UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MOTION TO QUASH OR MODIFY SUBPOENA AND INCORPORATED MEMORANDUM OF LAW

MCSquared PR, Inc. ("MCSquared"), specially appearing to challenge this Court's jurisdiction, and through its undersigned counsel, moves, pursuant to Federal Rule of Civil Procedure 45(c)(3), and any applicable local rules, for entry of an order quashing or modifying the subpoena ("Subpoena") served on MCSquared by Chevron Corp. ("Chevron") pursuant to this Court's November 25, 2014 Order [ECF No. 8] granting Chevron Corporation's ("Chevron") Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery from MCSquared PR, Inc. for Use in Foreign Proceedings (the "Application") [ECF No. 2].[1] In support thereof, MCSquared states as follows:

[1] MCSquared believes that the Court should dispose of this proceeding in its entirety as set forth in the accompanying Motion to Vacate and Incorporated Memorandum of Law ("Motion to Vacate") based *inter alia* on the fact that MCSquared neither "resides" nor is "found" in the Southern District of New York. MCSquared expressly reserves all rights regarding this Court's lack of jurisdiction to grant an order directed to MCSquared under 28 U.S.C. § 1782. MCSquared is submitting this motion to preserve its rights in connection with the discovery sought through the Subpoena. The instant motion shall not be construed in any way as a waiver of any of the arguments advanced by MCSquared in its Motion to Vacate.

PROCEDURAL HISTORY

1. On November 24, 2014, Chevron filed the Application requesting judicial assistance pursuant to 28 U.S.C. § 1782 [ECF No. 2]. The Application was supported by a Memorandum of Law [ECF No. 3] and by the Declaration of Anne Champion [ECF No. 4] which attached 210 exhibits.

2. On November 25, 2014, the Court entered an order granting the Application (the "1782 Order") [ECF No. 8] which allowed Chevron to seek wide-ranging discovery from MCSquared.

3. On December 1, 2014, Chevron served MCSquared with a Subpoena pursuant to the 1782 Order. Chevron and MCSquared entered into a stipulation extending the Subpoena's return date to December 22, 2014 [ECF No. 17].

4. MCSquared, contemporaneously herewith, filed the Motion to Vacate advancing several arguments as to why the 1782 Order should be vacated. For the sake of brevity, MCSquared adopts herein all of the arguments advanced in the Motion to Vacate.

5. The Motion to Vacate, if granted, will moot the instant motion. However, to the extent that the Motion to Vacate is denied, MCSquared, as set forth below, has substantial grounds to quash, or in the alternative, modify the Subpoena.

STANDARD

A challenge to a discovery request under 28 U.S.C. § 1782 may be made by moving to quash the subpoena or other discovery pursuant to Federal Rule of Civil Procedure 45(c)(3). *See Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.d 76, 87 (2d Cir. 2012); *In re Edelman*, 295 F.3d 171, 173-75 (2d Cir. 2002)(same).

MEMORANDUM OF LAW

A. Chevron's Failed to Meet the Statutory and *Intel* Factors to obtain Discovery from MCSquared pursuant to 28 U.S.C. § 1782.

As set forth in detail in the accompanying Motion to Vacate, Chevron is not entitled to seek discovery from MCSquared pursuant to 28 U.S.C. § 1782. MCSquared hereby adopts by reference the arguments advanced in its Motion to Vacate. If the 1782 Order is vacated, as it should be, then the Subpoena should also be quashed.

B. The Subpoena Must be Quashed or Modified Because It Requests Discovery that is Irrelevant, Overbroad, Burdensome, and Intrusive

If the Court were to find that discovery is authorized under 28 U.S.C. § 1782, "the federal discovery rules, Fed. R. Civ. P. 26-30, contain the relevant practices and procedures for the taking of testimony and the production of documents." *Weber v. Finker*, 554 F.3d 1379, 1384-85 (11th Cir. 2009). Thus § 1782 subpoenas will be scrutinized for relevance against Rule 26's relevancy standards. *In re Roz Trading, Ltd.*, 469 F. Supp. 2d 1221, 1230 (N.D. Ga. 2006).

