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Attorney-Client Communication

Memo

Date:	July 23, 2013
To:	Dr. Diego Garcia Carrión
From:	Paul S. Reichler
Re:	Subpoenas To Internet Service Providers In RICO And Fraud Action

You have asked that I comment in writing regarding the recommendation of Winston & Strawn LLP that the Republic not seek to get involved in the pending lawsuits concerning the subpoenas that Chevron Corporation has served on Microsoft Corporation, Google Inc., and Yahoo! Inc. Chevron served these subpoenas in connection with the RICO and fraud claims that Chevron is pursuing against various defendants in the United States District Court for the Southern District of New York, based on their roles in the Lago Agrio litigation in Ecuador.

The litigation concerning the subpoenas is occurring in the United States District Court for the Northern District of New York, and more recently, the United States Court of Appeals for the Second Circuit (also in New York), with respect to Microsoft, and in the United States District Court for the Northern District of California, with respect to Google and Yahoo. This is because Chevron served the subpoena on Microsoft in the Northern District of New York, and served the subpoenas on Google and Yahoo in the Northern

District of California.

In the litigation in the Northern District of New York, Judge Lewis A. Kaplan, sitting by designation in that District, issued a Memorandum Opinion on June 25, 2013 denying motions to quash the Microsoft subpoena filed by the defendants in the RICO and fraud action, and by certain "John Doe" non-parties who own two of the email addresses in question.[1] Those "John Doe" non-parties have filed a motion for reconsideration of that decision. Those same non-parties also have recently filed a notice of appeal to the United States Court of Appeals for the Second Circuit.

In contrast, no decision has yet been issued in the litigation involving the Google and Yahoo subpoenas in the Northern District of California. Motions to quash have been filed there by the defendants in the RICO and fraud action and by some 30 "John Doe" non-parties who own certain of the email addresses listed in the subpoenas.

As we discussed with you in Washington on July 18, 2013, we have reviewed a series of emails from Winston that you forwarded to me on July 16, 2013. In several of those emails, Winston recommended that the Republic not seek to get involved in the litigation concerning the subpoenas, at least at the District Court level. As we explained during our meeting on July 18, we were persuaded by Winston's views in this regard. Having since had the opportunity to review various of the court papers that have been submitted in the two litigations concerning the subpoenas, we are even more persuaded that the Republic should not seek to get involved in these matters.

Before explaining the reasons supporting our concurrence with Winston's recommendation, a few observations are in order. First, we do not have the same level of

[1] Judge Kaplan is also the trial judge in the RICO and fraud case in the Southern District of New York.

familiarity as Winston with either the RICO and fraud action in the Southern District of New York, or the arbitration between Chevron and the Republic concerning the Lago Agrio litigation in Ecuador. Our views are based on our general awareness of the nature of those proceedings, information in the Winston emails, and our review in the last several days of certain court papers in the U.S. subpoena lawsuits.

Second, it may be useful briefly to describe the subpoenas themselves. The Microsoft subpoena focuses on 30 specific "Hotmail" email addresses; the Google subpoena focuses on 44 specific "gmail" email addresses; and the Yahoo subpoena focuses on 27 specific "yahoo" email addresses. Each of the subpoenas seeks information concerning the ownership and usage of these specified email addresses, but not the contents of any email communications. As Judge Kaplan explained on pages 4 and 6 of his June 25, 2013 Memorandum Opinion denying the motions to quash the Microsoft subpoena:

> In simpler terms, Chevron is requesting that Microsoft produce documents identifying the account holders and their available personal information. Chevron seeks also the IP address associated with the creation of each account and the IP address connected with every subsequent login to each account over a nine-year period. The subpoena does not call for the contents of any emails sent or received by any of the thirty email addresses.
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> To summarize, if Microsoft still has and were to produce the requested information, Chevron would learn the IP address associated with every login for every account over a nine-year period. Chevron could identify the countries, states, or even cities where the users logged into the accounts, and perhaps, in some instances, could determine the actual building addresses.
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> Chevron would not learn who logged into the accounts. That is to say that Chevron would know who created (or purported to create) the email accounts but would not know

> if there was a single user or multiple users for each account. Nevertheless, the subpoenaed information might allow Chevron to infer the movements of the users over the relevant period (at a high level of generality) and might permit Chevron to make inferences about some of the users' professional and personal relationships.

