IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:10-cv-00047-MSK-MEH

CHEVRON CORPORATION,

Petitioner,

v.

STRATUS CONSULTING, INC.;
DAVID J. CHAPMAN;
DOUGLAS BELTMAN;
JENNIFER MH. PEERS;
DAVID M. MILLS;
PETER N. JONES;
LAURA BELANGER; and
ANN S. MAEST,

Respondents.

and,

DANIEL CARLOS LUSITANDE YAIGUAJE, *et al.*,

Ecuadorian plaintiffs/Interested parties.

STRATUS' AND ECUADORIAN PLAINTIFFS' MOTION FOR SANCTIONS AGAINST PETITIONER CHEVRON CORPORATION

CERTIFICATE OF COMPLIANCE

Pursuant to D.C. COLO. L. Civ. R. 7.1(A), the undersigned counsel certifies that Emery Celli has conferred with counsel for Petitioner Chevron Corporation regarding this Motion. Counsel for Chevron opposes this Motion.

INTRODUCTION

D.C. Colo. L. Civ. R. 30.3(A)(5) prohibits "[q]uestioning that unfairly embarrasses, humiliates, intimidates, or harasses the deponent . . . absent a clear statement on the record explaining how the answers to such questions will constitute, or lead to, competent evidence admissible at trial." At the October 6, 2010 deposition of Mr. Beltman, a third party to the Lago Agrio case, Chevron attempted to embarrass, humiliate, intimidate, harass, and threaten Mr. Beltman, questioning him about his knowledge of federal criminal statutes, about RICO, about the Hobbs Act, about other courts' decisions in this case concerning crime fraud, about government debarment of contractors, and other topics that have nothing whatsoever to do with legitimate questioning in this case. These blatant intimidation tactics have no place in this case and fall below the standards of professional conduct required by the Local and Federal Rules. Stratus and Plaintiffs respectfully submit that Chevron should be sanctioned as follows: (1) that the Court order Chevron to cease such harassing conduct in future depositions in this case, and (2) although it is appropriate for Chevron to pay the parties' costs and fees, *inter alia*, for the deposition itself, D.C. Colo. L. Civ. R. 30.3(D), Stratus/Plaintiffs respectfully suggest that the Court order alternative sanctions against Chevron, such as an appropriate payment to a local bar association or other organization that sponsors deposition education.[1]

[1] *See, e.g., AG Equip. Co. v. AIG Life Ins. Co.*, No. 07-CV-556-CVE-PJC, 2008 WL 5205192, at *8 (N.D. Okla. Dec. 10, 2008).

BACKGROUND

Judge Kane granted Petitioner's request for the issuance of subpoenas of certain individuals affiliated with Stratus Consulting pursuant to 28 U.S.C. § 1782. (Dkt. # 22.) One of these individuals, Douglas Beltman, appeared for a deposition in Denver on October 6, 2010.

Although Your Honor's last ruling (Dkt. # 262) addressed Stratus' document production and not depositions, Plaintiffs did more than honor the spirit of the Court's ruling: they did not assert even a single privilege objection during the entire deposition. Chevron thus had what it had always claimed it wanted: a free and open opportunity to question Mr. Beltman concerning the Cabrera report. Instead, Chevron abused that opportunity and the good offices of this Court, with harassing, bad faith questioning intended to intimidate the witness.

Ms. Neuman began with this series of questioning:

> Q. Are you aware that six fellow judges in the United States have now ruled that plaintiffs and their consultants, in writing the Cabrera report and plaintiffs' collusion with Cabrera, is a crime of fraud for the purposes of applying the exception to the attorney-client privilege?
>
> A. I'm not aware --
>
> MR. BEIER: Objection to form. Argumentative.
>
> A. I'm not aware of that, no.
>
> . . .
>
> Q. Are you aware that Magistrate Judge Garcia in the federal court for the District of New Mexico found that the Crude outtakes show, quote, inappropriate, unethical, and perhaps illegal conduct by plaintiffs' counsel and consultants?
>
> MR. BEIER: Object to the form.

