

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re Application of RODRIGO PEREZ )  
PALLARES and RICARDO REIS VEIGA for an ) M-19-111  
Order to Conduct Discovery for Use in Foreign )  
Proceedings )  
)  
In re Application of CHEVRON )  
CORPORATION for an Order Pursuant to 28 )  
U.S.C. § 1782 to Conduct Discovery for Use in )  
Foreign Proceedings )  
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**DECLARATION OF JOSEPH A. BERLINGER**

I, JOSEPH A. BERLINGER, hereby declare as follows:

1. I am the producer and director of the documentary film entitled *Crude* and the managing member of the film’s holding company, Crude Productions, LLC. I make this declaration based on personal knowledge and submit it in opposition to the *ex parte* applications of Chevron Corporation, Rodrigo Pérez Pallares, and Ricardo Reis Veiga (collectively, the “Chevron Parties”) filed, pursuant to 28 U.S.C. § 1782, to conduct discovery for use in foreign proceedings (the “Applications”). If called as a witness, I would testify to the same as stated herein.

2. In this proceeding, the Chevron Parties seek this Court’s assistance to obtain over 600 hours of raw footage, or “outtakes,” produced in connection with the filming of my documentary. *Crude* examines the lawsuit brought in Ecuador by tens of thousands of Ecuadorians against Chevron over oil spills, toxic dumps and other contamination in the Amazon rainforest (the “Lago Agrio Litigation”), as well as Chevron’s denial of the allegations against it. The Chevron Parties purportedly seek the outtakes for use in the Lago Agrio Litigation, as well as a criminal prosecution in Ecuador against Messrs. Pérez and Veiga and an international arbitration.

3. Only Crude Productions LLC and I have custody, possession or control over the raw footage sought by the Chevron Parties. Respondents Michael Bonfiglio, Third Eye Motion Picture Company, Inc. and @radical.media do not. I do not object to producing to the Chevron Parties the two publicly released versions of *Crude* – the “Netflix streaming version” and the final DVD release – which are the only versions of the film that were released to the public and are annexed hereto as Exhibits A and B, respectively.

4. For the reasons explained in this declaration and in the accompanying memorandum of law, I strongly oppose the Applications because the material contained in the raw footage of *Crude* is confidential and protected by the journalists’ privilege. In addition, the disclosure of this confidential material would directly and irreparably impair my ability to make similar films in the future.

### **My Film Career**

5. Over the last twenty years, I have worked as a filmmaker, journalist and photographer. A significant part of my career has been focused on producing and directing feature-length documentary films. I do not use voiceover narration in my documentaries, allowing audiences to draw their own conclusions about what they are viewing onscreen. I create documentaries for the purpose of investigating and telling the story of people, places and events that raise important issues but might otherwise go unnoticed.

6. I began creating documentary films in 1989. My first documentary was *Outrageous Taxi Stories*, an independently-produced short film about New York City taxi drivers. The following year, I began collaborating with Bruce Sinofsky to create *Brother’s Keeper*, which followed the murder trial of Delbert Ward in the rural community of Munnsville, New York and explored possible motives for the crime, the police investigation, the reaction of the community and the questionable tactics employed by the District Attorney. Named 1992’s

“Best Documentary” by the Directors Guild of America, the New York Film Critics Circle and the National Board of Review, *Brother’s Keeper* appeared on the “10 Best Films of the Year” lists of over 50 major critics.

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alleged murderer of hundreds of handicapped children, experimenting on the remains of his victims for decades after WWII and continually evading justice.

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**Production of *Crude***

12. In 2005, I began working on *Crude*, the documentary film at issue in this proceeding. That summer, I met an American environmental lawyer named Steven Donziger, who is one of the lead attorneys representing the plaintiffs in the Lago Agrio Litigation against Chevron. In that lawsuit, the plaintiffs claim that they suffered severe injuries to their health and habitat as a result of massive contamination allegedly caused by Chevron's irresponsible oil drilling operations and inadequate remediation following the company's exit from Ecuador in the 1990's. Chevron denies liability and contests the alleged harm. Donziger urged me to create a documentary film to tell his clients' story.

13. Upon visiting the Ecuadorian Amazon for the first time, I witnessed the petrochemical sludge and the allegedly toxic wastewater that for decades has been dumped into

open pits or directly into the water and soil -- a practice implemented when Texaco, Chevron's predecessor, began drilling for oil there in the late 1960's and early 1970's. I spoke with people who were sick and dying from cancer and other diseases they believed were the result of oil spills and toxic waste dumping. I also met with Pablo Fajardo, the lead attorney in Ecuador for the plaintiffs in the Lago Agrio Litigation.

14. While in Ecuador, I committed myself to making a film to tell the story of the Lago Agrio Litigation and the events and people surrounding the trial. However, I made it clear to Donziger that I was not going to create an environmental and human rights advocacy film with a single point of view. *Crude*, like my prior documentary films, would present a complex situation from multiple perspectives without revealing my viewpoint, allowing each audience member to come up with his or her own conclusion about the events they had witnessed onscreen. This would not be a one-sided diatribe, but rather a film that would reveal the complexities of the Lago Agrio Litigation, with Chevron's many arguments well represented. *Crude* would be an independent film not in the control of Donziger or the Lago Agrio plaintiffs.

15. Principal photography for *Crude* began in November 2005 and lasted through the August 2008. During those three years, I filmed in numerous locations in Ecuador, as well as many cities in the United States and in London. In an effort to accomplish my goal of telling a balanced story, I tried to meet and gain access to (or at least capture on film) all of the major participants in the Lago Agrio Litigation including the attorneys for the plaintiffs and Chevron, the presiding Judge, and court-appointed experts. I sought out members of the community which was the focus of the lawsuit including the indigenous Cofán people, local medical professionals and community leaders. I reached out to Chevron and negotiated for almost seven months to obtain access to senior Chevron executives. Chevron ultimately agreed that I could interview

Sara McMillen, Chevron's Chief Environmental Scientist and Ricardo Reis Veiga, one of the applicants here and the Managing Counsel for Chevron Latin America.

16. I believe that *Crude* presents Chevron's point-of-view along with that of all the other participants in this significant dispute without taking sides in the litigation. The film contains several lengthy clips of an interview with Ms. McMillen discussing the extensive research conducted by Chevron to assess the environmental impact of Chevron's operations in the region. The film also contains an interview with Mr. Veiga discussing the remediation process and the validity of the release the government of Ecuador gave to Chevron as well as the role of PetroEcuador as the alleged actual polluter of the region.

17. I was pleased that critics who reviewed the film focused on its even-handed and balanced treatment of the subject matter. For example, A.O. Scott, writing for the New York Times wrote:

**"While Mr. Berlinger's sympathies clearly lie with the oddly matched pair of lawyers — Steven Donziger, a big, outgoing American, and Pablo Fajardo, a wiry, diffident Ecuadorean — who are consumed by the now 16-year-old suit against Chevron, he is fair-minded enough to include rebuttals from the company's executives and in-house environmental scientists. And since this is, in part, a courtroom drama, both sides have a chance to be heard"**

Similarly, Scott Foundas of LA Weekly wrote:

**"In the gripping, intrinsically cinematic *Crude*, (Berlinger) does an equally superb job of taking us through the twists and turns of a legal battle nearly as long as the Amazon itself, and with no discernible end in sight. As usual, Berlinger presents both sides of the case as fairly and non-judgmentally as possible, never inserting himself into the narrative and turning the audience, in effect, into the jury."**

Here are additional reviews that highlight the fact that *Crude* is an even-handed presentation of the Chevron's dispute with the inhabitants of the Ecuadorian rainforest:

**"You've got to hand it to Berlinger for his even-handed work on *Crude*, a film that depicts immense sadness and stunning corporate villainy. Yet Berlinger offers a balanced look at the conflict. Chevron gets the chance to tell its story and Berlinger never pulls any sort of "gotcha" move on them. It's just that the**

facts are so damning, even given the full-bore public-relations disinformation campaign by Chevron. The story Berlinger tells is about the callously deadly and widespread despoiling of the Ecuadorian rain forest by Texaco -- now owned by Chevron -- and Chevron's refusal to accept responsibility for it. **It's infuriating, at the least, to look at and listen to evidence - and listen to Chevron's lawyers and spokespeople denying all the things they so obviously are guilty of. But Berlinger tells the story calmly, carefully, offering both sides the opportunity to present a case.**" Marshall Fine, *The Huffington Post*

**"Riveting... Berlinger clearly knows about balance in covering an important issue."** - James Nelson, *Agence France Presse*

A fascinating documentary...**well-balanced**...all the more incisive for its decision to eschew editorializing and let the evidence speak for itself." - Allan Hunter, *The Daily Express*

**"Sophisticated... a compelling, multifaceted cinematic surrogate trial... Berlinger once again shows his skill for even-handed humanist storytelling."** - Simon Abrams, *The L Magazine*

**"Absorbing...provocative yet conscientiously well balanced."** - *The Metro*

**"Environmental documentaries in the last decade have had the predictability of an evangelical sermon or a going-out-of-business sale: The end is nigh, but act now and the bounty can still be yours. Crude is something else.** A legal thriller, it's a three-year investigation into the disaster environmentalists call the "Amazonian Chernobyl" that **offers both sides of the story and leaves the viewer in the position of jury.** What makes *Crude* worthy of the overused term "epic" is the way the case symbolizes a host of contemporary issues: the iron-fistedness of multinational corporations; environmental despoliation; the disappearance of indigenous cultures; and the power of celebrity and the media to influence justice." - Liam Lacey, *Toronto Globe and Mail*

**"Enthralling... Although he follows events from the perspective of the Ecuadorians, Berlinger maintains a refreshing and clear-sighted intellectual honesty: Chevron's representatives are allowed plenty of space to make their arguments."** - *The Lancet*

**"A tougher sell is Joe Berlinger's "Crude," about a class-action suit filed by 30,000 indigenous Ecuadoreans against the US corporation Chevron for despoiling the Amazon rainforest. I say it's a tough sell because the movie's really about process -- about an uphill David-vs-Goliath fight that takes place over months and years and in various offices and courtrooms. We see the awful results of toxic pollution -- cancers, sores on two-week-old infants -- and the movie's savvy enough to let us hear the corporate response in full."** - Ty Burr, *Boston Globe*

18. The film debuted in January 2009 at the Sundance Film Festival and was released theatrically by First Run Features. *Crude* has received numerous accolades including being named one of the Top Five Documentaries of the Year by the National Board of Review and Best International Green Film at Berlin's prestigious Cinema For Peace, as well as over 20 other international awards from a variety of film, environmental and human rights organizations.

