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12 **UNITED STATES DISTRICT COURT**
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

15 CHEVRON CORP.,) Case No. 5:12-mc-80237 CRB (NC)
16) Plaintiff,) **EX PARTE APPLICATION FOR STAY**
17) v.) **OF ORDER PENDING APPEAL**
18) STEVEN DONZIGER, *et al.*) Fed. R. Civ. P. 62
19) Defendants.)
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25 U.S. Const. amend I*passim*

1 Pursuant to Federal Rule of Civil Procedure 62, and its inherent authority to stay its rulings
2 pending appeal, the Non-Party Movants respectfully request relief from the Magistrate’s
3 August 22, 2013 Order Granting in Part and Denying in Part Motions to Quash Subpoenas
4 (“Order”). ECF No. 70.

5 Relief is needed because compliance with the subpoenas could moot the pending appeal
6 and because Chevron is threatening the ISPs holding the information with contempt. In addition,
7 the information sought here is at best tangentially relevant to the underlying claims, which go to
8 trial on October 15, 2013.

9 Plaintiff here seeks two things: 1) confirmation of identities that it has repeatedly claimed it
10 already knows and can prove, and 2) location information for nonparties that is highly unlikely to
11 still exist and is not likely to lead to the discovery of admissible evidence since additional
12 discovery would be needed to tie the location to defendants and discovery is closed. Neither is a
13 compelling interest. Instead, Chevron’s insistence on production at this late date seems aimed at
14 intimidating the non-parties who assisted or were sympathetic to the positions of the defendant in
15 the underlying matter, rather than seeking any information that is important to their case. On the
16 other hand, revelation of this information to Chevron will both violate Movants’ First Amendment
17 speech and associational rights and be an irreparable harm, since the information cannot late be
18 unlearned by Chevron. A stay to ensure that the appellate court can determine if this tactic is
19 appropriate is warranted.

20 **I. Introduction**

21 On September 19, 2012, Chevron Corp. (“Chevron”) issued Rule 45 subpoenas to non-
22 parties Google Inc. (“Google”) and Yahoo! Inc. (“Yahoo!”) in this Court, in support of *Chevron*
23 *Corp. v. Donziger, et al.*, Case No. 11-cv-0691 (LAK), filed in the Southern District of New York
24 on February 1, 2011. The subpoenas seek identity information and nine years’ of detailed
25 computer “IP logs” associated with 71 email addresses, 44 Gmail addresses and 27 Yahoo!
26 addresses. The IP logs track the location of the users over time.

27 The Movants are not parties to the underlying case, but instead are environmental activists,
28 journalists, bloggers, volunteers, interns, and attorneys who have worked (or associated with those

1 who have worked) to expose and create accountability for the environmental harms caused in
2 Ecuador by Chevron and its predecessor company, Texaco (the “Ecuador campaign”). Chevron
3 admits that it obtained the email addresses largely from the hard drive of defendant Steven
4 Donziger (Chevron Opp. (ECF No. 46 at 6:5-8), that it seeks the identity information for the 71
5 email addresses to connect those individuals with the “legal and public relations strategies” in the
6 Ecuador campaign (Opp. at 2:10-13), and that it seeks the IP log information to track the location
7 of participants the Ecuador campaign (Opp. at 11:22-12:2).

8 The Non-Party Movants moved to quash Chevron’s subpoenas because they (1) violate the
9 Non-Party Movants’ First Amendment rights to anonymous speech and association, (2) violate the
10 Non-Party Movants’ right to privacy under the California Constitution, and (3) are facially
11 overbroad. ECF No. 43. The Magistrate quashed Chevron’s subpoenas to Google and Yahoo! as
12 to twenty-five of the thirty-two email addresses owned Non-Party Movants and narrowed the
13 subpoenas as to the remaining email addresses. ECF No. 70.