As set forth in detail in the Motion to Vacate, Chevron is purportedly seeking discovery from MCSquared on the theory that MCSquared was used by or conspired with the Republic of Ecuador ("Ecuador") to: (a) promote the enforcement of the Judgment; (b) finance the Lago Agrio Plaintiff Related Parties; and (c) intimidate or tamper with witnesses [ECF No. 3 at 33-36]. The discovery Chevron seeks is purportedly relevant to litigation pending in Brazil and Argentina concerning the enforcement of a judgment which was obtained, and fully briefed before the court of last resort, several months before MCSquared began acting for Ecuador. Moreover, as set forth in the Affidavit of Maria Garay appended to the Motion to Vacate, MCSquared did not play a role and has no knowledge about the three proffered reasons by Chevron as its predicate to seek discovery from MCSquared. Similarly, MCSquared set forth in detail in the Motion to Vacate the lack of relevance of the discovery sought from MCSquared to the litigations concerning Chevron pending in the Courts of Argentina, Brazil and Gibraltar and those arguments are incorporated herein by reference.

Additionally, Chevron's requests for documents are extremely overbroad, burdensome and/or intrusive. For example:

- Request Nos. 1, 3, and 7 seeks a copy of all documents concerning MCSquared's work on behalf of Ecuador.

- Request No. 2 seeks documents regarding the negotiations of the contract between MCSquared and Ecuador, a matter entirely irrelevant to pending litigations in Argentina, Brazil and Gibraltar.

- Request No. 5 seeks the financial records of MCSquared which are wholly irrelevant in light of Garay's sworn testimony that MCSquared did not finance on behalf of Ecuador or any other third party the Lago Agrio Plaintiff Related Parties.

- Request Nos. 16, 17 seek documents relating to MCSquared registration pursuant to the Foreign Agents Registration Act ("FARA") which are irrelevant and intrusive to any of the litigations identified in the 1782 Application filed by Chevron.

- Request Nos. 19-21 seeks documents concerning financial matters irrelevant to any of Chevron's proffered reasons for seeking discovery from MCSquared and its highly intrusive.

- Request Nos 27-28 seeks documents concerning Ecuador's General Comptroller's and Attorney General's Offices which are irrelevant to any of Chevron's proffered reasons for seeking discovery from MCSquared and are highly intrusive.

Similarly, Chevron's designated topics of examination concern matters that are highly confidential, irrelevant to the pending litigations in Argentina, Brazil and Gibraltar, and extremely intrusive. For example:

- Topic No. 1 seeks testimony regarding the contract entered into by MCSquared and Ecuador, which as already testified to by Garay, had nothing to do with the nefarious purposes that Chevron speculated in its filings with the Court.

- Topic No. 2 seeks testimony regarding all of the work performed by MCSquared on behalf of Ecuador, even though none of the work performed by MCSquared bears any relationship to the Lago Agrio litigation saga.

- Topic No. 4 seeks testimony regarding MCSquared's compensation received from Ecuador which is completely irrelevant the litigations pending in Argentina, Brazil and Gibraltar and extremely intrusive.

- Topic No. 6 seeks testimony regarding MCSquared's communications with Ecuador, even though none of the work performed by MCSquared bears any relationship to the Lago Agrio litigation saga.

- Topic Nos. 12, 16 and 17 seeks testimony regarding matters wholly unrelated to the litigations pending in Argentina, Brazil and Gibraltar including the FARA registration and the Ecuadorian's Attorney General and the Comptroller's Office investigation.

Moreover, the Subpoena is extremely burdensome as it would require MCSquared to expend an inmense amount of resources, in both money and employee time, searching for, reviewing, and then potentially producing responsive materials. As noted above, the document requests, essentially encompass all documents created by MCSquared during its rendition of services to Ecuador, and reviewing, compiling, and producing such documentation would be a monumental task that can severely impact MCSquared to conduct its business.

Courts are especially reluctant to impose undue burdens on non-parties. *See In the Matter of the Application of Time, Inc.*, No. 99-2916, 1999 WL 804090, at *8 (E.D. La. Oct. 6, 1999) (denying document production component of subpoena to non-party where it would consume "tens of thousands of dollars in man-hours and legal fees"); *Jack Frost Labs, Inc. v. Physicians Nurses Mfg. Corp.*, No. 92 CIV.9264 (MGC), 1994 WL 9690, at *2 (S.D.N.Y. Jan. 13, 1994) ("[t]he most obvious burden is borne by non-party witnesses, and we are instructed to be particularly sensitive to any prejudice to non-litigants drawn against their will into the legal disputes of others"); *Cantaline v. Raymark Inds.*,

Inc., 103 F.R.D. 447, 452 (S.D. Fla. 1984) ("Federal Rules of Civil Procedure were not intended to burden a non-party with a duty to suffer excessive or unusual expenses in order to comply with a subpoena duces tecum"). Furthermore, a request is deemed unduly burdensome where the requesting party seeks documents from a corporation that did not exist when the relevant incident took place. *See Kang v. Nova Vision, Inc.*, 2007 WL 1879158, at *2-3 (S.D. Fla. June 26, 2007). This means that a discovery request under § 1782 must be "directly related to the foreign proceeding" and "within a reasonable time period" from the relevant incident. *See In re Application of Mesa Power Group, LLC*, 878 F. Supp. 2d 1296, 1306 (S.D. Fla. 2012).