### **Confidentiality Arrangements and My Relationships of Trust with Sources**

19. In order to make *Crude*, I needed to obtain permission from the people involved in the Lago Agrio Litigation to allow me to film them, often in sensitive, painful or conflict-ridden situations. I entered into agreements with some of my sources, promising that I would not use certain footage in which they appeared without first obtaining their express authorization. Other times, there was a standing agreement with my subjects that they could request that the camera be turned off if they became uncomfortable. With respect to this footage, there also was an implicit understanding that the moments leading up to the request to turn off the camera would not be included in the film. I offered these or other confidentiality arrangements both to representatives of the plaintiffs and Chevron.

20. The types of confidentiality arrangements described above are my stock in trade. The inability to honor the arrangements I have made with my subjects would seriously impair my ability to undertake these kinds of long-term investigative reports in the future.

21. With all of the subjects in *Crude*, I needed to work hard to build and maintain relationships of trust. They believed in my honesty and journalistic integrity, trusting that I would take the hundreds of hours of raw footage (from a multitude of sources) and craft an accurate portrayal of events by laboring intensively in the edit room. There was an implicit (and sometimes explicit) understanding that the materials I decided to leave out of the finished product would remain confidential and not be turned over to third parties for a purpose other than

the making of the film. This expectation of confidentiality countered the subjects' legitimate concerns that releasing raw footage into the wrong hands risks that material being taken out of context and used against them.

22. It is often the case that the subjects of a proposed new documentary contact the subjects of my previous documentaries to gauge my integrity and to determine how I treat confidential material, therefore a breach of these confidentiality arrangements would hurt future efforts to make these kinds of films.

### **Prior Attempts to Obtain My Outtakes**

23. As discussed above, I am a documentary filmmaker who has produced several films about ongoing lawsuits. Not surprisingly, the raw footage from my films is often of interest to the litigants for use in their cases. However, I have never released that footage to any third party (voluntarily or otherwise) and, in the past, I have successfully opposed subpoenas demanding that I produce outtakes. Prior to the release of *Paradise Lost*, which covered events surrounding a capital murder trial, the prosecutor and one of the three defendants in the case issued subpoenas to me and other parties involved in the production of the film to obtain audio tapes of interviews conducted in connection with the film. We opposed the subpoenas on the ground that the audio tapes were protected from disclosure under the journalists' privilege.

24. In two separate orders entered on February 22 and March 11, 1994, Judge David Burnett of the Circuit Court of Craighead County, Arkansas quashed the subpoenas. Citing to the "qualified privilege in favor of the press engaged in the newsgathering process," the court held that the issuers had not overcome their burden of showing that "the materials sought by the subpoenas are relevant to any claim or defense in this litigation" or that "the information sought is unavailable from other sources." A copy of these orders is attached as Exhibit C.

25. In January of this year, I received a request from Jorge A. Mestre, Esq., the attorney for the individual Applicants, Messrs. Pérez and Veiga, requesting access to information, documents and unused footage from the production of *Crude*. In a letter dated January 27, 2010, my counsel, Maura Wogan, informed Mr. Mestre that we could not comply with the request without “violating [our] longstanding policy against disclosure of unused footage and/or editorial materials” because to do so “would seriously impair [our] ability to do future investigative filmmaking by undermining [our] credibility with potential subjects or sources requesting confidentiality.” A copy of Ms. Wogan’s letter is attached as Exhibit D.

**Why I Strongly Object to Producing the Raw Footage**

26. On or about April 10, 2010, I was served with copies of the Applications, in which the Chevron Parties ask this Court to require me to produce all of the *Crude* footage that was shot, acquired or licensed in connection with the film and to depose me to authenticate the footage. I strongly object to the production of the raw footage from *Crude* because it is protected by the privilege afforded to me as a journalist.

27. Maintaining my privilege as a journalist not to disclose confidential sources or the raw materials created in connection with the production of my films is fundamental to my ability to create documentary films. The privilege is especially important when I am producing films like *Crude* that focus on ongoing lawsuits. The reason that people on both sides of the dispute are willing to grant me access into their lives and communities is because of the agreements I make to keep material confidential and because they trust that I am a neutral outsider and not an advocate for either side of the controversy.

28. With *Crude*, for example, I was given extensive access to film Donziger, Pablo Fajardo and inhabitants of the Oriente region because they trusted I would tell their story in an accurate and neutral way. They opened their doors to me because they trusted that I was a

journalist and not a participant in the litigation. They also trusted that I would not turn over the raw footage to Chevron to be used against them. In fact, when Donziger was considering the level of access to grant me, I was able to encourage him to trust me, in part, by explaining that I had a history of successfully fighting against third-party attempts to obtain access to raw footage.

29. Chevron also relied on my journalistic credentials and commitments to telling both sides of the story in allowing me to film interviews with the two Chevron representatives. As stated above, I also agreed to allow Chevron certain approval rights.

30. If the subjects of my films believed that the raw footage, as opposed to a release of footage as part of the overall story told by me, would be handed over to third-parties and potentially taken out of context (especially by their adversaries in the lawsuit), they would be far less inclined to trust me and allow me to film them. Without the protections of the journalists' privilege and the confidence that I can honor my commitment to maintain control over my footage, I cannot make documentary films like *Crude*. Thus, requiring me to produce the outtakes from *Crude* would impose a significant burden on me, making it extremely difficult to gain access to critical sources and impairing my ability to make documentaries in the future.

### **The Cofán Meeting Scene**

31. In its papers, Chevron draws attention to a brief scene in the film showing a meeting in the Dureno community of the indigenous Cofán people, suggesting that the meeting “appear[s] to be one of the ‘focus groups’ conducted by Dr. Beristain” as part of the court ordered independent damages analysis conducted by Richard Cabrera. Chevron’s assumptions about this scene are incorrect. The Cofán meeting shown in the film was *not* one of Dr. Beristain’s neutral focus groups commissioned by Cabrera, but a *plaintiffs’ meeting* held *prior* to the commencement of Cabrera’s global assessment study and the appointment of Dr. Beristain to Cabrera’s team. This fact is confirmed by the film itself. Immediately preceding the Cofán

meeting scene, Steve Donziger can be heard telling Trudie Styler, wife of rock musician Sting, about the story of the Cofán people and the nature of the meeting they are about to attend. Mr. Donziger explains:

[The Cofán] are gathering independent of us to meet as a community to talk to *their lawyers* – meaning Pablo [Fajardo] and really myself, although I’m with you and not with the group – to talk about what they want as compensation for all the damage. . . . The meeting will probably be in process when we get there, but it will probably be a really, really interesting day.

*Crude* at 1:15:18-1:15:50.

32. The reason I edited Dr. Beristain from the Cofán meeting scene was not to “conceal” any improper conduct by plaintiffs’ counsel, but to prevent the scene from being misconstrued and taken out of context, just as Chevron is attempting to do here. In fact, I included several scenes in the film in which plaintiffs’ counsel engaged in questionable conduct, including the very scenes Chevron highlights as evidence of plaintiff’s improper “tactics.” As discussed above, I was committed to creating an unbiased depiction of the people and events surrounding the Lago Agrio Litigation to allow the audience to draw its own conclusions about the issues presented onscreen.

33. Before *Crude* was theatrically released, I invited representatives of both Chevron and the Lago Agrio plaintiffs to screen the film and offer their comments and reactions. I asked for their feedback only to ensure the film’s accuracy, but I retained complete editorial control. Chevron’s PR representative reviewed the film on behalf of Chevron and told me that he thought the film was fair and balanced. Plaintiffs’ counsel suggested I change the film in several ways. I rejected all but one recommended change. Because the film condensed several months of activity into a few minutes, I believed that viewers might misconstrue the scene showing Dr. Beristain at the Cofán meeting as a scene showing one of Dr. Beristain’s *subsequent* independent focus group meetings even though, as described above, the independent focus group meetings

had not yet been commissioned. To avoid giving the wrong impression that plaintiffs' counsel were in attendance at the subsequent neutral focus group meetings which, to my knowledge, they were not, I edited the scene for the final release. The original version remains available for viewing on Netflix.