14 Movants timely appealed on September 24, 2013.

15 Despite the pending appeal, Chevron has now, by letter briefs, asked the Magistrate Judge
16 to compel the ISPs to produce the information no later than October 15, 2013. ECF Nos. 88, 89.¹

17 **II. ARGUMENT**

18 Courts consider four factors in determining whether to grant a stay pending appeal:
19 “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the
20 merits; (2) whether [he] will be irreparably injured absent a stay; (3) whether issuance of the stay
21 will substantially injure the other parties ...; and (4) where the public interest lies.” *Nken v.*
22 *Holder*, 556 U.S. 418, 419 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *Leiva-*
23 *Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011). The first two factors “are the most critical.”
24 *Nken*, 556 U.S. at 419.

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26
27 ¹ Although the letter briefs note that Chevron met and conferred with Yahoo! and Google, Chevron
28 made no effort to meet and confer with Nonparty Movants on these issues, as required by the
Magistrate Judge’s standing order.

1 To preserve the status quo, the Court should stay its Order. Absent a stay, movants will
2 suffer irreparable constitutional harm: if their records are disclosed in the interim, their appeal
3 could be mooted and their identities and location information will have been conveyed to Chevron
4 and cannot be then unlearned by them, in violation of the First Amendment right to anonymity and
5 right of association. By contrast, a stay will cause no harm to Chevron, especially since it claims it
6 already knows the identity of the individuals and their IP addresses alone are of little assistance this
7 close to trial. The public interest will be served by the preservation of constitutional rights pending
8 full appellate consideration of the substantial issues this case presents. As such, the balance of
9 hardships tips sharply in favor of staying enforcement of the Order until the Ninth Circuit can
10 consider the important constitutional issues presented by the appeal.

11 **A. Absent a Stay, Movants Will Suffer Irreparable Harm.**

12 To be granted a stay, a petitioner must show a particularized harm, “for example, that
13 removal would effectively prevent her from pursuing her petition for review, or that, even if she
14 prevails, she could not be afforded effective relief.” *Leiva-Perez*, 640 F.3d at 969 (citing *Nken*, 556
15 U.S. at 435). Movants easily satisfy this requirement: if their ISPs are required to disclose the
16 information, their privacy can never be fully regained and their constitutional rights will have been
17 violated.

18 As Chevron has now asked the Magistrate Judge to compel compliance, a stay is necessary
19 to prevent the disclosure of the information. If the ISPs are forced to disclose the requested
20 information, Movants will suffer irreparable harm because their confidentiality will be lost forever.
21 As one court observed in another context, “the irreparable harm to [movants] lies in the fact that
22 ‘once the documents are surrendered pursuant to [this Court’s] order, confidentiality will be lost for
23 all time. The status quo could never be restored . . . Failure to grant a stay will entirely destroy
24 appellants’ rights to secure meaningful review.’” *Center for Int’l Environmental Law v. OUSTR*,
25 240 F. Supp. 2d 21, 23 (D.D.C. 2003) (quoting *Providence Journal Co. v. FBI*, 595 F.2d 889, 890
26 (1st Cir. 1979)) (granting stay pending appeal in FOIA case); *see also, e.g., United States v. Phillip*
27 *Morris, Inc.*, 314 F.3d 612, 621-22 (D.C. Cir. 2003) (“disclosure of privileged documents to an
28

1 adverse party” constitutes “irreparable harm”). This case clearly meets the standard for irreparable
2 harm.

3 **B. This Case Presents Substantial Issues On Appeal.**

4 To satisfy the “substantial issues” factor, a petitioner “need not demonstrate that it is more
5 likely than not that [it] will win on the merits”; rather, it must show “a probability of success on the
6 merits” or that “serious legal questions are raised” by the appeal. *See Leiva-Perez*, 640 F.3d at 967
7 (citing *Abbassi v. I.N.S.*, 143 F.3d 513, 514 (9th Cir. 1998)). “Serious questions need not promise a
8 certainty of success, nor even present a probability of success, but must involve a ‘fair chance of
9 success on the merits.’” *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991) (quoting
10 *National Wildlife Fed’n v. Coston*, 773 F.2d 1513, 1517 (9th Cir. 1985)).

