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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION,

Plaintiff,

- against -

STEVEN DONZIGER, et al.,

Defendants.

Case No.: 11 CV 0691 (LAK)

**MEMORANDUM OF LAW ON BEHALF OF
DEFENDANT STRATUS CONSULTING, INC. IN SUPPORT OF ITS
MOTION TO AMEND ITS ANSWER TO ASSERT COUNTERCLAIMS**

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PRELIMINARY STATEMENT

Chevron's core allegation in this action is that defendants purportedly concocted a scheme to fraudulently procure an 18 billion dollar judgment in Ecuador ("Ecuador Judgment") in order to so intimidate this giant oil company that it would have no choice but to pay a huge settlement. Unlike the other defendants in this action, Stratus Consulting, Inc. ("Stratus"), Douglas Beltman and Ann Maest¹ have never had a stake whatsoever in the Ecuador Judgment; nor has Chevron ever articulated a motive for Stratus to put its reputation for scientific excellence and integrity at risk. Stratus has denied all of Chevron's allegations against it, and this Court has not entered any findings of fault *against Stratus* as to the alleged scheme or otherwise.

But filing suit against Stratus was not enough for Chevron. Now it has embarked on an extrajudicial campaign of malicious defamation and deliberate interference with Stratus' business to tortiously destroy Stratus (and the livelihood of its employees) and to prevent Stratus from being able to successfully defend itself at trial against Chevron's allegations.

Chevron's scheme to tortiously destroy Stratus consists, among other things, of widely and publicly disseminating lurid allegations against Stratus concocted from lies and inappropriate manipulation of documentary, visual and testimonial evidence; publishing defamatory written statements directly to Stratus' clients and others, including

¹ Although all of these defendants are amending their answer, the proposed Counterclaims are being asserted only on behalf of Stratus Consulting, Inc.

falsely and maliciously telling clients that this and other courts have entered conclusive findings confirming Chevron's allegations against Stratus; in direct and indirect communications explicitly and repeatedly requesting that Stratus' clients fire Stratus or not engage Stratus as a technical consultant; and creating and posting defamatory and malicious videos and written statements about Stratus on Chevron websites.

Chevron's malicious extrajudicial campaign against Stratus gives rise to claims for defamation per se and prima face tort. This Court should permit Stratus to amend its pleading to assert counterclaims arising out of Chevrons' recent tortious conduct.

FACTUAL BACKGROUND

The Amendment Date

On June 25, 2012, this Court entered an order, *inter alia*, requiring that applications for leave to amend or to add additional parties shall be made no later than August 1, 2012. Thereafter, that date was extended until August 15, 2012 (the "Amendment Date"). Dkts. 494, 534. It does not appear coincidental that Chevron began its smear campaign against Stratus after that date.

The specific factual bases for the counterclaims that Stratus seeks leave to interpose are set forth in detail in the proposed pleading, which is appended to the Declaration of Stuart A. Krause as Exhibit A ("Proposed Second Amended Answer and Counterclaims"). A summary of the salient facts is as follows:

Beginning in late October 2012, and continuing until at least November 29, 2012, Chevron has engaged in a malicious campaign utilizing false and defamatory statements in correspondence and internet content, in an attempt to convince the Portland Harbor Trustee Council (the "Portland Council") to terminate Stratus as a retained expert. In its correspondence, Chevron (quoting extensively from decisions of this Court addressed to motions involving other defendants) portrays as matters of judicially determined fact its lurid allegations that Stratus committed fraud, tampered with evidence and obstructed justice, when, as this Court knows, there have been no such determinations made. Indeed, Chevron well knows from this Court's ruling on Stratus' motion to dismiss that its allegations against Stratus have yet to be proven. In that decision (the "Dismissal Decision") (Dkt. 472), the Court held:

"For these reasons, the Stratus Defendants' argument that the amended complaint does not sufficiently allege that they were part of the alleged RICO enterprise is without merit. **Whether they in fact were part of it must await proof.**"

Id. at 5 (emphasis added).