### **Scenes of Judicial Inspections**

34. Chevron speculates that the raw footage will contain evidence relevant to “the conduct of the judicial inspection procedure,” which is allegedly an important issue to the foreign proceedings. However, Chevron’s attorneys, often accompanied by their own cameras and film crew, were present at every public event and hearing concerning the judicial inspections at which the *Crude* cameras were rolling. Neither I nor my crew was ever granted private access to film the judicial inspections. In fact, the scene allegedly showing Donziger’s “pressure tactics” in entering the judge’s chambers was also captured by Chevron’s cameras and the Ecuadorian news media. Thus, my raw footage is not the only source of the information sought by Chevron.

### **The Criminal Prosecutions**

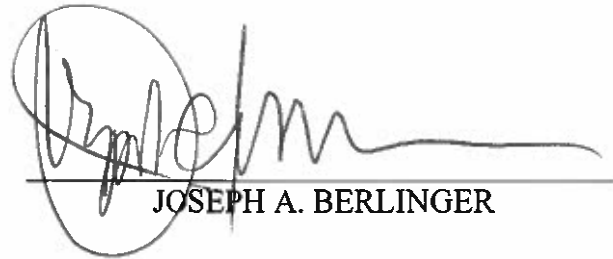
35. Beyond what is already contained in the film, the unpublished footage contains no material regarding the criminal prosecutions in general or specifically the prosecutions against Messrs. Pérez and Reis Veiga.

\* \* \*

36. For the reasons explained in this declaration and in the accompanying memorandum of law, I respectfully request that the Applications be denied.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York  
April 22, 2010



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Sara McMillen, Chevron's Chief Environmental Scientist and Ricardo Reis Veiga, one of the applicants here and the Managing Counsel for Chevron Latin America.

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22. It is often the case that the subjects of a proposed new documentary contact the subjects of my previous documentaries to gauge my integrity and to determine how I treat confidential material, therefore a breach of these confidentiality arrangements would hurt future efforts to make these kinds of films.

### **Prior Attempts to Obtain My Outtakes**

23. As discussed above, I am a documentary filmmaker who has produced several films about ongoing lawsuits. Not surprisingly, the raw footage from my films is often of interest to the litigants for use in their cases. However, I have never released that footage to any third party (voluntarily or otherwise) and, in the past, I have successfully opposed subpoenas demanding that I produce outtakes. Prior to the release of *Paradise Lost*, which covered events surrounding a capital murder trial, the prosecutor and one of the three defendants in the case issued subpoenas to me and other parties involved in the production of the film to obtain audio tapes of interviews conducted in connection with the film. We opposed the subpoenas on the ground that the audio tapes were protected from disclosure under the journalists' privilege.

24. In two separate orders entered on February 22 and March 11, 1994, Judge David Burnett of the Circuit Court of Craighead County, Arkansas quashed the subpoenas. Citing to the "qualified privilege in favor of the press engaged in the newsgathering process," the court held that the issuers had not overcome their burden of showing that "the materials sought by the subpoenas are relevant to any claim or defense in this litigation" or that "the information sought is unavailable from other sources." A copy of these orders is attached as Exhibit C.

25. In January of this year, I received a request from Jorge A. Mestre, Esq., the attorney for the individual Applicants, Messrs. Pérez and Veiga, requesting access to information, documents and unused footage from the production of *Crude*. In a letter dated January 27, 2010, my counsel, Maura Wogan, informed Mr. Mestre that we could not comply with the request without “violating [our] longstanding policy against disclosure of unused footage and/or editorial materials” because to do so “would seriously impair [our] ability to do future investigative filmmaking by undermining [our] credibility with potential subjects or sources requesting confidentiality.” A copy of Ms. Wogan’s letter is attached as Exhibit D.

**Why I Strongly Object to Producing the Raw Footage**

26. On or about April 10, 2010, I was served with copies of the Applications, in which the Chevron Parties ask this Court to require me to produce all of the *Crude* footage that was shot, acquired or licensed in connection with the film and to depose me to authenticate the footage. I strongly object to the production of the raw footage from *Crude* because it is protected by the privilege afforded to me as a journalist.

27. Maintaining my privilege as a journalist not to disclose confidential sources or the raw materials created in connection with the production of my films is fundamental to my ability to create documentary films. The privilege is especially important when I am producing films like *Crude* that focus on ongoing lawsuits. The reason that people on both sides of the dispute are willing to grant me access into their lives and communities is because of the agreements I make to keep material confidential and because they trust that I am a neutral outsider and not an advocate for either side of the controversy.

28. With *Crude*, for example, I was given extensive access to film Donziger, Pablo Fajardo and inhabitants of the Oriente region because they trusted I would tell their story in an accurate and neutral way. They opened their doors to me because they trusted that I was a

journalist and not a participant in the litigation. They also trusted that I would not turn over the raw footage to Chevron to be used against them. In fact, when Donziger was considering the level of access to grant me, I was able to encourage him to trust me, in part, by explaining that I had a history of successfully fighting against third-party attempts to obtain access to raw footage.

29. Chevron also relied on my journalistic credentials and commitments to telling both sides of the story in allowing me to film interviews with the two Chevron representatives. As stated above, I also agreed to allow Chevron certain approval rights.

30. If the subjects of my films believed that the raw footage, as opposed to a release of footage as part of the overall story told by me, would be handed over to third-parties and potentially taken out of context (especially by their adversaries in the lawsuit), they would be far less inclined to trust me and allow me to film them. Without the protections of the journalists' privilege and the confidence that I can honor my commitment to maintain control over my footage, I cannot make documentary films like *Crude*. Thus, requiring me to produce the outtakes from *Crude* would impose a significant burden on me, making it extremely difficult to gain access to critical sources and impairing my ability to make documentaries in the future.

### **The Cofán Meeting Scene**

31. In its papers, Chevron draws attention to a brief scene in the film showing a meeting in the Dureno community of the indigenous Cofán people, suggesting that the meeting “appear[s] to be one of the ‘focus groups’ conducted by Dr. Beristain” as part of the court ordered independent damages analysis conducted by Richard Cabrera. Chevron’s assumptions about this scene are incorrect. The Cofán meeting shown in the film was *not* one of Dr. Beristain’s neutral focus groups commissioned by Cabrera, but a *plaintiffs’ meeting* held *prior* to the commencement of Cabrera’s global assessment study and the appointment of Dr. Beristain to Cabrera’s team. This fact is confirmed by the film itself. Immediately preceding the Cofán

meeting scene, Steve Donziger can be heard telling Trudie Styler, wife of rock musician Sting, about the story of the Cofán people and the nature of the meeting they are about to attend. Mr. Donziger explains:

[The Cofán] are gathering independent of us to meet as a community to talk to *their lawyers* – meaning Pablo [Fajardo] and really myself, although I’m with you and not with the group – to talk about what they want as compensation for all the damage. . . . The meeting will probably be in process when we get there, but it will probably be a really, really interesting day.

*Crude* at 1:15:18-1:15:50.

32. The reason I edited Dr. Beristain from the Cofán meeting scene was not to “conceal” any improper conduct by plaintiffs’ counsel, but to prevent the scene from being misconstrued and taken out of context, just as Chevron is attempting to do here. In fact, I included several scenes in the film in which plaintiffs’ counsel engaged in questionable conduct, including the very scenes Chevron highlights as evidence of plaintiff’s improper “tactics.” As discussed above, I was committed to creating an unbiased depiction of the people and events surrounding the Lago Agrio Litigation to allow the audience to draw its own conclusions about the issues presented onscreen.

33. Before *Crude* was theatrically released, I invited representatives of both Chevron and the Lago Agrio plaintiffs to screen the film and offer their comments and reactions. I asked for their feedback only to ensure the film’s accuracy, but I retained complete editorial control. Chevron’s PR representative reviewed the film on behalf of Chevron and told me that he thought the film was fair and balanced. Plaintiffs’ counsel suggested I change the film in several ways. I rejected all but one recommended change. Because the film condensed several months of activity into a few minutes, I believed that viewers might misconstrue the scene showing Dr. Beristain at the Cofán meeting as a scene showing one of Dr. Beristain’s *subsequent* independent focus group meetings even though, as described above, the independent focus group meetings

had not yet been commissioned. To avoid giving the wrong impression that plaintiffs' counsel were in attendance at the subsequent neutral focus group meetings which, to my knowledge, they were not, I edited the scene for the final release. The original version remains available for viewing on Netflix.

### **Scenes of Judicial Inspections**

34. Chevron speculates that the raw footage will contain evidence relevant to “the conduct of the judicial inspection procedure,” which is allegedly an important issue to the foreign proceedings. However, Chevron’s attorneys, often accompanied by their own cameras and film crew, were present at every public event and hearing concerning the judicial inspections at which the *Crude* cameras were rolling. Neither I nor my crew was ever granted private access to film the judicial inspections. In fact, the scene allegedly showing Donziger’s “pressure tactics” in entering the judge’s chambers was also captured by Chevron’s cameras and the Ecuadorian news media. Thus, my raw footage is not the only source of the information sought by Chevron.

