

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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Docket Nos. 10-1918 (L); 10-1966 (c)

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**IN RE: APPLICATION OF CHEVRON**

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**Joe Berlinger; Crude Productions, LLC; Michael  
Bonfiglio; Third Eye Motion Picture Company, Inc.;**  
**@radical.media; Lago Agrio Plaintiffs**  
*Appellants,*

v.

**Chevron Corporation; Rodrigo Pérez Pallares;**  
**Ricardo Reis Vega,**  
*Appellees.*

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**APPELLANTS' OPPOSITION TO APPELLEES'  
JOINT MOTION TO STRIKE MATERIALS  
OUTSIDE THE RECORD**

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Maura J. Wogan  
Jeremy S. Goldman  
FRANKFURT KURNIT KLEIN & SELZ, P.C.  
488 Madison Avenue, 10<sup>th</sup> Floor  
New York, NY 10022  
(212) 980-0120  
mwogan@fkks.com  
nhyland@fkks.com  
jgoldman@fkks.com

*Attorneys for Appellants Joe Berlinger, Crude  
Productions, LLC, Michael Bonfiglio, Third  
Eye Motion Picture Company, Inc. and  
@radical.media*

## **PRELIMINARY STATEMENT**

Appellants Joe Berlinger (“Berlinger”), Crude Productions, LLC, Michael Bonfiglio, Third Eye Motion Picture Company, Inc. and @radical.media respectfully submit this Memorandum of Law in Opposition to Appellees’ Joint Motion to Strike Materials Outside the Record (the “Motion”). By their Motion, Appellees seek to prevent this Court from considering a declaration from Appellant Joe Berlinger (“Berlinger II”) that was properly submitted to this Court in support of Appellants’ motion for a stay pending appeal. That declaration raised no new issues, but simply sought to provide more detail about the confidentiality agreements Berlinger entered into with the subjects of his film, information that the District Court erroneously refused to accept when it was offered. Appellees object to the inclusion of Berlinger II, yet their appellate briefs rely heavily on documents and events that are outside of the record, including information from the very stay proceedings in which Berlinger II was submitted. Under these circumstances, the Motion should be denied.

**A. Berlinger II was Properly Submitted in Support of Berlinger’s Stay Motion**

Appellees assert that the inclusion of the declaration “is a patently improper effort to rewrite the facts on appeal.” Motion at 5. In fact, Berlinger II was properly submitted to this Court on May 27, 2010 in support of Appellants’ Motion for a Stay, which was granted on June 8, 2010. *See* D.E. 187.

Rule 8 of the Federal Rules of Appellate Procedure provides that a motion for a stay “must . . . include . . . originals or copies of affidavits or other sworn statements supporting facts subject to dispute.” Fed. R. App. P. 8(a)(2)(B)(ii). Berlinger II provided facts and information that were directly relevant and responsive to allegations made by Appellees in their opposition papers. Specifically, Berlinger II responded to “certain false accusations by Chevron disparaging [Berlinger’s] integrity and independence as a journalist and documentary filmmaker,” countering untrue statements about when the film was made available to the public and providing factual information about a standard release form in response to Chevron’s arguments about confidentiality. Thus, Berlinger II contained “sworn statements supporting facts subject to dispute.” *See* Fed. R. App. P. 8(a)(2)(B)(ii).

Appellants tried to strike Berlinger II once before, raising the identical arguments presented here. *See* Appellee Chevron Corporation’s (1) Opposition to Respondents-Appellants’ Motion to File an Oversized Reply and (2) In the Alternative, Emergency Motion for Leave to File a Sur-Reply (D.E. 100), at 1-2 (“The factual allegations raised in the Declaration constitute an improper attempt to change the record on appeal and should be disregarded for that reason alone.”). But Appellees’ attempt failed. *See* Order Granting Motion for Leave to File Oversized Reply Brief (D.E. 159).