11 Petitioner unquestionably satisfies these tests as well: there are serious questions about the
12 court’s underlying ruling in in four key ways. First, the court erred in holding that the anonymity
13 of people using email addresses cannot be protected by the First Amendment. Second, it erred in
14 holding that the individuals’ associations with the Ecuador campaign are not protected by the First
15 Amendment. Third, it erred legally in holding that the fact that IP logs are collected by ISPs
16 eliminates the privacy interests users have in their locations and erred factually in asserting that IP
17 logs are public. Finally, the Magistrate erred in finding that the subpoenas as a whole could not be
18 quashed, regardless of their validity and constitutionality, unless all those named in the subpoena
19 participate in the motion to quash.

20 **1. Email Addresses Are Protected by the First Amendment Right to Speak**
21 **Anonymously.**

22 In sharp contrast to this settled case law, the Magistrate Judge here erred by asserting, with
23 no supporting authority, that no anonymity can attach to email addresses. The Court asserted:
24 “Although the Doe movants may believe that using their email addresses will protect their
25 identities, that belief is simply not reflected by the reality of the world we live in.” Order at 14.

26 In the first published case addressing Internet anonymity of non-parties, *Doe v.*
27 *2theMart.com, Inc.*, the court observed, “Internet anonymity facilitates the rich, diverse, and far
28 ranging exchange of ideas,” 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001); *see also Doe v.*

1 S.E.C., No. 11-cv-80209 CRB, 2011 WL 5600513 (N.D. Cal. Nov. 17, 2011) (“the Ninth Circuit
2 [has] recognized a protectable speech interest in ISP subscriber information”). Notably, in both
3 cases, as here, the question was when an ISP can be required to identify a user from an email
4 address. The Magistrate mistakenly contrasted this situation with the one in *Mount Hope Church*
5 *v. Bash Back!*, No. 11-cv-00536 RAJ, *rev’d on other grounds*, 705 F.3d 418 (9th Cir. 2012), where
6 the Court held that a subpoena that seeks to tie anonymous critics’ identities to their statements
7 must be scrutinized closely so as not to chill expressive activity. Order at 13. The Magistrate
8 asserted that, unlike *Mount Hope Church*, Chevron was not seeking to link the Movants’ names to
9 any particular statement. But this is simply not true. Chevron’s discovery is admittedly *precisely*
10 *intended* to tie the Movants’ specific identities to the content of their communications it already
11 obtained from Mr. Donziger’s hard drive, so that it can demonstrate their alleged role in the “legal
12 and public relations strategies.” Indeed, if the Movants’ identities are not to be tied to their specific
13 speech about Ecuador campaign, it is difficult to imagine how their identities qualify as “likely to
14 lead to discoverable evidence” as required by Rule 26.²

15 **2. Chevron’s Request for the IP Logs of Its Critics in Order to Inquire into**
16 **the Critics’ Associations Clearly Implicates Those Critics’ Right to Free**
17 **Association.**

18 The Supreme Court has made clear that infringements on freedom of association may
19 survive constitutional scrutiny only when they “serve compelling state interests, unrelated to the
20 suppression of ideas, that cannot be achieved through means significantly less restrictive of
21 associational freedoms.” *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). The
22 Magistrate erred in assuming that all of the Non-Party Movants had to be a part of the same formal
23 association. Order at 15. There is no such requirement in the law. *Perry v. Schwarzenegger*, 602
24 F.3d 976, 981 (9th Cir. 2010) (association protection can stretch across multiple entities); *Britt v.*

25 _____
26 ² Chevron also seeks to have it both ways: claiming that it knows the identities of the individuals
27 for purposes of saying that the individuals have no right to anonymity, even going so far as
28 attempting to individually name them, while at the same time claiming that it does not know the
identities for purposes of whether they actually need the information. This inconsistency alone
should be a basis for quashing the subpoena.