Also, within the last few weeks Chevron has posted defamatory statements on its website and posted a professionally crafted video on websites linked to its website, which also maliciously defames Stratus, for no other purpose than to attempt to convince prospective and existing clients, and the public, that Stratus has been found by courts to have committed heinous offenses, and thus lacks the integrity or credibility to serve as a

professional consultant and should not be permitted to provide its services to the governmental agencies that routinely retain it.²

ARGUMENT

POINT I

LEAVE TO AMEND AND SUPPLEMENT PLEADINGS TO ASSERT COUNTERCLAIMS IS APPROPRIATE UNDER RULES 13(e), 15(a) AND 16(b)(4)

A. Facts Giving Rise to Stratus' Counterclaims Arose After the Amendment Date

Pursuant to Federal Rule 13(e), the Court may “permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.” Fed. R. Civ. P. Rule 13(e). Thus, it is well established that claims that matured after a defendant in an action has filed his answer may be asserted later in a supplemental answer. See Valley Disposal v. Central Vt. Solid Waste Mgmt. Dist., 113 F.3d 357, 364 (2d Cir. 1997) (claim not asserted by the defendant in his answer may be asserted later in a supplemental answer if the claim had not matured or had not been acquired by the time the original answer was served); USA Soccer Properties, Inc. v. Aegis Group PLC, 1994 U.S. Dist. LEXIS 6131 (S.D.N.Y. 1994) (Court granted defendants leave to amend their answer where plaintiff engaged in a campaign of

² As also detailed in the proposed counterclaims, Chevron even attempted (contrary to its own economic interest) to inject itself into an action between Stratus and its insurers, claiming to be a “friend of the court” for the clear purpose of trying to deny Stratus potential sources of funds to pay a judgment Chevron might obtain in this action.

defamation against the defendants, including publicizing false and defamatory allegations of racketeering and fraud that resulted in injury to its business and reputation.); See also, Four Seasons Solar Products Corp. v. Sun System Prefabricated Solar Greenhouses, Inc., 101 F.R.D. 292 (E.D.N.Y. 1983).

Stratus' claims asserted in its proposed Counterclaims arose after the Amendment Date. These claims consist of numerous intentionally false statements in writing to at least one of Stratus' clients and numerous false statements in writing and on videos on Chevron's public websites, including:

- Chevron's letter dated October 23, 2012 to the Portland Council. See Proposed Counterclaims, Exhibit A.
- Chevron's letter dated November 5, 2012 to the Portland Council. See Proposed Counterclaims, Exhibit B.
- Chevron's letter dated November 12, 2012 to the Portland Council. See Proposed Counterclaims, Exhibit D.
- Chevron's letter dated November 29, 2012 to the Portland Council. See Proposed Counterclaims, Exhibit E.
- *The Amazon Post: Chevron's Views and Opinions on the Ecuador Lawsuit*: A website published, maintained and controlled by Chevron, which includes an article dated October 30, 2012 titled Stratus Consulting's Role in the Fraudulent Case Against Chevron (the "Amazon Post Article"). See Proposed Counterclaims, Exhibit F.
- A video posted on, among others, www.theamazonpost/video, and <http://www.youtube.com/watch?v=IEAtho8oPrw> (the "Chevron Defamatory Video"). See Proposed Counterclaims, Exhibit G.

These documents and posts include (a) knowingly false material statements to a third-person, in this case the Portland Council (coupled with persistent requests that Stratus be fired), (b) materially false postings by Chevron made on *The Amazon Post*, as well as various other public web sites, containing knowing distortions of Orders of this Court, and (c) false characterization of other Court's rulings. The false statements to the parties targeted by Chevron give rise to counterclaims for defamation per se and *prima facie* tort; and the key conduct giving rise to these claims occurred after the Amendment Date. Therefore, the Court should grant Stratus' motion for leave to file a Second Amended Answer and assert Counterclaims.