### **The Criminal Prosecutions**

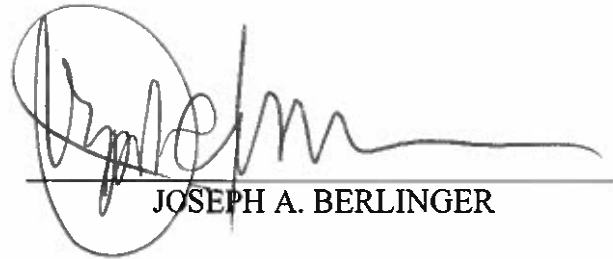
35. Beyond what is already contained in the film, the unpublished footage contains no material regarding the criminal prosecutions in general or specifically the prosecutions against Messrs. Pérez and Reis Veiga.

\* \* \*

36. For the reasons explained in this declaration and in the accompanying memorandum of law, I respectfully request that the Applications be denied.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York  
April 22, 2010



JOSEPH A. BERLINGER

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re Application of RODRIGO PEREZ )  
PALLARES and RICARDO REIS VEIGA for an ) M-19-111  
Order to Conduct Discovery for Use in Foreign )  
Proceedings )  
)  
In re Application of CHEVRON )  
CORPORATION for an Order Pursuant to 28 )  
U.S.C. § 1782 to Conduct Discovery for Use in )  
Foreign Proceedings )  
----- X

**DECLARATION OF JOSEPH A. BERLINGER**

I, JOSEPH A. BERLINGER, hereby declare as follows:

1. I am the producer and director of the documentary film entitled *Crude* and the managing member of the film’s holding company, Crude Productions, LLC. I make this declaration based on personal knowledge and submit it in opposition to the *ex parte* applications of Chevron Corporation, Rodrigo Pérez Pallares, and Ricardo Reis Veiga (collectively, the “Chevron Parties”) filed, pursuant to 28 U.S.C. § 1782, to conduct discovery for use in foreign proceedings (the “Applications”). If called as a witness, I would testify to the same as stated herein.

2. In this proceeding, the Chevron Parties seek this Court’s assistance to obtain over 600 hours of raw footage, or “outtakes,” produced in connection with the filming of my documentary. *Crude* examines the lawsuit brought in Ecuador by tens of thousands of Ecuadorians against Chevron over oil spills, toxic dumps and other contamination in the Amazon rainforest (the “Lago Agrio Litigation”), as well as Chevron’s denial of the allegations against it. The Chevron Parties purportedly seek the outtakes for use in the Lago Agrio Litigation, as well as a criminal prosecution in Ecuador against Messrs. Pérez and Veiga and an international arbitration.

3. Only Crude Productions LLC and I have custody, possession or control over the raw footage sought by the Chevron Parties. Respondents Michael Bonfiglio, Third Eye Motion Picture Company, Inc. and @radical.media do not. I do not object to producing to the Chevron Parties the two publicly released versions of *Crude* – the “Netflix streaming version” and the final DVD release – which are the only versions of the film that were released to the public and are annexed hereto as Exhibits A and B, respectively.

4. For the reasons explained in this declaration and in the accompanying memorandum of law, I strongly oppose the Applications because the material contained in the raw footage of *Crude* is confidential and protected by the journalists’ privilege. In addition, the disclosure of this confidential material would directly and irreparably impair my ability to make similar films in the future.

### **My Film Career**

5. Over the last twenty years, I have worked as a filmmaker, journalist and photographer. A significant part of my career has been focused on producing and directing feature-length documentary films. I do not use voiceover narration in my documentaries, allowing audiences to draw their own conclusions about what they are viewing onscreen. I create documentaries for the purpose of investigating and telling the story of people, places and events that raise important issues but might otherwise go unnoticed.

6. I began creating documentary films in 1989. My first documentary was *Outrageous Taxi Stories*, an independently-produced short film about New York City taxi drivers. The following year, I began collaborating with Bruce Sinofsky to create *Brother’s Keeper*, which followed the murder trial of Delbert Ward in the rural community of Munnsville, New York and explored possible motives for the crime, the police investigation, the reaction of the community and the questionable tactics employed by the District Attorney. Named 1992’s

“Best Documentary” by the Directors Guild of America, the New York Film Critics Circle and the National Board of Review, *Brother’s Keeper* appeared on the “10 Best Films of the Year” lists of over 50 major critics.

7. In 1996, Sinofsky and I again partnered to create *Paradise Lost: The Child Murders at Robin Hood Hills*, a cinéma-vérité documentary that captured a year in the life of a small southern town as it came to grips with one of the most horrifying crimes in the region’s history. *Paradise Lost* questioned the guilt of three teenagers many believe were wrongfully convicted of capital murder, sparking a national movement to overturn the convictions and “Free the West Memphis Three.” *Paradise Lost* won a Primetime Emmy Award (and two additional nominations), the National Board of Review’s Best Documentary Award, Best Documentary nominations from the DGA, Independent Spirit and Cable ACE Awards, and was placed on over 35 “Top Ten Films of the Year” lists by major critics across the United States.

8. In 2004, I completed *Metallica: Some Kind of Monster*, a theatrically-released documentary I directed and produced with Sinofsky about the heavy metal rock band as it grappled with monumental changes, underwent group therapy and recorded its first album in five years. The film debuted at the 2004 Sundance Film Festival, won the Independent Spirit Award for Best Documentary Feature and was nominated for a Broadcast Film Critics Association Award and the IDA Award for Best Documentary Feature. It was also named to the “Top Ten Films of the Year” lists of over 30 critics. The film’s DVD, distributed worldwide by Paramount Home Entertainment, garnered additional awards and has sold over a million copies.

9. In 2004, I also completed the Emmy-nominated *Gray Matter*, a documentary for Cinemax, CBC and France 2, which chronicled my personal search for an 86-year-old former Nazi, Dr. Heinrich Gross. One of Austria’s leading forensic psychiatrists, Gross was also the

alleged murderer of hundreds of handicapped children, experimenting on the remains of his victims for decades after WWII and continually evading justice.

10. In addition to my feature documentary work, I have also directed many hours of non-fiction and fiction television. I currently serve as co-executive producer for Sundance Channel's critically-acclaimed series *Iconoclasts*, for which I have also directed numerous episodes, with subjects including Robert Redford, Paul Newman, Madeleine Albright, Michael Stipe, Dave Chappelle, Dr. Maya Angelou, Norman Lear, and Sean Penn.

11. Over the years, I have received additional awards that have recognized my commitment to excellence in journalism, including the George Foster Peabody Award for excellence in broadcast journalism, and the American Bar Association's Silver Gavel Award for media fostering the American public's understanding of the law and the legal system. I am a member of the Directors Guild of America, Writers Guild of America, Academy of Television Arts and Sciences, and Academy of Motion Picture Arts and Sciences.

### **Production of *Crude***

12. In 2005, I began working on *Crude*, the documentary film at issue in this proceeding. That summer, I met an American environmental lawyer named Steven Donziger, who is one of the lead attorneys representing the plaintiffs in the Lago Agrio Litigation against Chevron. In that lawsuit, the plaintiffs claim that they suffered severe injuries to their health and habitat as a result of massive contamination allegedly caused by Chevron's irresponsible oil drilling operations and inadequate remediation following the company's exit from Ecuador in the 1990's. Chevron denies liability and contests the alleged harm. Donziger urged me to create a documentary film to tell his clients' story.

13. Upon visiting the Ecuadorian Amazon for the first time, I witnessed the petrochemical sludge and the allegedly toxic wastewater that for decades has been dumped into

open pits or directly into the water and soil -- a practice implemented when Texaco, Chevron's predecessor, began drilling for oil there in the late 1960's and early 1970's. I spoke with people who were sick and dying from cancer and other diseases they believed were the result of oil spills and toxic waste dumping. I also met with Pablo Fajardo, the lead attorney in Ecuador for the plaintiffs in the Lago Agrio Litigation.

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23. As discussed above, I am a documentary filmmaker who has produced several films about ongoing lawsuits. Not surprisingly, the raw footage from my films is often of interest to the litigants for use in their cases. However, I have never released that footage to any third party (voluntarily or otherwise) and, in the past, I have successfully opposed subpoenas demanding that I produce outtakes. Prior to the release of *Paradise Lost*, which covered events surrounding a capital murder trial, the prosecutor and one of the three defendants in the case issued subpoenas to me and other parties involved in the production of the film to obtain audio tapes of interviews conducted in connection with the film. We opposed the subpoenas on the ground that the audio tapes were protected from disclosure under the journalists' privilege.

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26. On or about April 10, 2010, I was served with copies of the Applications, in which the Chevron Parties ask this Court to require me to produce all of the *Crude* footage that was shot, acquired or licensed in connection with the film and to depose me to authenticate the footage. I strongly object to the production of the raw footage from *Crude* because it is protected by the privilege afforded to me as a journalist.

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28. With *Crude*, for example, I was given extensive access to film Donziger, Pablo Fajardo and inhabitants of the Oriente region because they trusted I would tell their story in an accurate and neutral way. They opened their doors to me because they trusted that I was a

journalist and not a participant in the litigation. They also trusted that I would not turn over the raw footage to Chevron to be used against them. In fact, when Donziger was considering the level of access to grant me, I was able to encourage him to trust me, in part, by explaining that I had a history of successfully fighting against third-party attempts to obtain access to raw footage.