Whether a subpoena imposes an "undue burden" upon a non-party turns on "such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed." *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 53 (S.D.N.Y. 1996). Even if the discovery requested is deemed relevant, discovery can still be denied or limited due to the undue burden it imposes. *See Application of Time, Inc.*, 1999 WL 804090, at *8 (denying discovery pursuant to 28 U.S.C. § 1782 where responsive documents requested from non-party would number in the hundreds of thousands).

Here, MCSquared came into existence well after the mass of operative facts concerning the underlying litigation in foreign courts relating to the Lago Agrio

litigation saga. The discovery sought by Chevron is not even distantly relevant to the litigation pending before the courts of Argentina, Brazil and Gibraltar. In short, the Subpoena served by Chevron contains overreaching demands upon MCSquared, a non-party, for documents that may satisfy Chevron's speculative curiosity into MCSquared's business affairs without even bothering to mask the Subpoena as a tool of relevant discovery.

C. The Discovery Sought is Highly Confidential and Potentially Privileged

In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the Supreme Court noted that the potential disclosure of confidential information pursuant to 28 U.S.C. § 1782 may be a reason to deny discovery. *Intel*, 542 at 266. Even if the relevance of the discovery sought is ultimately established, it is insufficient to overcome applicable privileges. *See United Kingdom v. U.S.*, 238 F.3d 1312, 1320 (11th Cir. 2001). "[T]he Supreme Court [has] emphasized that § 1782(a) itself shields privileged material." *In re Clerici*, 481 F.3d 1324, 1333 n.12 (11th Cir. 2007) (citing *Intel* 542 U.S. at 260). This shield extends to matters privileged under foreign law. *In re Comm'rs Subpoenas*, 325 F.3d 1287, 1305 (11th Cir. 2003) (disapproved of on other grounds).

As set forth in the Motion to Vacate, the documentation sought by Chevron is property of Ecuador and MCSquared is contractually bound to keep it confidential. More importantly, the documentation sought may be privileged and those privileges belong to Ecuador. For example, the documentation sought may be subject to the

deliberate process privilege or can otherwise be withheld under the Foreign Sovereign Immunities Act, the Act of State Doctrine, or may be illegal to be produced under the laws of Ecuador.

CONCLUSION

For all of these reasons, MCSquared PR, Inc. respectfully requests that the Court grant its Motion and enter and Order quashing the Subpoena served by Chevron in its entirety or, in the alternative, substantially narrowing the discovery requests submitted by Chevron. In addition, to the extent that the Court orders the production of any documents, MCSquared PR, Inc. respectfully requests that any materials produced be subject to a stipulated confidentiality order providing that the documents could only be filed under seal in the proceedings identified by Chevron in its 28 U.S.C. § 1782 Petition. MCSquared PR, Inc. also respectfully requests any further relief that the Court deems just and proper.

Dated: Miami, Florida
December 15, 2014

Respectfully submitted,

LAW OFFICES OF RODRIGO S. DA SILVA, P.A.
1001 Brickell Bay Drive, 9th Floor
Miami, Florida 33131
E-mail: rodrigo@rdasilvalaw.com
Telephone: (305) 615-1434
Facsimile: (305) 615-1435

By: /s/ *Rodrigo S. Da Silva*
Rodrigo S. Da Silva, Esq.
Counsel for MCSquared PR, Inc.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that a true and correct copy of the foregoing MOTION TO QUASH OR MODIFY SUBPOENA AND INCORPORATED MEMORANDUM OF LAW was served on December 15, 2014 upon all counsel of record by filing it on that day by means of the U.S. District Court for the Southern District of New York's Case Management/Electronic Case Filing (CM/ECF) system.

Dated: Miami, Florida
December 15, 2014

By: /s/ *Rodrigo S. Da Silva*
Rodrigo S. Da Silva, Esq.