



VIA ELECTRONIC MAIL

January 14, 2020

Steven E. Sletten
Gibson, Dunn & Crutcher LLP
330 South Grand Avenue
Los Angeles, CA 90071

**Re: *Persian Gulf v. BP West Coast Products et al.*
Non-party Subpoena to Consumer Watchdog & Jamie Court**

Dear Mr. Sletten:

We write in response to Defendants' January 8, 2020 deposition subpoena directed to Jamie Court, President of Consumer Watchdog.¹ As we have informed you in our numerous conversations, the documents and testimony sought from Consumer Watchdog and Mr. Court are protected by the First Amendment journalists' and other privileges. Taking into account the extreme burden already imposed by the seven non-party subpoenas Chevron and Exxon have collectively served on Consumer Watchdog since 2009 (accounting for approximately 500 hours of attorney time in just the last 18 months), it is clear that the purpose in seeking to depose Mr. Court now is simply part of a larger strategy to harass, intimidate, and inconvenience the organization as punishment for its investigative reporting into the oil and gasoline industry over the last 25 years.

The sheer breadth and intrusiveness of Chevron and Exxon's three most recent subpoenas, dated September 6, 2018; July 24, 2019; and January 8, 2020, leads to no other plausible conclusion as to the basis for the subpoena now directed to Mr. Court other than to muzzle a long-time critic of the industry, and is a clear abuse of discovery. *See Beinin v. Ctr. for Study of Popular Culture*, No. 06-CV-2298-JW-RS, 2007 WL 832962, at *2 (N.D. Cal. Mar. 16, 2007), *objections overruled*, No. 06-CV-2298-JW, 2007 WL 1795693 (N.D. Cal. June 20, 2007) ("When applied to third parties, discovery can be limited to protect them from harassment, inconvenience, or disclosure of confidential documents."); *see also In re Subpoena to Apple Inc.*, No. 13-CV-254-MOC-DSC, 2014 WL 2798863, at *2 (N.D. Cal. June 19, 2014) (similar).

A clear pattern of attacking the messenger is obvious here, as Defendants have continuously ramped up their attempts to invade Consumer Watchdog's First Amendment privileges with each subpoena. This is self-evident as the seven non-party subpoenas issued by Chevron and Exxon in multiple lawsuits challenging the oil and gas industry's anti-consumer and anti-competitive practices each sought Consumer Watchdog's confidential sources and communications with news reporters and government officials, and other unpublished materials

¹ We note that we have not been officially served with a copy of the subpoena, as it appears the service was directed to the wrong address.

protected by the First Amendment privileges. The fact that Defendants have consistently sought Consumer Watchdog's confidential sources, communications, and documents across multiple lawsuits is evidence that Chevron and Exxon's subpoenas are part of an ongoing campaign untethered to the underlying litigation the industry attempts to use to excuse its harassment.

Moreover, we have raised with you on multiple occasions during the meet and confer over the July 29, 2019 non-party subpoena that a deposition subpoena for Mr. Court is unduly burdensome, particularly when weighed against the potential relevance and purported need for the information, if any, to Defendants' defense in the current litigation. *See Gonzales v. Google, Inc.*, 234 F.R.D. 674, 680 (N.D. Cal. 2006) (citing *Heat & Control, Inc. v. Hester Indus., Inc.*, 785 F.2d 1017, 2014 (Fed. Cir. 1986) ("[A] court determining the propriety of a subpoena balances the relevance of the discovery sought, the requesting party's need, and the potential hardship to the party subject to the subpoena.")).

Here, as Defendants and Plaintiffs alike have equal access to Consumer Watchdog's published investigative reports and public testimony regarding the California oil and gasoline industry, as well as the publicly-available data relied upon in those published documents, Defendants can put on their own evidence refuting the conclusions of Consumer Watchdog's reports, can challenge the findings of these reports through their own experts, and therefore are in no way prejudiced by not taking Mr. Court's deposition. *See e.g., Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998); *Edwards v. California Dairies, Inc.*, No. 14-MC-00007-SAB, 2014 WL 2465934, at *6 (E.D. Cal. June 2, 2014).