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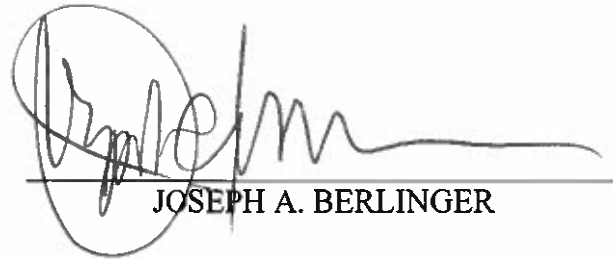
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Dated: New York, New York  
April 22, 2010



JOSEPH A. BERLINGER

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
In re Application of RODRIGO PEREZ )  
PALLARES and RICARDO REIS VEIGA for an ) M-19-111  
Order to Conduct Discovery for Use in Foreign )  
Proceedings )  
)  
In re Application of CHEVRON )  
CORPORATION for an Order Pursuant to 28 )  
U.S.C. § 1782 to Conduct Discovery for Use in )  
Foreign Proceedings )  
----- X

**DECLARATION OF JOSEPH A. BERLINGER**

I, JOSEPH A. BERLINGER, hereby declare as follows:

1. I am the producer and director of the documentary film entitled *Crude* and the managing member of the film’s holding company, Crude Productions, LLC. I make this declaration based on personal knowledge and submit it in opposition to the *ex parte* applications of Chevron Corporation, Rodrigo Pérez Pallares, and Ricardo Reis Veiga (collectively, the “Chevron Parties”) filed, pursuant to 28 U.S.C. § 1782, to conduct discovery for use in foreign proceedings (the “Applications”). If called as a witness, I would testify to the same as stated herein.

2. In this proceeding, the Chevron Parties seek this Court’s assistance to obtain over 600 hours of raw footage, or “outtakes,” produced in connection with the filming of my documentary. *Crude* examines the lawsuit brought in Ecuador by tens of thousands of Ecuadorians against Chevron over oil spills, toxic dumps and other contamination in the Amazon rainforest (the “Lago Agrio Litigation”), as well as Chevron’s denial of the allegations against it. The Chevron Parties purportedly seek the outtakes for use in the Lago Agrio Litigation, as well as a criminal prosecution in Ecuador against Messrs. Pérez and Veiga and an international arbitration.

3. Only Crude Productions LLC and I have custody, possession or control over the raw footage sought by the Chevron Parties. Respondents Michael Bonfiglio, Third Eye Motion Picture Company, Inc. and @radical.media do not. I do not object to producing to the Chevron Parties the two publicly released versions of *Crude* – the “Netflix streaming version” and the final DVD release – which are the only versions of the film that were released to the public and are annexed hereto as Exhibits A and B, respectively.

4. For the reasons explained in this declaration and in the accompanying memorandum of law, I strongly oppose the Applications because the material contained in the raw footage of *Crude* is confidential and protected by the journalists’ privilege. In addition, the disclosure of this confidential material would directly and irreparably impair my ability to make similar films in the future.

### **My Film Career**

5. Over the last twenty years, I have worked as a filmmaker, journalist and photographer. A significant part of my career has been focused on producing and directing feature-length documentary films. I do not use voiceover narration in my documentaries, allowing audiences to draw their own conclusions about what they are viewing onscreen. I create documentaries for the purpose of investigating and telling the story of people, places and events that raise important issues but might otherwise go unnoticed.

6. I began creating documentary films in 1989. My first documentary was *Outrageous Taxi Stories*, an independently-produced short film about New York City taxi drivers. The following year, I began collaborating with Bruce Sinofsky to create *Brother’s Keeper*, which followed the murder trial of Delbert Ward in the rural community of Munnsville, New York and explored possible motives for the crime, the police investigation, the reaction of the community and the questionable tactics employed by the District Attorney. Named 1992’s

“Best Documentary” by the Directors Guild of America, the New York Film Critics Circle and the National Board of Review, *Brother’s Keeper* appeared on the “10 Best Films of the Year” lists of over 50 major critics.

7. In 1996, Sinofsky and I again partnered to create *Paradise Lost: The Child Murders at Robin Hood Hills*, a cinéma-vérité documentary that captured a year in the life of a small southern town as it came to grips with one of the most horrifying crimes in the region’s history. *Paradise Lost* questioned the guilt of three teenagers many believe were wrongfully convicted of capital murder, sparking a national movement to overturn the convictions and “Free the West Memphis Three.” *Paradise Lost* won a Primetime Emmy Award (and two additional nominations), the National Board of Review’s Best Documentary Award, Best Documentary nominations from the DGA, Independent Spirit and Cable ACE Awards, and was placed on over 35 “Top Ten Films of the Year” lists by major critics across the United States.

8. In 2004, I completed *Metallica: Some Kind of Monster*, a theatrically-released documentary I directed and produced with Sinofsky about the heavy metal rock band as it grappled with monumental changes, underwent group therapy and recorded its first album in five years. The film debuted at the 2004 Sundance Film Festival, won the Independent Spirit Award for Best Documentary Feature and was nominated for a Broadcast Film Critics Association Award and the IDA Award for Best Documentary Feature. It was also named to the “Top Ten Films of the Year” lists of over 30 critics. The film’s DVD, distributed worldwide by Paramount Home Entertainment, garnered additional awards and has sold over a million copies.

9. In 2004, I also completed the Emmy-nominated *Gray Matter*, a documentary for Cinemax, CBC and France 2, which chronicled my personal search for an 86-year-old former Nazi, Dr. Heinrich Gross. One of Austria’s leading forensic psychiatrists, Gross was also the

alleged murderer of hundreds of handicapped children, experimenting on the remains of his victims for decades after WWII and continually evading justice.

10. In addition to my feature documentary work, I have also directed many hours of non-fiction and fiction television. I currently serve as co-executive producer for Sundance Channel's critically-acclaimed series *Iconoclasts*, for which I have also directed numerous episodes, with subjects including Robert Redford, Paul Newman, Madeleine Albright, Michael Stipe, Dave Chappelle, Dr. Maya Angelou, Norman Lear, and Sean Penn.

11. Over the years, I have received additional awards that have recognized my commitment to excellence in journalism, including the George Foster Peabody Award for excellence in broadcast journalism, and the American Bar Association's Silver Gavel Award for media fostering the American public's understanding of the law and the legal system. I am a member of the Directors Guild of America, Writers Guild of America, Academy of Television Arts and Sciences, and Academy of Motion Picture Arts and Sciences.

**Production of *Crude***

12. In 2005, I began working on *Crude*, the documentary film at issue in this proceeding. That summer, I met an American environmental lawyer named Steven Donziger, who is one of the lead attorneys representing the plaintiffs in the Lago Agrio Litigation against Chevron. In that lawsuit, the plaintiffs claim that they suffered severe injuries to their health and habitat as a result of massive contamination allegedly caused by Chevron's irresponsible oil drilling operations and inadequate remediation following the company's exit from Ecuador in the 1990's. Chevron denies liability and contests the alleged harm. Donziger urged me to create a documentary film to tell his clients' story.

13. Upon visiting the Ecuadorian Amazon for the first time, I witnessed the petrochemical sludge and the allegedly toxic wastewater that for decades has been dumped into

open pits or directly into the water and soil -- a practice implemented when Texaco, Chevron's predecessor, began drilling for oil there in the late 1960's and early 1970's. I spoke with people who were sick and dying from cancer and other diseases they believed were the result of oil spills and toxic waste dumping. I also met with Pablo Fajardo, the lead attorney in Ecuador for the plaintiffs in the Lago Agrio Litigation.

14. While in Ecuador, I committed myself to making a film to tell the story of the Lago Agrio Litigation and the events and people surrounding the trial. However, I made it clear to Donziger that I was not going to create an environmental and human rights advocacy film with a single point of view. *Crude*, like my prior documentary films, would present a complex situation from multiple perspectives without revealing my viewpoint, allowing each audience member to come up with his or her own conclusion about the events they had witnessed onscreen. This would not be a one-sided diatribe, but rather a film that would reveal the complexities of the Lago Agrio Litigation, with Chevron's many arguments well represented. *Crude* would be an independent film not in the control of Donziger or the Lago Agrio plaintiffs.

15. Principal photography for *Crude* began in November 2005 and lasted through the August 2008. During those three years, I filmed in numerous locations in Ecuador, as well as many cities in the United States and in London. In an effort to accomplish my goal of telling a balanced story, I tried to meet and gain access to (or at least capture on film) all of the major participants in the Lago Agrio Litigation including the attorneys for the plaintiffs and Chevron, the presiding Judge, and court-appointed experts. I sought out members of the community which was the focus of the lawsuit including the indigenous Cofán people, local medical professionals and community leaders. I reached out to Chevron and negotiated for almost seven months to obtain access to senior Chevron executives. Chevron ultimately agreed that I could interview

Sara McMillen, Chevron's Chief Environmental Scientist and Ricardo Reis Veiga, one of the applicants here and the Managing Counsel for Chevron Latin America.

16. I believe that *Crude* presents Chevron's point-of-view along with that of all the other participants in this significant dispute without taking sides in the litigation. The film contains several lengthy clips of an interview with Ms. McMillen discussing the extensive research conducted by Chevron to assess the environmental impact of Chevron's operations in the region. The film also contains an interview with Mr. Veiga discussing the remediation process and the validity of the release the government of Ecuador gave to Chevron as well as the role of PetroEcuador as the alleged actual polluter of the region.