B. Justice Requires that the Court Grant Stratus' Motion for Leave to Amend and Assert Counterclaims, and Chevron is Not Prejudiced By the Amendment

Equally, Federal Rule 15(a)(2), directs that a Court should freely give leave to amend a pleading when justice so requires. Fed. R. Civ. P. 15(a)(2). As the Second Circuit has held, freely permitting such leave to amend serves the objective of allowing a party to assert matters that were overlooked or unknown at the time of the initial pleading. See Smiga v. Dean Witter Reynolds, Inc., 766 F.2d 698, 703 (2d Cir. 1985) ("the objective served by freely allowing amendments is to enable a party to assert matters that were overlooked or were unknown at the time . . . (of the) original complaint or answer") (*quoting* 6 C. Wright and A. R. Miller, Federal Practice and Procedure § 1473 (1971)).

As Stratus actively defends itself against the allegations in this case, Chevron has broadened its attacks against Stratus and engaged in a malicious and illegal

extrajudicial campaign against Stratus in an attempt to deprive it of sources of funds to defend against the oil giant's claims in this action. Stratus has meritorious claims against Chevron that arose after the Amendment Date and has alleged sufficient facts that were unknown at the time of the Amendment Date in support of these claims.

Moreover, there is no prejudice to Chevron if the Court grants leave for Stratus to amend its answer to assert Counterclaims. In Monahan v. New York City Dep't of Corrections, the Second Circuit held that a party should be freely granted leave to assert new claims or defenses unless such assertions would "(i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction." Monahan v. New York City Dep't of Corrections, 214 F.3d 275, 284 (2d Cir. 2000) (quoting Block v. First Blood Assocs, 988 F.2d 344, 350 (2d Cir. 1992)).

Here, pre-trial discovery is still in its early stages – the deadline for all discovery is May 31, 2013 and trial is not scheduled until October 2013, almost a year away. The facts giving rise to Stratus' Counterclaims are intricately related to the facts of the underlying case. Therefore, Chevron will not be required to expend significant additional resources as a result of Stratus' assertion of Counterclaims. Moreover, in light of the fact that pre-trial discovery is still in its preliminary stage, no significant delay in the resolution of the underlying case will result due to Stratus' assertion of its Counterclaims.

C. Stratus Has Shown Good Cause under Fed. R. Civ. P. 16(b)(4)

Under Federal Rule 16(b)(4), a pre-trial schedule may be modified for good cause with the Court's consent. The good cause standard under Rule 16(b) primarily depends on the diligence of the party seeking the amendment. Kassner v. 2d Avenue Delicatessen, 496 F.3d 229, 243 (2d Cir. 2007).

Stratus is well aware that the time to amend and add counterclaims has passed. However, Stratus has acted diligently and expeditiously. It has moved for leave to amend and assert Counterclaims as soon as it became aware of the facts that gave rise to the Counterclaims, which facts arose after the Amendment Date. Therefore, good cause exists under Fed. R. Civ. P. 16(b)(4) to modify the pre-trial schedule to allow Stratus to assert its Counterclaims.

POINT II

STRATUS' COUNTERCLAIMS ARE PROPERLY PLED

Chevron's scheme is to present as judicially confirmed its false, lurid allegations against Stratus and to manipulate evidence to make it appear that Stratus engaged in a conspiracy to hold Chevron liable, as it claims, for "contamination that does not exist." Then Chevron attempts to destroy Stratus financially by (i) reaching out to Stratus' clients, asking them to terminate Stratus' services by telling those clients that this Court and other Courts have entered conclusive findings of intentional wrongdoing against Stratus; and (ii) widely publishing on the internet false statements about Stratus, coupled

with disclosures about Stratus' clients and business, concluding with arguments that Stratus should not have this business. Chevron's goal is to blitzkrieg Stratus, through defamation, financially undermine Stratus by attacking its business, and prevent Stratus from being able to defend itself against Chevron's unproven allegations. Stratus' proposed counterclaims, therefore, are not an attempt to turn the outrageous allegations asserted by Chevron in this action into counterclaims, but they arise out of Chevron's extrajudicial conduct.