A. No.

Q (BY MS. NEUMAN) Are you aware that the federal court in the Western District of North Carolina said, quote, "While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal and what has blatantly occurred in this matter would, in fact, be considered fraud by any court," close quote?

MR. BEIER: Object to the form.

A. I'm not aware of that, no.

Q (BY MS. NEUMAN) Are you aware that a federal court in California in the 1782 proceeding against Mr. Powers, in applying the crime fraud exception, stated that, quote, "There is ample evidence in the record that the Ecuadorian plaintiffs secretly provided information to Mr. Cabrera, who was supposedly a neutral court-appointed expert, and colluded with Mr. Cabrera to make it look like the opinions were his own," close quote?

MR. BEIER: Object to the form.

MS. MOLL: I join the objection.

A. No, I'm not aware of that.

Q (BY MS. NEUMAN) Have you personally read any of the opinions of the judges that have made crime fraud rulings in these matters?

A. I don't know.

Q. Has anyone told you that crime fraud rulings have been made in connection with plaintiff's collusion with Mr. Cabrera?

MR. BEIER: I'm going to object and instruct the witness not to answer the question to the extent it discloses attorney-client communications. If you can answer the question without disclosing attorney-client communications, then do so.

A. I'll follow the advice of my attorney and not answer that question.

Ex. A (Transcript of Deposition of Oct. 6, 2010 Douglas John Beltman) at 12:20-16:8.[2]

[2] All exhibits are to the accompanying declaration of Ilann M. Maazel.

This line of "questioning" was a simple attempt to intimidate Mr. Beltman and accuse him and Stratus of participating in a crime or fraud. Counsel then launched into a recitation of criminal statutes completely unrelated to the purposes of the limited § 1782 proceeding:

> Q. Have you ever heard of the Hobbs Act?
>
> A. No.
>
> Q. Have you ever heard of RICO?
>
> A. Yes.
>
> Q. Do you know what it is?
>
> A. Unh-unh. No, I don't.
>
> Q. Have you ever heard of the Travel Act?
>
> A. Pardon? Could you repeat that?
>
> Q. Have you ever heard of the Travel Act?
>
> A. No.
>
> Q. Are you aware of your Fifth Amendment right against self-incrimination?
>
> A. Yes.
>
> Q. You understand that you are free to assert that right in this proceeding?
>
> A. Yes.

Id. 18:22-19:12. Not content to cite criminal statutes in this § 1782 deposition, Chevron raised the possibility of debarment proceedings by the United States against Stratus:

> Q. Have you ever been the subject of a government debarment proceeding?
>
> A. No.

> Q. Has Stratus ever been the subject of a government debarment proceeding?
>
> A. Not to my knowledge.
>
> Q. Are you aware that the involvement and criminal conduct can serve as grounds for both individuals and companies to be permanently debarred from government contracting?
>
> A. Yes, I'm aware of that.
>
> Q. Are you aware that involvement in a fraud can serve as grounds for both individuals and companies to be permanently debarred from government contracting?
>
> A. No, I'm not.
>
> MR. BEIER: Objection. Calls for a legal conclusion. You can answer.
>
> A. I'm not aware of that, no.

Id. 19:13-20:6.

In addition to these blatant attempts at intimidation, counsel was repeatedly abusive of Mr. Beltman when he provided answers that undermined counsel's fraud theory, mischaracterizing Mr. Beltman's testimony in an attempt to trap him into changing his answers, insinuating that he was lying, *id.* 20:17-19, and unfairly accusing him on the record of "misrepresenting" a document in evidence. *Id.* 183:24-25.

LEGAL STANDARD

D.C. Colo. L. Civ. R. 30.3(A)(5) prohibits "[q]uestioning that unfairly embarrasses, humiliates, intimidates, or harasses the deponent, or invades his or her privacy absent a clear statement on the record explaining how the answers to such questions will constitute, or lead to, competent evidence admissible at trial." Pursuant to D.C. Colo. L. Civ. R. 30.3(B), this prohibition is a standing order of the court for

purposes of Fed. R. Civ. P. 37(b), and thus sanctions are available for violations of Local Rule 30.3(A). Sanctions issued pursuant to Rule 37(b) are discretionary, though they "must be in the interests of justice and proportional to the specific violation." *Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1557 (10th Cir. 1996).