17. I was pleased that critics who reviewed the film focused on its even-handed and balanced treatment of the subject matter. For example, A.O. Scott, writing for the New York Times wrote:

**"While Mr. Berlinger's sympathies clearly lie with the oddly matched pair of lawyers — Steven Donziger, a big, outgoing American, and Pablo Fajardo, a wiry, diffident Ecuadorean — who are consumed by the now 16-year-old suit against Chevron, he is fair-minded enough to include rebuttals from the company's executives and in-house environmental scientists. And since this is, in part, a courtroom drama, both sides have a chance to be heard"**

Similarly, Scott Foundas of LA Weekly wrote:

**"In the gripping, intrinsically cinematic *Crude*, (Berlinger) does an equally superb job of taking us through the twists and turns of a legal battle nearly as long as the Amazon itself, and with no discernible end in sight. As usual, Berlinger presents both sides of the case as fairly and non-judgmentally as possible, never inserting himself into the narrative and turning the audience, in effect, into the jury."**

Here are additional reviews that highlight the fact that *Crude* is an even-handed presentation of the Chevron's dispute with the inhabitants of the Ecuadorian rainforest:

**"You've got to hand it to Berlinger for his even-handed work on *Crude*, a film that depicts immense sadness and stunning corporate villainy. Yet Berlinger offers a balanced look at the conflict. Chevron gets the chance to tell its story and Berlinger never pulls any sort of "gotcha" move on them. It's just that the**

facts are so damning, even given the full-bore public-relations disinformation campaign by Chevron. The story Berlinger tells is about the callously deadly and widespread despoiling of the Ecuadorian rain forest by Texaco -- now owned by Chevron -- and Chevron's refusal to accept responsibility for it. **It's infuriating, at the least, to look at and listen to evidence - and listen to Chevron's lawyers and spokespeople denying all the things they so obviously are guilty of. But Berlinger tells the story calmly, carefully, offering both sides the opportunity to present a case.**" Marshall Fine, *The Huffington Post*

**"Riveting... Berlinger clearly knows about balance in covering an important issue."** - James Nelson, *Agence France Presse*

A fascinating documentary...**well-balanced**...all the more incisive for its decision to eschew editorializing and let the evidence speak for itself." - Allan Hunter, *The Daily Express*

**"Sophisticated... a compelling, multifaceted cinematic surrogate trial... Berlinger once again shows his skill for even-handed humanist storytelling."** - Simon Abrams, *The L Magazine*

**"Absorbing...provocative yet conscientiously well balanced."** - *The Metro*

**"Environmental documentaries in the last decade have had the predictability of an evangelical sermon or a going-out-of-business sale: The end is nigh, but act now and the bounty can still be yours. Crude is something else.** A legal thriller, it's a three-year investigation into the disaster environmentalists call the "Amazonian Chernobyl" that **offers both sides of the story and leaves the viewer in the position of jury.** What makes *Crude* worthy of the overused term "epic" is the way the case symbolizes a host of contemporary issues: the iron-fistedness of multinational corporations; environmental despoliation; the disappearance of indigenous cultures; and the power of celebrity and the media to influence justice." - Liam Lacey, *Toronto Globe and Mail*

**"Enthralling... Although he follows events from the perspective of the Ecuadorians, Berlinger maintains a refreshing and clear-sighted intellectual honesty: Chevron's representatives are allowed plenty of space to make their arguments."** - *The Lancet*

**"A tougher sell is Joe Berlinger's "Crude," about a class-action suit filed by 30,000 indigenous Ecuadoreans against the US corporation Chevron for despoiling the Amazon rainforest. I say it's a tough sell because the movie's really about process -- about an uphill David-vs-Goliath fight that takes place over months and years and in various offices and courtrooms. We see the awful results of toxic pollution -- cancers, sores on two-week-old infants -- and the movie's savvy enough to let us hear the corporate response in full."** - Ty Burr, *Boston Globe*

18. The film debuted in January 2009 at the Sundance Film Festival and was released theatrically by First Run Features. *Crude* has received numerous accolades including being named one of the Top Five Documentaries of the Year by the National Board of Review and Best International Green Film at Berlin's prestigious Cinema For Peace, as well as over 20 other international awards from a variety of film, environmental and human rights organizations.

### **Confidentiality Arrangements and My Relationships of Trust with Sources**

19. In order to make *Crude*, I needed to obtain permission from the people involved in the Lago Agrio Litigation to allow me to film them, often in sensitive, painful or conflict-ridden situations. I entered into agreements with some of my sources, promising that I would not use certain footage in which they appeared without first obtaining their express authorization. Other times, there was a standing agreement with my subjects that they could request that the camera be turned off if they became uncomfortable. With respect to this footage, there also was an implicit understanding that the moments leading up to the request to turn off the camera would not be included in the film. I offered these or other confidentiality arrangements both to representatives of the plaintiffs and Chevron.

20. The types of confidentiality arrangements described above are my stock in trade. The inability to honor the arrangements I have made with my subjects would seriously impair my ability to undertake these kinds of long-term investigative reports in the future.

21. With all of the subjects in *Crude*, I needed to work hard to build and maintain relationships of trust. They believed in my honesty and journalistic integrity, trusting that I would take the hundreds of hours of raw footage (from a multitude of sources) and craft an accurate portrayal of events by laboring intensively in the edit room. There was an implicit (and sometimes explicit) understanding that the materials I decided to leave out of the finished product would remain confidential and not be turned over to third parties for a purpose other than

the making of the film. This expectation of confidentiality countered the subjects' legitimate concerns that releasing raw footage into the wrong hands risks that material being taken out of context and used against them.

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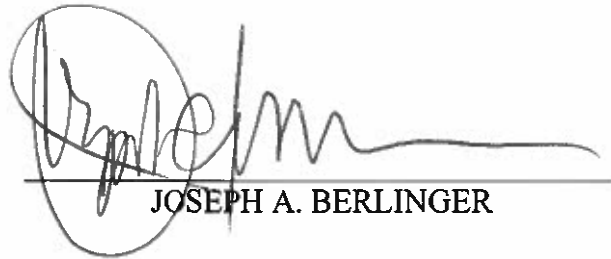
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Dated: New York, New York  
April 22, 2010



JOSEPH A. BERLINGER

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re Application of RODRIGO PEREZ )  
PALLARES and RICARDO REIS VEIGA for an ) M-19-111  
Order to Conduct Discovery for Use in Foreign )  
Proceedings )  
)  
In re Application of CHEVRON )  
CORPORATION for an Order Pursuant to 28 )  
U.S.C. § 1782 to Conduct Discovery for Use in )  
Foreign Proceedings )  
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**DECLARATION OF JOSEPH A. BERLINGER**

I, JOSEPH A. BERLINGER, hereby declare as follows:

1. I am the producer and director of the documentary film entitled *Crude* and the managing member of the film’s holding company, Crude Productions, LLC. I make this declaration based on personal knowledge and submit it in opposition to the *ex parte* applications of Chevron Corporation, Rodrigo Pérez Pallares, and Ricardo Reis Veiga (collectively, the “Chevron Parties”) filed, pursuant to 28 U.S.C. § 1782, to conduct discovery for use in foreign proceedings (the “Applications”). If called as a witness, I would testify to the same as stated herein.

2. In this proceeding, the Chevron Parties seek this Court’s assistance to obtain over 600 hours of raw footage, or “outtakes,” produced in connection with the filming of my documentary. *Crude* examines the lawsuit brought in Ecuador by tens of thousands of Ecuadorians against Chevron over oil spills, toxic dumps and other contamination in the Amazon rainforest (the “Lago Agrio Litigation”), as well as Chevron’s denial of the allegations against it. The Chevron Parties purportedly seek the outtakes for use in the Lago Agrio Litigation, as well as a criminal prosecution in Ecuador against Messrs. Pérez and Veiga and an international arbitration.

3. Only Crude Productions LLC and I have custody, possession or control over the raw footage sought by the Chevron Parties. Respondents Michael Bonfiglio, Third Eye Motion Picture Company, Inc. and @radical.media do not. I do not object to producing to the Chevron Parties the two publicly released versions of *Crude* – the “Netflix streaming version” and the final DVD release – which are the only versions of the film that were released to the public and are annexed hereto as Exhibits A and B, respectively.

4. For the reasons explained in this declaration and in the accompanying memorandum of law, I strongly oppose the Applications because the material contained in the raw footage of *Crude* is confidential and protected by the journalists’ privilege. In addition, the disclosure of this confidential material would directly and irreparably impair my ability to make similar films in the future.

### **My Film Career**

5. Over the last twenty years, I have worked as a filmmaker, journalist and photographer. A significant part of my career has been focused on producing and directing feature-length documentary films. I do not use voiceover narration in my documentaries, allowing audiences to draw their own conclusions about what they are viewing onscreen. I create documentaries for the purpose of investigating and telling the story of people, places and events that raise important issues but might otherwise go unnoticed.

6. I began creating documentary films in 1989. My first documentary was *Outrageous Taxi Stories*, an independently-produced short film about New York City taxi drivers. The following year, I began collaborating with Bruce Sinofsky to create *Brother’s Keeper*, which followed the murder trial of Delbert Ward in the rural community of Munnsville, New York and explored possible motives for the crime, the police investigation, the reaction of the community and the questionable tactics employed by the District Attorney. Named 1992’s

“Best Documentary” by the Directors Guild of America, the New York Film Critics Circle and the National Board of Review, *Brother’s Keeper* appeared on the “10 Best Films of the Year” lists of over 50 major critics.