1 *Superior Court*, 20 Cal. 3d 844, 858 (1978) (association protection applied to numerous individuals
2 “who have merely attended” any of multiple organizations’ “numerous meetings”).

3 Even more troubling, the Magistrate mistakenly held that the fact that Chevron’s subpoenas
4 are so broad that they ensnare “subscribers who are in no way affiliated with this litigation”
5 somehow “undercuts” everyone’s claim to First Amendment protection. Yet the protection for
6 associations cannot turn on the scope of the subpoena that seeks to identify them. To hold
7 otherwise, as the Magistrate did, rewards Chevron for issuing an overbroad subpoena.

8 In fact, this Court has already specifically recognized the First Amendment rights of one
9 group to which some of the Does may belong. *See Chevron Corp. v. Donziger*, No. 13-mc-80038,
10 2013 WL 1402727, ECF No. 59 (N.D. Cal., Apr. 5, 2013). In quashing subpoenas issued to
11 Amazon Watch (“AW”), the Magistrate concluded that “there is nothing to suggest that [AW]’s
12 campaigns and speech were more than mere advocacy” protected by the First Amendment. *See*
13 ECF No. 59 at 6. The decision focused on the five areas Judge Kaplan had determined justified
14 discovery – all of which specifically related to the Ecuadorian judgment – and noted that
15 “[i]mportantly, none of those five instances had anything to do with the alleged pressure campaign
16 or [AW].” *Id.* at 7, 8. Here, however, the Magistrate would allow Chevron to circumvent that
17 order and obtain information it was previously prohibited from seeking, and Chevron here admits
18 that it seeks this information because of the participation of the Movants in “legal and public
19 relations strategies.”³ But as the Magistrate previously found, communications about public
20 relations and advocacy work do not fall within the areas Judge Kaplan found warranted discovery,
21 and allowing such discovery here would be inconsistent with the Court’s prior orders and clear
22 error.

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25 _____
26 ³ For example, the Magistrate indicates that owners of two of the email addresses at issue may be
27 employees of Amazon Watch, “a non-party that has campaigned extensively to raise awareness of
28 the environmental situation in Ecuador as it relates to Chevron.” Order at 23. But the Magistrate
concluded Chevron is entitled to discovery because they communicated with Donziger about press
releases, letters to the editor, and the like. *Id.* at 23-24.

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3. Chevron’s Request for the IP Logs of Its Critics in Order to Track Its Critics’ Movements Over Years Clearly Implicates Those Critics’ California Right to Privacy.

Chevron seeks IP logs specifically because they would reveal the location where its critics were every time they logged into their email accounts over the course of nine years. Tracking one’s critics’ movements over the course of nearly a decade surely implicates the right to privacy. The Magistrate did note that no court has found a privacy interest in similar IP logs over a long period of time, Order at 16, and while it seems that this is a question of first impression in this District, that is because Chevron’s attempt here is unprecedented.⁴

More importantly, the Magistrate incorrectly relied on the statement in the ISP’s privacy policies that the ISPs would provide IP logs in response to a valid subpoena to find that the Non-Party Movants have waived any expectation of privacy. Far from being a waiver, however, the terms of service merely beg the question of whether this subpoena is valid, something to be decided according to the large body of case law concerning standards for the protection of information in the possession of ISPs from civil subpoenas. *See, e.g., Anonymous Online Speakers v. U.S. Dist. Court*, 661 F.3d 1168, 1173 (9th Cir. 2011) (the right to speak anonymously online “promotes the robust exchange of ideas and allows individuals to express themselves freely”); *see also Doe v. SEC*, No. 11-mc-80184 CRB (NJV), 2011 U.S. Dist. LEXIS 132983, at *8 (N.D. Cal. Nov. 17, 2011) (finding a “protectable speech interest in ISP subscriber information”).