In addition, federal courts have inherent authority "to sanction attorneys for abuse of the discovery process." *Pescia v. Auburn Ford-Lincoln Mercury Inc.*, 177 F.R.D. 509, 510 (M.D. Ala. 1997). *See also Kaufman v. Am. Fam. Mut. Ins. Co.*, No. 05-cv-02311-WDM-MEH, 2008 WL 1806195, at *7 (D. Colo. Apr. 21, 2008); *Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc.*, 133 F.R.D. 166, 168 (D. Colo. 1990).[3]

ARGUMENT

"No one expects the deposition of a key witness in a hotly contested case to be a non-stop exchange of pleasantries." *Freeman v. Schointuck*, 192 F.R.D. 187, 189 (D. Md. 2000). But as the District Court for the Southern District of Ohio has observed:

> As officers of the court, counsel are expected to conduct themselves in a professional manner during a deposition. . . . . A deposition is not to be used as a device to intimidate a witness or opposing counsel so as to make that person fear the trial as an experience that will be equally unpleasant, thereby motivating him to either dismiss or settle the complaint.

Ethicon Endo-Surgery v. U.S. Surgical Corp., 160 F.R.D. 98, 99 (S.D. Ohio 1995) (cited in *Landers v. Kevin Gros Offshore, L.L.C.*, Civ. No. 08-1293-MVL-SS, 2009 WL 2046587, at *1 (E.D. La. July 13, 2009)).

[3] "[M]agistrate judges have the authority to order discovery sanctions." *Hutchinson v. Pfeil*, 105 F.3d 562, 566 (10th Cir. 1997) (citing 28 U.S.C. § 636(b)(1)(A) and *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1462 (10th Cir. 1988)); *see also Palgut v. City of Colorado Springs*, Civ. No. 06-cv-01142-WDM-MJW, 2009 WL 539723, at *2 (D. Colo. Mar. 3, 2009).

Chevron's counsel's abusive questioning of Mr. Beltman crossed this line. A deposition conducted in an "unproductive and harassing manner" is "undoubtedly sanctionable." *In re Rimsat, Ltd.*, 212 F.3d 1039, 1047 (7th Cir. 2000). *See also Morse v. S. Pac. Transp. Co.*, 42 F.3d 1401, 1994 WL 650047, at *1 (9th Cir. 1994) (finding attorney's behavior "clearly sanctionable" where he was argumentative and "badger[ed] the witness through dozens of pages of the transcript"); *Sassower v. Field,* 973 F.2d 75 (2d Cir. 1992) (affirming order of sanctions where attorney's conduct included "incredibly harassing depositions" and "abusive questioning" of defendants); *Heinrichs v. Marshall & Stevens Inc.*, 921 F.2d 418, 420 (2d Cir. 1990) (affirming award of sanctions where counsel's questioning of witnesses "was often improperly argumentative and confrontational").

What legitimate reason was there for Chevron to question an expert about his knowledge of RICO, the Hobbs Act, and other criminal statutes? What legitimate reason was there for Chevron to question an expert about government debarment proceedings? What legitimate reason was there for Chevron to recite other courts' conclusions about the applicability of the crime fraud exception to other witnesses? Not only has this court explicitly *not* ruled on this issue, *see* Dkt. #262 at 19, but Mr. Beltman, a non-lawyer, could not reasonably be expected to have any pertinent information about other courts' legal reasoning.

Counsel's clear intent, right at the beginning of the deposition, was to intimidate the witness by raising the specter of criminal proceedings and government debarment of Stratus. The questioning had no legitimate purpose. It did not concern Mr. Beltman's

knowledge concerning facts relevant to the proceeding. It was blatant, naked intimidation that violated Local Rule 30.3(A)(5).