Additionally, Consumer Watchdog's reports and analysis targeted by the latest subpoenas are not merely public record; their accuracy has been independently confirmed. Many of their findings have been adopted, validated, and extended by new research and analysis from the California Energy Commission and the California Governor's Office. For example, in March 2019, Governor Gavin Newsom called on the California Energy Commission to evaluate claims of price-gouging and anti-competitive behavior. The California Energy Commission's initial findings validated Consumer Watchdog's analysis that California oil refiners are overcharging their branded stations as a way of artificially inflating retail gas prices and their profits.²

The California Energy Commission's October 2019 final report confirmed these findings³ and Governor Newsom called upon California Attorney General Xavier Becerra to take action.⁴ A copy of Governor Newsom's letter to the Attorney General is attached as Exhibit A. As the Governor noted in his letter:

² Consumer Watchdog first identified the market disruptions noted in the California Energy Commission's report in 2015. *Consumer Watchdog's Analysis for the California Attorney General and California Energy Commission's Petroleum Market Advisory Committee* (June 30, 2015), <https://consumerwatchdog.org/resources/wholesalegasolinemanipulationanalysis.pdf>.

³ California Energy Commission: *Additional Analysis on Gasoline Prices in California* (Oct. 21, 2019), https://www.energy.ca.gov/sites/default/files/2019-10/Gas_Price_Report_0.pdf.

⁴ Letter From Gov. Gavin Newsom Transmitting California Energy Commission's Report *Additional Analysis on Gasoline Prices in California* (Oct. 21, 2019), <https://www.gov.ca.gov/wp-content/uploads/2019/10/10.21.19-letter.pdf>.

The enclosed report by the California Energy Commission (CEC) suggests big oil companies are misleading and overcharging customers, leading to Californians paying as much as 30 cents per gallon more than residents of other states.

...

Simply stated, name-brand gas retail outlets in California are charging more for a gallon of gas compared to their unbranded, hypermart competitors. And gas retail outlets in California are charging more than in other states. A significant portion of the higher prices is attributable to charges by name brands – this far exceeds national trends.

There is no identifiable evidence to justify these premium prices. . . . The mystery surcharge adds up, especially for cost-conscious, working families. If oil companies are engaging in false advertising or price fixing, then legal action should be taken to protect the public.⁵

This raises the question of whether Defendants also intend to issue overbroad and invasive document and deposition subpoenas to these nonparties as well. Presumably Chevron and Exxon are not willing to expend the political capital that a subpoena to the Governor or the Attorney General would require, but instead prefer to pick on a small nonprofit organization that has long been a target of the industry.

Furthermore, as you and co-counsel for Defendants know, Consumer Watchdog has already produced all responsive documents that are not privileged. While your December 31 email focuses on Mr. Court having been listed in Plaintiffs' initial disclosures as the basis for seeking his deposition, you ignore that to the extent Defendants seek testimony concerning Consumer Watchdog's First Amendment protected activities Mr. Court would invoke the appropriate—and undoubtedly applicable—privileges. A subpoena that is not reasonably calculated to lead to the discovery of admissible evidence is presumptively unduly burdensome under Fed. R. Civ. P. 45.

Consumer Watchdog has already spent significant charitable resources and time to protect their privileged communications and documents. The Federal Rules of Civil Procedure clearly afford nonparties like Mr. Court and Consumer Watchdog special protection against the time and expense of complying with subpoenas. “[C]oncern for the unwanted burden thrust upon nonparties is a factor entitled to special weight in evaluating the balance of competing needs’ in a Rule 45 inquiry.” *Amini Innovation Corp. v. McFerran Home Furnishings, Inc.*, 300 F.R.D. 406, 409 (C.D. Cal. 2014) (internal citation omitted); *see also* Fed. R. Civ. P. 45(c)(3)(B)(ii), (iii) (A court may in its discretion disallow the taking of a non-retained expert’s testimony unless the proponent makes a showing of “*substantial need*” that “cannot be otherwise met without undue hardship” and payment of reasonable compensation.) (emphasis added); *Dart Indus. Co., Inc. v. Westwood Chem. Co., Inc.*, 649 F.2d 646, 649 (9th Cir.1980) (discovery restrictions may be even broader where target is nonparty).