Finally, the Magistrate made a factual error in holding that “IP logs associated with their email accounts are the addresses visible to the outside world associated with their accounts.” Order at 19. This is untrue. The IP logs of Google and Yahoo! are not publicly visible. A single IP address may be visible to a single recipient of a message, but the flow of IP addresses over nine years collected by an ISP is simply not available from any public place. Indeed, if IP logs were in fact public, Chevron would have no need for these subpoenas.

⁴ The Magistrate’s reliance on *United States v. Forrester*, 512 F.3d 500 (9th Cir. 2008), to find that there can be no privacy interest in IP addresses is inappropriate here. *Forrester* involved a search of a suspect’s outgoing Internet connections, not the production of information tending to show where that suspect had been for the last nine years.

1 **4. The Magistrate Erred in Finding that Chevron’s Subpoenas are**
 2 **Overbroad but Failing to Require Chevron to Present Facts Necessary to**
 3 **Limit Them.**

4 The Magistrate “suspected” that Chevron could have “more closely tailored [its subpoenas]
 5 to defendants’ alleged actions, for example, starting with the filing of a particular environmental
 6 report or the launch of a public relations campaign,” instead seeking everything for nine years.
 7 Order at 21. But despite Chevron’s failure to “present[] the Court with the facts necessary to so
 8 limit the subpoenas,” the Court did not require Chevron to more narrowly tailor the subpoenas.
 9 Order at 21. Particularly in light of the First Amendment and privacy interests at stake, the
 10 Magistrate erred. *See Chevron Corp.*, No. 13-mc-80038, 2013 WL 1402727, at *5 (once a party
 11 makes a prima facie case that a subpoena seeks discovery into First Amendment protected activity,
 12 the burden seeks to the party seeking discovery to show that the subpoena is carefully tailored).

13 **5. The Magistrate’s Finding that the Non-Party Movants Lack Third-Party**
 14 **Standing to Challenge Chevron’s Subpoenas as a Whole Is Contrary to the**
 15 **Law.**

16 Finally, the Magistrate erred in finding that the Non-Party Movants could challenge
 17 Chevron’s subpoenas only as to the email addresses they own. It is well-settled law that, in First
 18 Amendment cases, there are “unique standing considerations . . . that tilt dramatically toward a
 19 finding of standing.” *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2011) (citations omitted).
 20 The subpoenas clearly impact speech – they were issued to identify and track the location of those
 21 who participated in the Ecuador campaign’s “legal and public relations strategies” as to all of those
 22 whose information is sought. And the chilling effect of this strategy is clear even as to those who
 23 could not move to quash. As with other First Amendment cases, these unconstitutional subpoenas
 24 should not be enforced by this Court regardless of who the movants are.

25 **C. Chevron Will Not Be Harmed Significantly By a Stay.**

26 The third factor the Court must consider in determining whether a stay is appropriate is
 27 whether issuance of the stay will substantially injure the other parties interested in the proceeding.
 28 *See, e.g., Nken*, 556 U.S. at 426. For two principal reasons, Chevron will not be harmed by a stay
 pending appeal.

1 First, Chevron has no pressing need for the information. As to the movants' identities, they
2 have claimed that they already know who the Movants are – repeatedly and confidently. They have
3 made no showing that they will be unable to carry their burden of proof with regard to these
4 unnamed parties in the upcoming trial if needed (which seems unlikely). As to the movants' IP
5 addresses, both Google and Yahoo! have indicated that it is very unlikely that they actually have
6 the responsive information, given their standard retention practices. But even should they happen
7 to still have some fraction of what is sought here, Chevron would need several additional steps to
8 link that information with the defendants in order to use it to support its conspiracy theories. Yet
9 discovery is closed in the case and the trial is set for October 15. This information was sought just
10 at the very end of discovery by Chevron, yet to be useful in even the most marginal way, it must be
11 combined with additional information (to prove, for instance as Chevron suggests, that these
12 accounts were actually used by Defendants in some way that is relevant to the conspiracy).