"Accusations of wrongdoing against witnesses and attorneys have no place in a deposition." *Ethicon Endo-Surgery*, 160 F.R.D. at 99. Because this questioning by counsel was "undertaken as part of a deliberate stratagem" to intimidate and harass a witness, sanctions, including the costs and fees associated with the deposition, are appropriate. *Mass. Inst. of Tech. v. Imclone Sys., Inc.*, 490 F. Supp.2d 119, 127 (D. Mass. 2007); *see also Landers*, 2009 WL 2046587, at *2; *Freeman*, 192 F.R.D. 187. Although such sanctions are appropriate, Stratus/Plaintiffs respectfully submit that the Court grant more modest relief: an order that Chevron (1) cease all harassing conduct in future depositions in this case, and (2) pay an appropriate monetary sanction to a local bar association and/or another appropriate organization that sponsors deposition education. *See, e.g., AG Equip. Co.*, 2008 WL 5205192, at *8.

Federal courts around the country have begun to recognize that these § 1782 proceedings by Chevron and its counsel are "spiraling out of control." Ex. B at 3 (Order, *In re Chevron*, No. 3:10-cv-00686 (M.D. Tenn. Sept. 21, 2010) (Dkt. No. 108)). At the suggestion of third-party Joe Berlinger, for example, Judge Kaplan appointed a special master to oversee any of Chevron's depositions in that § 1782 proceeding, at Chevron's expense. Ex. C (Order, *In re Chevron*, No. 10-MC-0001 (S.D.N.Y. Sept. 7, 2010) (Dkt. No. 52) at 18 (New York); *id.* at 17 ("the Court will not at this stage permit unsupervised depositions or allow Chevron to inquire into whatever it may wish."). Presumably, Chevron would in the future follow an order from this Court (and the Local Rules) and

desist from such improper questioning in the future, making the use of a special master to supervise Chevron in this proceeding unnecessary.

CONCLUSION

The Court should award sanctions against Chevron and/or its counsel as set forth above, or in whatever form it deems appropriate, including an order to cease all harassing conduct in future depositions in this case, and grant such other relief as is just and proper.

Respectfully submitted,

Dated: October 14, 2010
New York, New York

SILVER & DEBOSKEY, P.C.

*/s Martin D. Beier*__
Martin Dean Beier
Silver & DeBoskey, P.C.
1801 York Street
Denver, CO 80206
303-399-3000
Email: beierm@s-d.com

Attorneys for Stratus Consulting, Inc.

EMERY CELLI BRINCKERHOFF
& ABADY LLP

/s/ Ilann M. Maazel
Ilann M. Maazel (imaazel@ecbalaw.com)
Jonathan S. Abady
O. Andrew F. Wilson
Adam R. Pulver

75 Rockefeller Plaza, 20th Floor
New York, New York 10019
(212) 763-5000

MOTLEY & RICE LLC
Ingrid L. Moll

20 Church Street, 17th Fl.
Hartford, Connecticut, 06103
(860) 882-1678

Attorneys for Ecuadorian Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2010, I caused the **MOTION FOR SANCTIONS** to be filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Andrea E. Neuman
Gibson Dunn & Crutcher, LLP-Irvine
3161 Michelson Drive, #1200
Irvine, CA 92612-4412
949-451-3937
Fax: 949-475-4653
Email: aneuman@gibsondunn.com

Peter E. Seley
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
202-887-3687
Fax: 202-530-9594
Email: pseley@gibsondunn.com

James M. Sabovich
Gibson, Dunn & Crutcher LLP-Irvine
3161 Michelson Drive, #1200
Irvine, CA 92612-4412
949-451-3939
Fax: 949-451-4220
Email: jsabovich@gibsondunn.com

John D.W. Partridge
Gibson, Dunn & Crutcher LLP-Denver
1801 California Street
#4200
Denver, CO 80202-2694
303-298-5700
Fax: 303-296-5907
Email: jpartridge@gibsondunn.com

Thomas Michael Crimmins, III
Gibson, Dunn & Crutcher LLP-Denver
1801 California Street
#4200
Denver, CO 80202-2694
303-298-5910
Fax: 303-313-2850

Email: mcrimmins@gibsondunn.com
Attorneys for Petitioner

Joe L. Silver
Silver & DeBoskey, P.C.
1801 York Street
Denver, CO 80206
303-399-3000
Fax: 303-399-2650
Email: silverj@s-d.com

/s/ Ilann M. Maazel
Ilann M. Maazel