Against this backdrop, we see very little, if any, advantage for the Republic in seeking to become involved in these subpoena proceedings, and we see considerable potential disadvantage. Initially, I note that we have no reason to believe that the Republic or any official or representative thereof owns any of the email addresses listed in the subpoenas. Further, while the publicly available record does not reveal the extent to which the targeted email addresses are owned by Ecuadorian citizens, it seems relatively clear that a substantial number of the email addresses are owned by citizens of other nations. Thus, Ecuador's standing to be heard in the subpoena litigations is questionable at best. Even if Ecuador were deemed to have standing to represent the interests of any affected Ecuadorian citizens (and it is far from clear that it would be granted representative standing), it would still likely not have standing to challenge the subpoenas insofar as they concern email addresses owned by citizens of other nations.

Any attempt by Ecuador to join the subpoena lawsuits at the District Court level at this juncture would also likely be attacked as being too late. The subpoenas were served in 2012 and motions to quash were filed in October of that year. Judge Kaplan already has denied the motions to quash in the Northern District of New York, and has before him a motion for reconsideration (although the ensuing notice of appeal may divest him of jurisdiction over that motion). The parallel motions to quash are fully briefed and ripe for decision in the Northern District of New York. Neither District Court is likely to view favorably any belated attempt by the Republic to take a position on whether the subpoenas

should be enforced.

The filing in the New York litigation of the notice of appeal to the Second Circuit does theoretically provide a new opportunity for Ecuador to seek to express its views in a more timely manner at the appellate level. But the Court of Appeals still might not be receptive to the Republic attempting to do so, among other reasons because the Republic did not do so in the lower court, and also because of the standing issue discussed above.

Another factor that weighs against Ecuador seeking to get involved with either of the subpoena litigations is that we are not aware of, nor has Winston suggested, any argument against enforcement of the subpoenas that Ecuador is uniquely situated to make. The defendants in the RICO and fraud action have every incentive to contest the subpoenas, and are doing so. In addition, owners of many of the email addresses in question have engaged two public interest organizations, the Electronic Frontier Foundation and Earthrights International, to represent them in resisting enforcement of the subpoenas. While the defendants and the non-party "John Does" have not been successful in challenging the subpoenas, at least not yet, they are vigorously attacking them. It is thus unclear what value the Republic would add to the litigations. If you believe that there is some special Ecuadorian interest, such as a right of privacy protected by the Ecuadorian Constitution, that Ecuador is better positioned to articulate than any of the existing litigants, please let us know. Even then, we are doubtful that any such interest would be sufficient to materially affect the outcome of the litigations, at least until it is established that Ecuadorians own a substantial number of the email addresses in question.[2]

[2] This memorandum does not consider whether, and if so, to what extent, under a conflicts of laws analysis, a United States Court enforcing a United States subpoena for Internet-related information would be permitted or required to take the law of another nation into account.

The most compelling reason why we believe Ecuador should not enter the fight over the subpoenas, however, is that doing so would create the appearance that Ecuador is acting in concert with the Lago Agrio plaintiffs and their lawyers, as well as the appearance that Ecuador fears what the subpoenaed information would show. These perceptions could be damaging to Ecuador in the pending arbitration (and to the defendants in the RICO and fraud action). We understand from Winston's emails that Ecuador has followed a policy of keeping its distance -- "separation," as Winston calls it -- from the RICO and fraud litigation in the Southern District of New York. This seems to us to be a wise policy decision. Accordingly, we think it would be unwise for Ecuador to risk losing this "separation" by inserting itself into the subpoena lawsuits, especially since, in our view, joining those lawsuits is highly unlikely to produce any meaningful benefits either for the Republic or the individuals who are already fighting the subpoenas.

For all these reasons, we support Winston's recommendation. If you would like to discuss this matter further, please let me know.