**B. Berlinger II Provided Details Regarding Berlinger’s Confidentiality Agreements that the District Court Erroneously Refused to Accept in the Record**

On appeal, Appellants contend that the District Court “committed reversible error in finding that Berlinger . . . ‘had not sustained his burden of demonstrating confidentiality for purposes of the journalist privilege.’” App. Br. (D.E. 199) at 31 (quoting SPA-23). One of the District Court’s errors was rejecting Berlinger’s offer to submit to the District Court, for its *in camera* review, additional details concerning the nature of the confidentiality agreements he entered into with his subjects. Tr. at 29 (A-1565). Berlinger II contains information that Berlinger would have submitted to the District Court had his request not been improperly denied. Accordingly, it would be inappropriate for the Court to preclude consideration of that information on appeal.

**C. Appellees Themselves Rely on Evidence and Events Outside the Record**

Appellees accuse Appellants of including in the record a declaration that was not before the District Court when it issued the Order now being appealed. Yet, in their appellate papers, Appellees themselves rely on evidence that was not before the District Court in an attempt to bolster their arguments on appeal. For example, Appellees included in their Appendix two letters exchanged by counsel for Chevron and Berlinger while Berlinger’s stay motion before the District Court was pending. *See* PAA-244-247. Those letters, dated May 18 and 19, 2010, were not

before the District Court when it issued its Order on May 6, 2010. Nevertheless, Chevron attached those documents to its Appendix, and cited to them in support of its attempt to shift the burden onto Berlinger to prove the *non*-relevance of the undisclosed footage, even though the burden of establishing relevance rests squarely on Chevron. *See* Chevron Br. (D.E. 218) at 41-42; *Gonzales v. Nat'l Broad. Co., Inc.*, 197 F.3d 29, 36 (2d Cir. 1999). Similarly, Appellees Perez and Veiga rely on evidence that was not before the District Court to support their claims of urgency, alleging that “on June 17, 2010, the Prosecutor General formally served the Accusation on Messrs. Perez and Veiga, which will trigger a preliminary hearing within 30 days of June 17th.” Perez/Veiga Br. (D.E. 220) at 44; *see also id.* at 11; Chevron Br. (D.E. 218) at 25.<sup>1</sup>

Appellees also cite extensively in their appellate briefs to the District Court’s May 20, 2010 order (“Postponement Order”) and the lower and appellate court hearings on Berlinger’s motion for a stay pending appeal. *See, e.g.*, Chevron Br. (D.E. 218) at 24, 25, 38, 41, 42, 43, 45, 50, 51; Perez/Veiga Brief (D.E. 220) at 19, 26.<sup>2</sup> The stay proceedings occurred after the lower court entered its May 6, 2010

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<sup>1</sup> Amicus Curiae Dole Corporation (“Dole”) cites to and relies upon a report issued, *just two days before* Dole submitted its brief, by the U.S. Chamber Institute for Legal Reform. *See* Berlinger’s Reply Brief (D.E. 251) at 9-10.

<sup>2</sup> For example, in support of its argument that the District Court correctly applied the availability prong of the two-part test under *Gonzales* for overcoming the journalist’s privilege – a point Berlinger contests on appeal, Chevron cites not to

order and *are the very same proceedings in which Berlinger II was submitted*. If Appellees are permitted to rely on information from the stay proceedings to support their arguments on appeal, Appellants should be permitted that same latitude.

### **CONCLUSION**

For the foregoing reasons, Appellants respectfully request that this Court deny Appellees' Joint Motion to Strike Materials Outside the Record.

Dated: New York, New York  
July 6, 2010

FRANKFURT KURNIT KLEIN & SELZ,  
P.C.

By:                     /s/ Maura J. Wogan                      
Maura J. Wogan  
Jeremy S. Goldman

488 Madison Avenue, 10th Floor  
New York, NY 10022  
(212) 980-0120

*Attorneys for Appellants Joe Berlinger,  
Crude Productions, LLC, Michael  
Bonfiglio, Third Eye Motion Picture  
Company, Inc. and @radical.media*

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the District Court's original Order, but to the subsequent Postponement Order, in which Judge Kaplan attempts to recast the basis for his availability analysis. *See Berlinger's Reply Brief (D.E. 251) at 22-23.*