⁵ *Id.*

To the extent Mr. Court's deposition is for the completely collateral purpose of impeaching his credibility, his deposition is unnecessary, untimely, and the burden on Mr. Court and Consumer Watchdog is not in proportion to Defendants' need. *See Rawcar Grp., LLC v. Grace Med., Inc.*, No. 13-CV-1105-H (BLM), 2014 WL 12199977, at *4 (S.D. Cal. June 26, 2014) (quashing third-party subpoena where "Defendant makes no effort to establish the relevance or likely benefit of each request, to justify the breadth of the discovery and Defendant's need for the discovery . . ."). Moreover, "[v]irtually every court that has addressed deposition notices directed at an official at the highest level or 'apex' of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment." *Celerity, Inc. v. Ultra Clean Holding, Inc.*, No. C 05-4374MMC(JL), 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007).

Like Defendants' CEOs or any other prominent executive, Mr. Court's time is scarce and critical to the organization's charitable mission. His schedule is booked months in advance and he has little more than one or at most two hours at a time to give to any one campaign or project. The fact that you would expect him to make available a seven-hour block of his time, in addition to travel time and preparation, without first meaningfully meeting and conferring about his availability is not only wholly unreasonable but also completely impractical. It would also be a waste of the charitable resources Mr. Court has a fiduciary duty to shepherd. Such a deposition thus seems clearly intended not just to discredit and intimidate Consumer Watchdog, but also to divert Consumer Watchdog's resources and undermine the organization's efforts to reform your clients' industry.

As you are well aware, Consumer Watchdog's policing of oil drilling and regulation in the state, including the Governor's firing this summer of California's top oil regulator due to conflicts of interest at the agency he governed, was driven by our nonprofit's investigative reporting and day-to-day advocacy.⁶ As a result of Consumer Watchdog's complaints, two state oil regulators

⁶ *See, e.g.*, Janet Wilson, *Governor Orders Regulator's Ouster After Reports By Desert Sun*, *Desert Sun* (July 11, 2019), <https://www.desertsun.com/story/news/2019/07/11/california-governor-gavin-newsom-orders-firing-state-top-oil-regulator/1710651001/>; Andrew Oxford, *Gov. Newsom Orders Firing Of California's Top Oil, Gas Regulator Over Fracking Permits*, *Associated Press* (July 12, 2019), <https://www.mercurynews.com/2019/07/12/california-governor-orders-firing-of-oil-gas-regulator/>; Phil Willon, *Gov. Gavin Newsom fires top official over fracking permits – but won't ban the oil well*, *Los Angeles Times* (July 12, 2019), <https://www.latimes.com/politics/la-pol-ca-gavin-newsom-oil-fracking-20190712-story.html>; Debra Kahn, *Newsom Fires Top Oil Regulator After Industry Ties Exposed*, *Politico Pro* (July 12, 2019); Alexei Koseff, *Gavin Newsom Fires California Official Who Okd Big Increase in Fracking*, *San Francisco Chronicle* (July 12, 2019), <https://www.sfchronicle.com/politics/article/Gavin-Newsom-fires-California-official-who-OKd-14092017.php>; Sophia Bollag, *'I am very angry' – Newsom blasts fracking regulator he fired over conflict of interest claims*, *Sacramento Bee* (July 12, 2019), <https://www.sacbee.com/news/politics-government/capitol-alert/article232599842.html>; Andy Rowell, *After Firing Top Regulator, Will Newsom Seize His Chance to Lead California Off of Oil*, *Oil Change International* (July 19, 2019), <http://priceofoil.org/2019/07/19/after-firing-top-regulator-will-newsom-seize-his-chance-to-lead-california-off-of-oil/>; Derek Catron, *Kern Spill Renews Oil Production Controversy*, *Capitol Weekly* (Aug. 21, 2019), <https://capitolweekly.net/kern-spill-renews-oil-production-controversy/>; Dan Bacher,

are also currently under investigation by California's Fair Political Practices Commission for owning stock in Chevron and Exxon while simultaneously regulating the companies' oil drilling and exploration permits.⁷