This Court in this action recently observed that the proper forum to address the legal sufficiency of proposed Counterclaims is not on a motion to amend, but rather on a subsequent motion, if interposed, addressed to the pleading. See Dkt. 638 (granting leave to assert counterclaim on motion by Defendant Donziger). Nevertheless, in brief, Stratus' proposed counterclaims state proper claims for relief, as set forth below.

A. Defamation Per Se

Stratus' first and second counterclaims assert a claim for defamation per se based on Chevron's false statements in letters to the Portland Council, postings on *The Amazon Post* and in Chevron's Defamatory Video. A claim for defamation exists where a party can establish

- (1) a defamatory statement concerning another;
- (2) published to a third party;
- (3) with fault amounting to at least negligence on the part of the publisher; and
- (4) either actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by the publication.

Restatement (Second) Torts, § 558.

A communication is defamatory “if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” Restatement (Second) of Torts § 559. Chevron’s communications set forth in the Counterclaims constitute both libel and/or slander per se.

1. **Slander Per Se**

The Restatement (Second) of Torts states that:

One who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or of his public or private office, whether honorary or for profit, is subject to liability without proof of special harm.

Id. § 573.

2. **Libel Per Se**

The Restatement (Second) of Torts states that:

One who falsely publishes matter defamatory of another in such a manner as to make the publication a libel is subject to liability to the other although no special harm results from the publication.

Id. at § 569.³

Here, Chevron's false statements in the October 23, 2012, November 5, 2012, November 12, 2012 and November 29, 2012 letters to the Portland Council, the postings on *The Amazon Post* and the Chevron Defamatory Video, which state, among other things, that there are "findings" of fraud against Stratus by this Court and other Courts, and that Stratus has engaged in illegal fraudulent and racketeering activity in its business, constitute knowing false statements about Stratus' integrity, business practice and credibility in its field of environmental and technical consulting (published to third parties).

Chevron knows that these statements are false and that its allegations have yet to be litigated against Stratus. Equally, any alleged "findings" of any court were not findings against Stratus (and often involved cases in which Stratus was not even a party). Chevrons' malicious intent is evidenced by its attempt to intercede in the Stratus dispute with its insurers in order to deny Stratus resources to defend itself in this action.

B. Prima Facie Tort

Prima facie tort provides for imposing liability "for harm that was intentionally inflicted, even though the conduct does not come within the requirements of

³ Chevron's defamatory statements have been disseminated and published in various states, including Colorado, California and Oregon. Accordingly, choice of law issues need to be resolved regarding Stratus' counterclaim for defamation. However, the governing principles are sufficiently similar as to render the general definitions of the Restatement sufficient for the purposes of this motion. Stratus is prepared to brief the "choice of law" issues, if requested by the Court.

one of the well established and named intentional torts.” Restatement (Second) of Torts, § 870.

Chevron’s action shows no motivation other than a sole intent to harm Stratus. It receives no economic benefit from Stratus losing its contract with the Portland Council or losing other government business by engaging in a letter campaign against Stratus, publishing and posting the malicious claims against Stratus in *The Amazon Post*, and the Chevron Defamatory Videos on various public websites. This activity is against Chevron’s economic interest and Chevron receives no economic benefit. Other activities by Chevron, such as moving for leave to submit the *amicus* brief in Stratus’ insurance coverage dispute with its insurance carriers – to which Chevron was not a party – were also *against* Chevron’s economic interest of having a deep-pocket insurer from whom Chevron could recover in the event it prevails in its claims against Stratus in this action. Indeed, Chevron’s defamatory actions against Stratus were motivated solely by a malicious intent to deprive Stratus of financial resources necessary to continue to defend itself against Chevron in this action. Stratus’ claim for *prima facie* tort states a claim.

CONCLUSION

Based on the foregoing and in the interest of justice, this Court should grant Stratus' motion to amend its answer and to assert Counterclaims.

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