7. In 1996, Sinofsky and I again partnered to create *Paradise Lost: The Child Murders at Robin Hood Hills*, a cinéma-vérité documentary that captured a year in the life of a small southern town as it came to grips with one of the most horrifying crimes in the region’s history. *Paradise Lost* questioned the guilt of three teenagers many believe were wrongfully convicted of capital murder, sparking a national movement to overturn the convictions and “Free the West Memphis Three.” *Paradise Lost* won a Primetime Emmy Award (and two additional nominations), the National Board of Review’s Best Documentary Award, Best Documentary nominations from the DGA, Independent Spirit and Cable ACE Awards, and was placed on over 35 “Top Ten Films of the Year” lists by major critics across the United States.

8. In 2004, I completed *Metallica: Some Kind of Monster*, a theatrically-released documentary I directed and produced with Sinofsky about the heavy metal rock band as it grappled with monumental changes, underwent group therapy and recorded its first album in five years. The film debuted at the 2004 Sundance Film Festival, won the Independent Spirit Award for Best Documentary Feature and was nominated for a Broadcast Film Critics Association Award and the IDA Award for Best Documentary Feature. It was also named to the “Top Ten Films of the Year” lists of over 30 critics. The film’s DVD, distributed worldwide by Paramount Home Entertainment, garnered additional awards and has sold over a million copies.

9. In 2004, I also completed the Emmy-nominated *Gray Matter*, a documentary for Cinemax, CBC and France 2, which chronicled my personal search for an 86-year-old former Nazi, Dr. Heinrich Gross. One of Austria’s leading forensic psychiatrists, Gross was also the

alleged murderer of hundreds of handicapped children, experimenting on the remains of his victims for decades after WWII and continually evading justice.

10. In addition to my feature documentary work, I have also directed many hours of non-fiction and fiction television. I currently serve as co-executive producer for Sundance Channel's critically-acclaimed series *Iconoclasts*, for which I have also directed numerous episodes, with subjects including Robert Redford, Paul Newman, Madeleine Albright, Michael Stipe, Dave Chappelle, Dr. Maya Angelou, Norman Lear, and Sean Penn.

11. Over the years, I have received additional awards that have recognized my commitment to excellence in journalism, including the George Foster Peabody Award for excellence in broadcast journalism, and the American Bar Association's Silver Gavel Award for media fostering the American public's understanding of the law and the legal system. I am a member of the Directors Guild of America, Writers Guild of America, Academy of Television Arts and Sciences, and Academy of Motion Picture Arts and Sciences.

**Production of *Crude***

12. In 2005, I began working on *Crude*, the documentary film at issue in this proceeding. That summer, I met an American environmental lawyer named Steven Donziger, who is one of the lead attorneys representing the plaintiffs in the Lago Agrio Litigation against Chevron. In that lawsuit, the plaintiffs claim that they suffered severe injuries to their health and habitat as a result of massive contamination allegedly caused by Chevron's irresponsible oil drilling operations and inadequate remediation following the company's exit from Ecuador in the 1990's. Chevron denies liability and contests the alleged harm. Donziger urged me to create a documentary film to tell his clients' story.

13. Upon visiting the Ecuadorian Amazon for the first time, I witnessed the petrochemical sludge and the allegedly toxic wastewater that for decades has been dumped into

open pits or directly into the water and soil -- a practice implemented when Texaco, Chevron's predecessor, began drilling for oil there in the late 1960's and early 1970's. I spoke with people who were sick and dying from cancer and other diseases they believed were the result of oil spills and toxic waste dumping. I also met with Pablo Fajardo, the lead attorney in Ecuador for the plaintiffs in the Lago Agrio Litigation.

14. While in Ecuador, I committed myself to making a film to tell the story of the Lago Agrio Litigation and the events and people surrounding the trial. However, I made it clear to Donziger that I was not going to create an environmental and human rights advocacy film with a single point of view. *Crude*, like my prior documentary films, would present a complex situation from multiple perspectives without revealing my viewpoint, allowing each audience member to come up with his or her own conclusion about the events they had witnessed onscreen. This would not be a one-sided diatribe, but rather a film that would reveal the complexities of the Lago Agrio Litigation, with Chevron's many arguments well represented. *Crude* would be an independent film not in the control of Donziger or the Lago Agrio plaintiffs.

15. Principal photography for *Crude* began in November 2005 and lasted through the August 2008. During those three years, I filmed in numerous locations in Ecuador, as well as many cities in the United States and in London. In an effort to accomplish my goal of telling a balanced story, I tried to meet and gain access to (or at least capture on film) all of the major participants in the Lago Agrio Litigation including the attorneys for the plaintiffs and Chevron, the presiding Judge, and court-appointed experts. I sought out members of the community which was the focus of the lawsuit including the indigenous Cofán people, local medical professionals and community leaders. I reached out to Chevron and negotiated for almost seven months to obtain access to senior Chevron executives. Chevron ultimately agreed that I could interview

Sara McMillen, Chevron's Chief Environmental Scientist and Ricardo Reis Veiga, one of the applicants here and the Managing Counsel for Chevron Latin America.

16. I believe that *Crude* presents Chevron's point-of-view along with that of all the other participants in this significant dispute without taking sides in the litigation. The film contains several lengthy clips of an interview with Ms. McMillen discussing the extensive research conducted by Chevron to assess the environmental impact of Chevron's operations in the region. The film also contains an interview with Mr. Veiga discussing the remediation process and the validity of the release the government of Ecuador gave to Chevron as well as the role of PetroEcuador as the alleged actual polluter of the region.

17. I was pleased that critics who reviewed the film focused on its even-handed and balanced treatment of the subject matter. For example, A.O. Scott, writing for the New York Times wrote:

**"While Mr. Berlinger's sympathies clearly lie with the oddly matched pair of lawyers — Steven Donziger, a big, outgoing American, and Pablo Fajardo, a wiry, diffident Ecuadorean — who are consumed by the now 16-year-old suit against Chevron, he is fair-minded enough to include rebuttals from the company's executives and in-house environmental scientists. And since this is, in part, a courtroom drama, both sides have a chance to be heard"**

Similarly, Scott Foundas of LA Weekly wrote:

**"In the gripping, intrinsically cinematic *Crude*, (Berlinger) does an equally superb job of taking us through the twists and turns of a legal battle nearly as long as the Amazon itself, and with no discernible end in sight. As usual, Berlinger presents both sides of the case as fairly and non-judgmentally as possible, never inserting himself into the narrative and turning the audience, in effect, into the jury."**

Here are additional reviews that highlight the fact that *Crude* is an even-handed presentation of the Chevron's dispute with the inhabitants of the Ecuadorian rainforest:

**"You've got to hand it to Berlinger for his even-handed work on *Crude*, a film that depicts immense sadness and stunning corporate villainy. Yet Berlinger offers a balanced look at the conflict. Chevron gets the chance to tell its story and Berlinger never pulls any sort of "gotcha" move on them. It's just that the**

facts are so damning, even given the full-bore public-relations disinformation campaign by Chevron. The story Berlinger tells is about the callously deadly and widespread despoiling of the Ecuadorian rain forest by Texaco -- now owned by Chevron -- and Chevron's refusal to accept responsibility for it. **It's infuriating, at the least, to look at and listen to evidence - and listen to Chevron's lawyers and spokespeople denying all the things they so obviously are guilty of. But Berlinger tells the story calmly, carefully, offering both sides the opportunity to present a case.**" Marshall Fine, *The Huffington Post*

**"Riveting... Berlinger clearly knows about balance in covering an important issue."** - James Nelson, *Agence France Presse*

A fascinating documentary...**well-balanced**...all the more incisive for its decision to eschew editorializing and let the evidence speak for itself." - Allan Hunter, *The Daily Express*

**"Sophisticated... a compelling, multifaceted cinematic surrogate trial... Berlinger once again shows his skill for even-handed humanist storytelling."** - Simon Abrams, *The L Magazine*

**"Absorbing...provocative yet conscientiously well balanced."** - *The Metro*

**"Environmental documentaries in the last decade have had the predictability of an evangelical sermon or a going-out-of-business sale: The end is nigh, but act now and the bounty can still be yours. Crude is something else.** A legal thriller, it's a three-year investigation into the disaster environmentalists call the "Amazonian Chernobyl" that **offers both sides of the story and leaves the viewer in the position of jury.** What makes *Crude* worthy of the overused term "epic" is the way the case symbolizes a host of contemporary issues: the iron-fistedness of multinational corporations; environmental despoliation; the disappearance of indigenous cultures; and the power of celebrity and the media to influence justice." - Liam Lacey, *Toronto Globe and Mail*

**"Enthralling... Although he follows events from the perspective of the Ecuadorians, Berlinger maintains a refreshing and clear-sighted intellectual honesty: Chevron's representatives are allowed plenty of space to make their arguments."** - *The Lancet*

**"A tougher sell is Joe Berlinger's "Crude," about a class-action suit filed by 30,000 indigenous Ecuadoreans against the US corporation Chevron for despoiling the Amazon rainforest. I say it's a tough sell because the movie's really about process -- about an uphill David-vs-Goliath fight that takes place over months and years and in various offices and courtrooms. We see the awful results of toxic pollution -- cancers, sores on two-week-old infants -- and the movie's savvy enough to let us hear the corporate response in full."** - Ty Burr, *Boston Globe*

18. The film debuted in January 2009 at the Sundance Film Festival and was released theatrically by First Run Features. *Crude* has received numerous accolades including being named one of the Top Five Documentaries of the Year by the National Board of Review and Best International Green Film at Berlin's prestigious Cinema For Peace, as well as over 20 other international awards from a variety of film, environmental and human rights organizations.

### **Confidentiality Arrangements and My Relationships of Trust with Sources**

19. In order to make *Crude*, I needed to obtain permission from the people involved in the Lago Agrio Litigation to allow me to film them, often in sensitive, painful or conflict-ridden situations. I entered into agreements with some of my sources, promising that I would not use certain footage in which they appeared without first obtaining their express authorization. Other times, there was a standing agreement with my subjects that they could request that the camera be turned off if they became uncomfortable. With respect to this footage, there also was an implicit understanding that the moments leading up to the request to turn off the camera would not be included in the film. I offered these or other confidentiality arrangements both to representatives of the plaintiffs and Chevron.

20. The types of confidentiality arrangements described above are my stock in trade. The inability to honor the arrangements I have made with my subjects would seriously impair my ability to undertake these kinds of long-term investigative reports in the future.

21. With all of the subjects in *Crude*, I needed to work hard to build and maintain relationships of trust. They believed in my honesty and journalistic integrity, trusting that I would take the hundreds of hours of raw footage (from a multitude of sources) and craft an accurate portrayal of events by laboring intensively in the edit room. There was an implicit (and sometimes explicit) understanding that the materials I decided to leave out of the finished product would remain confidential and not be turned over to third parties for a purpose other than

the making of the film. This expectation of confidentiality countered the subjects' legitimate concerns that releasing raw footage into the wrong hands risks that material being taken out of context and used against them.

22. It is often the case that the subjects of a proposed new documentary contact the subjects of my previous documentaries to gauge my integrity and to determine how I treat confidential material, therefore a breach of these confidentiality arrangements would hurt future efforts to make these kinds of films.

### **Prior Attempts to Obtain My Outtakes**

23. As discussed above, I am a documentary filmmaker who has produced several films about ongoing lawsuits. Not surprisingly, the raw footage from my films is often of interest to the litigants for use in their cases. However, I have never released that footage to any third party (voluntarily or otherwise) and, in the past, I have successfully opposed subpoenas demanding that I produce outtakes. Prior to the release of *Paradise Lost*, which covered events surrounding a capital murder trial, the prosecutor and one of the three defendants in the case issued subpoenas to me and other parties involved in the production of the film to obtain audio tapes of interviews conducted in connection with the film. We opposed the subpoenas on the ground that the audio tapes were protected from disclosure under the journalists' privilege.

24. In two separate orders entered on February 22 and March 11, 1994, Judge David Burnett of the Circuit Court of Craighead County, Arkansas quashed the subpoenas. Citing to the "qualified privilege in favor of the press engaged in the newsgathering process," the court held that the issuers had not overcome their burden of showing that "the materials sought by the subpoenas are relevant to any claim or defense in this litigation" or that "the information sought is unavailable from other sources." A copy of these orders is attached as Exhibit C.

25. In January of this year, I received a request from Jorge A. Mestre, Esq., the attorney for the individual Applicants, Messrs. Pérez and Veiga, requesting access to information, documents and unused footage from the production of *Crude*. In a letter dated January 27, 2010, my counsel, Maura Wogan, informed Mr. Mestre that we could not comply with the request without “violating [our] longstanding policy against disclosure of unused footage and/or editorial materials” because to do so “would seriously impair [our] ability to do future investigative filmmaking by undermining [our] credibility with potential subjects or sources requesting confidentiality.” A copy of Ms. Wogan’s letter is attached as Exhibit D.

**Why I Strongly Object to Producing the Raw Footage**

26. On or about April 10, 2010, I was served with copies of the Applications, in which the Chevron Parties ask this Court to require me to produce all of the *Crude* footage that was shot, acquired or licensed in connection with the film and to depose me to authenticate the footage. I strongly object to the production of the raw footage from *Crude* because it is protected by the privilege afforded to me as a journalist.

27. Maintaining my privilege as a journalist not to disclose confidential sources or the raw materials created in connection with the production of my films is fundamental to my ability to create documentary films. The privilege is especially important when I am producing films like *Crude* that focus on ongoing lawsuits. The reason that people on both sides of the dispute are willing to grant me access into their lives and communities is because of the agreements I make to keep material confidential and because they trust that I am a neutral outsider and not an advocate for either side of the controversy.

28. With *Crude*, for example, I was given extensive access to film Donziger, Pablo Fajardo and inhabitants of the Oriente region because they trusted I would tell their story in an accurate and neutral way. They opened their doors to me because they trusted that I was a

journalist and not a participant in the litigation. They also trusted that I would not turn over the raw footage to Chevron to be used against them. In fact, when Donziger was considering the level of access to grant me, I was able to encourage him to trust me, in part, by explaining that I had a history of successfully fighting against third-party attempts to obtain access to raw footage.

29. Chevron also relied on my journalistic credentials and commitments to telling both sides of the story in allowing me to film interviews with the two Chevron representatives. As stated above, I also agreed to allow Chevron certain approval rights.

30. If the subjects of my films believed that the raw footage, as opposed to a release of footage as part of the overall story told by me, would be handed over to third-parties and potentially taken out of context (especially by their adversaries in the lawsuit), they would be far less inclined to trust me and allow me to film them. Without the protections of the journalists' privilege and the confidence that I can honor my commitment to maintain control over my footage, I cannot make documentary films like *Crude*. Thus, requiring me to produce the outtakes from *Crude* would impose a significant burden on me, making it extremely difficult to gain access to critical sources and impairing my ability to make documentaries in the future.

### **The Cofán Meeting Scene**

31. In its papers, Chevron draws attention to a brief scene in the film showing a meeting in the Dureno community of the indigenous Cofán people, suggesting that the meeting “appear[s] to be one of the ‘focus groups’ conducted by Dr. Beristain” as part of the court ordered independent damages analysis conducted by Richard Cabrera. Chevron’s assumptions about this scene are incorrect. The Cofán meeting shown in the film was *not* one of Dr. Beristain’s neutral focus groups commissioned by Cabrera, but a *plaintiffs’ meeting* held *prior* to the commencement of Cabrera’s global assessment study and the appointment of Dr. Beristain to Cabrera’s team. This fact is confirmed by the film itself. Immediately preceding the Cofán

meeting scene, Steve Donziger can be heard telling Trudie Styler, wife of rock musician Sting, about the story of the Cofán people and the nature of the meeting they are about to attend. Mr. Donziger explains:

[The Cofán] are gathering independent of us to meet as a community to talk to *their lawyers* – meaning Pablo [Fajardo] and really myself, although I’m with you and not with the group – to talk about what they want as compensation for all the damage. . . . The meeting will probably be in process when we get there, but it will probably be a really, really interesting day.

*Crude* at 1:15:18-1:15:50.

32. The reason I edited Dr. Beristain from the Cofán meeting scene was not to “conceal” any improper conduct by plaintiffs’ counsel, but to prevent the scene from being misconstrued and taken out of context, just as Chevron is attempting to do here. In fact, I included several scenes in the film in which plaintiffs’ counsel engaged in questionable conduct, including the very scenes Chevron highlights as evidence of plaintiff’s improper “tactics.” As discussed above, I was committed to creating an unbiased depiction of the people and events surrounding the Lago Agrio Litigation to allow the audience to draw its own conclusions about the issues presented onscreen.

33. Before *Crude* was theatrically released, I invited representatives of both Chevron and the Lago Agrio plaintiffs to screen the film and offer their comments and reactions. I asked for their feedback only to ensure the film’s accuracy, but I retained complete editorial control. Chevron’s PR representative reviewed the film on behalf of Chevron and told me that he thought the film was fair and balanced. Plaintiffs’ counsel suggested I change the film in several ways. I rejected all but one recommended change. Because the film condensed several months of activity into a few minutes, I believed that viewers might misconstrue the scene showing Dr. Beristain at the Cofán meeting as a scene showing one of Dr. Beristain’s *subsequent* independent focus group meetings even though, as described above, the independent focus group meetings

had not yet been commissioned. To avoid giving the wrong impression that plaintiffs' counsel were in attendance at the subsequent neutral focus group meetings which, to my knowledge, they were not, I edited the scene for the final release. The original version remains available for viewing on Netflix.

### **Scenes of Judicial Inspections**

34. Chevron speculates that the raw footage will contain evidence relevant to “the conduct of the judicial inspection procedure,” which is allegedly an important issue to the foreign proceedings. However, Chevron’s attorneys, often accompanied by their own cameras and film crew, were present at every public event and hearing concerning the judicial inspections at which the *Crude* cameras were rolling. Neither I nor my crew was ever granted private access to film the judicial inspections. In fact, the scene allegedly showing Donziger’s “pressure tactics” in entering the judge’s chambers was also captured by Chevron’s cameras and the Ecuadorian news media. Thus, my raw footage is not the only source of the information sought by Chevron.

### **The Criminal Prosecutions**

35. Beyond what is already contained in the film, the unpublished footage contains no material regarding the criminal prosecutions in general or specifically the prosecutions against Messrs. Pérez and Reis Veiga.

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36. For the reasons explained in this declaration and in the accompanying memorandum of law, I respectfully request that the Applications be denied.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York  
April 22, 2010



JOSEPH A. BERLINGER