Taking Mr. Court and our attorneys off this beat for a day or more, in addition to preparation time, is an undue and unreasonable burden and apparently a retaliatory strike against your client's most effective critic in state government. As Defendants' lobbyists in Sacramento are no doubt aware, the date proposed for Mr. Court's deposition is two days prior to the deadline for two-year bills to be voted out from their respective legislative chambers. Mr. Court is spearheading the effort to impose an oil severance tax on the oil industry, as exists in other oil-producing states, as well as other bills reforming the recycling of petroleum products. For example, on January 28th, the date of the proposed deposition, Mr. Court will be working to make sure Senate Bill No. 246 (Wieckowski) passes the Senate, as well as toward the passage of numerous bills dealing with oil drilling practices. Is it a coincidence that you would seek to depose Mr. Court at precisely the moment he is engaged in a major reform battle with Defendants' lobbyists in the state capitol? To be clear, the objections above aside, Mr. Court is not available for deposition on January 28th nor does Consumer Watchdog believe a deposition on any date is warranted.

In sum, Defendants have not set forth the discoverable, non-privileged, and relevant information that would be obtained through Mr. Court's deposition. As such, we do not intend to make Mr. Court available for a deposition as currently proposed by Defendants on the grounds that Defendants have previously made clear their intention for deposing Mr. Court is to seek First Amendment privileged information and to simply attack the organization's work on the oil and gasoline industry generally, a purpose that is unrelated to the claims and defenses in the underlying action.

Sincerely,



Jerry Flanagan



Daniel L. Sternberg

Newsom Freezes New Fracking Operations, But Oil Drilling Permits Outpace 2018, Indybay Media (Nov. 24, 2019), <https://www.indybay.org/newsitems/2019/11/24/18828400.php>.

⁷ Press Release, Consumer Watchdog, *Fair Political Practices Commission Investigates Two Oil Regulators For Conflict Of Interest After Consumer Watchdog Complaint*, (Sept. 16, 2019), <https://www.consumerwatchdog.org/energy/fair-political-practices-commission-investigates-two-oil-regulators-conflict-interest-after>.

Exhibit A



OFFICE OF THE GOVERNOR

October 21, 2019

Attorney General Xavier Becerra
Attorney General's Office
California Department of Justice
Sacramento, CA 94244

Dear Attorney General Becerra,

The enclosed report by the California Energy Commission (CEC) suggests big oil companies are misleading and overcharging customers, leading to Californians paying as much as 30 cents per gallon more than residents of other states.

This report, which I directed the CEC to complete, underscores the importance of investigating oil company and retailer practices behind the so-called mystery surcharge incorporated in the price of gasoline in California, including the possibility of price fixing or other anti-competitive practices.

Simply stated, name-brand gas retail outlets in California are charging more for a gallon of gas compared to their unbranded, hypermart competitors. And gas retail outlets in California are charging more than in other states. A significant portion of the higher prices is attributable to charges by name brands – this far exceeds national trends.

There is no identifiable evidence to justify these premium prices. The CEC makes it clear that it was not able to obtain any evidence that gasoline sold by less expensive, unbranded retail outlets is in any way inferior to the product sold by name-brand outlets. The mystery surcharge adds up, especially for cost-conscious, working families. If oil companies are engaging in false advertising or price fixing, then legal action should be taken to protect the public.

Based on the enclosed report, I request your office open an investigation into whether false advertising or price fixing are occurring and contributing to the mystery surcharge imposed on Californians. In the course of the investigation,

you may want to consider the findings in the final report of the Petroleum Market Advisory Committee. I look forward to hearing your conclusions.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Gavin Newsom', with a long horizontal line extending to the right.

Gavin Newsom
Governor of California