet are almost exclusively in the United States. It is thus critical to consider and respect the non-parties' rights under Latin American law in order to minimize "the problem inherent in the issuance of subpoenas having extra-territorial effect." *Inges v. Ferguson*, 282 F.2d 149, 151 (2d Cir. 1960).

CONCLUSION

The district court's judgment should be reversed and the subpoena to Microsoft quashed. Alternatively, the Court should order the district court to limit the scope of the subpoena to relevant time periods and persons, if any exist.

Respectfully submitted,

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NOVEMBER 7, 2013

ADDENDUM

CONSTITUTION OF THE REPUBLIC OF ECUADOR 2008

Legislative Decree 0
Official Record 449 of October 20, 2008
Last modified: July 13, 2011
Status: Active

Art. 9 – Foreigners who are in Ecuadorian territory enjoy the same rights and duties as Ecuadorians, according to the Constitution.

Art. 11 – The exercise of the rights shall be governed by the following principles:

1. The rights can be exercised, demanded and enforced individually or collectively before the competent authorities; these authorities shall ensure compliance.

2. All persons are equal and enjoy the same rights, duties and opportunities.

No one shall be discriminated against on grounds of ethnicity, place of birth, age, sex, gender identity, cultural identity, marital status, language, religion, ideology, political affiliation, legal, socio-economic status, immigration status, sexual orientation, health, HIV carrier status, disability, physical difference, nor by any other distinction, personal or collective, temporary or permanent, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of rights. All forms of discrimination are punishable by law.

Art. 20 – The State shall ensure […] professional secrecy and confidentiality of sources who inform, give their opinions through the media or other forms of communication, or work in any communication activity.

Rights to freedom

Art. 66 – The following rights are recognized and guaranteed:

6. The right to hold opinions of one's choice and to express them freely.

13. The right to associate, assemble, and protest on a free and voluntary basis.

19. The right to protection of personal data, which includes access and right of decision on information and data of this nature, and the corresponding protection. The gathering, storing, processing, distribution or dissemination of such data or information shall require the authorization of the owner or the rule of law.

21. The right to inviolability and secrecy of physical and virtual correspondence; it may not be retained, opened or examined, except in cases provided by law, prior judicial intervention and the obligation to maintain confidentiality of matters other than the event causing consideration. It protects any type or form of communication.

Art. 76 – The right to due process will be assured in any proceedings in which rights and obligations of any kind are determined, including the following basic guarantees

4. Evidence obtained or applied in violation of the Constitution or the law will be null and void and without evidentiary effect.

Action of Habeas Data

Art. 92 – Everyone will be entitled, whether acting on his own behalf or as representatives authorized for that purpose, to ascertain the existence of and obtain access to documents, genetic data, personal data files or records and reports on them or their property, held by public or private organizations on any physical or electronic storage medium. They will also be entitled to ascertain the purpose of these and the uses to which they are put, the origin and destination of personal information and the time for which such data banks or files will be held.

Those in charge of personal data banks or archives may disclose the stored information with authorization from the owner of the data or the law.

Upon application to those holding the data, their owner may access them free of charge and have them updated, rectified, removed or deleted. In the case of sensitive data, which may only be held with the authorization of their owner or the law, the necessary security measures must be adopted. If the application is disregarded, the owner of the data may seek a court order. The person affected may sue for damages.

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I, the undersigned, Gary Schulties, Production Manager of Compass Languages, a professional translation agency based at 147 Old Solomons Island Rd, Suite 302, Annapolis, MD 21401 (EIN: 134194307) certify that the content of the following original document:

- **CONSTITUCIÓN DE LA REPUBLICA DEL ECUADOR 2008**

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Pursuant to Fed. R. App. P. 29(c)(7) and Fed. R. App. 32(a)(7)(C), I certify as follows:

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Dated: NOVEMBER 7, 2013

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