13 Second, the minimal impediment that a stay will cause to the investigation can be reduced
14 further by Chevron seeking to expedite the appeal, something it has not done. *See e.g., Center for*
15 *International Environmental Law*, 240 F. Supp. 2d at 24. “Weighing this . . . hardship against the
16 total and immediate divestiture of [movants'] rights to have effective review in [the court of
17 appeals],” there is no doubt that “the balance of hardship . . . favor[s] the issuance of a stay.”
18 *Providence Journal Co.*, 595 F.2d at 890. Because Petitioner would clearly suffer irreparable
19 injury in the absence of a stay, while Chevron will suffer at most a minor inconvenience if this
20 Court stays its Order, the balance of hardships tips sharply in favor of a stay pending appeal.

21 **D. The Public Interest Favors a Stay.**

22 The fourth stay factor the Court must consider in determining whether a stay is appropriate
23 is whether issuance of the stay is in the public interest. *See, e.g., Nken*, 556 U.S. at 426. A
24 compelling interest exists in protecting against the loss of constitutionally-protected rights. *See,*
25 *e.g., Sammartano v. First Judicial Dist. Court, in & for Cnty. of Carson City*, 303 F.3d 959, 974
26 (9th Cir. 2002) (noting the “significant public interest in upholding First Amendment principles”).⁵

27 ⁵ *See also, e.g., Homans v. Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001) (“[W]e believe that
28 the public interest is better served by following binding Supreme Court precedent and protecting
(footnote continued on following page)

1 While Chevron certainly has an interest in seeking information relevant to its case, it has not even
 2 alleged, much less proven that this information is of more than marginal relevance to its case. In
 3 the absence of a specific showing of a compelling interest in this information that trumps the
 4 interest of the Movants in enjoying the protection of the constitution, the public interest favors
 5 preserving the status quo until a final determination of Movants claims has been made.

6 III. CONCLUSION

7 The four *Hilton* and *Nken* factors weigh in favor of staying this Court's Order pending
 8 appeal. Petitioner has appealed the ruling and respectfully requests a stay pending determination of
 9 its appeal.

10 DATED: October 4, 2013

Respectfully submitted,

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(footnote continued from preceding page)

22 the core First Amendment right of political expression.”); *Iowa Right to Life Comm’ee, Inc. v.*
 23 *Williams*, 187 F.3d 963, 970 (8th Cir. 1999) (finding that a district court did not abuse its discretion
 24 in granting a preliminary injunction because “the potential harm to independent expression and
 25 certainty in public discussion of issues is great and the public interest favors protecting core First
 26 Amendment freedoms”); *Elam Constr., Inc. v. Regional Transp. Dist.*, 129 F.3d 1343, 1347 (10th
 27 Cir. 1997) (stating, in context of a request for injunctive relief, that “[t]he public interest ... favors
 28 plaintiffs’ assertion of their First Amendment rights”); *G & V Lounge, Inc. v. Mich. Liquor Control*
Com’n, 23 F.3d 1071, 1079 (6th Cir. 1994) (noting “it is always in the public interest to prevent the
 violation of a party’s constitutional rights”); *Cate v. Oldham*, 707 F.2d 1176, 1190 (11th Cir. 1983)
 (holding the “strong public interest in protecting First Amendment values” favored preliminary
 injunctive relief).

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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

CHEVRON CORP.,

Plaintiff,

v.

STEVEN DONZIGER, *et al.*

Defendants.

) Case No. 5:12-mc-80237 CRB (NC)

) **[PROPOSED] ORDER GRANTING *EX***
) ***PARTE* APPLICATION FOR STAY OF**
) **ORDER PENDING APPEAL**

) Fed. R. Civ. P. 72(a)
) Civ. L. R. 72-2

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Good cause appearing, IT IS SO ORDERED that Non-Party Movants' *Ex Parte* Application for Stay of Order Pending Appeal is **GRANTED**.

IT IS SO ORDERED.

DATED: _____

HON. CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE