UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION, Plaintiff, v. STEVEN DONZIGER, et al., Defendants.	:	11 Civ. 0691 (LAK)

JOINT REPORT BY PLAINTIFF CHEVRON CORPORATION, DONZIGER DEFENDANTS, AND HUGO GERARDO CAMACHO NARANJO AND JAVIER PIAGUAJE PAYAGUAJE REGARDING SCOPE OF DISCOVERY IN RELATION TO "SHAM" LITIGATION ALLEGATIONS

The parties hereby submit this Joint Report pursuant to Your Honor's instructions that the parties discuss the appropriate scope of certain types of discovery in connection with Chevron's allegations that the Lago Agrio Litigation was "sham litigation."

The Allegations at Issue and the Court's Request. At the December 21, 2012 hearing on Defendants' motions to compel, the Donziger Defendants and Defendants Camacho/Piaguaje sought discovery related to a series of requests that generally can be categorized as: (1) work, audits, or inspections done by Chevron, its consultants, contractors, and experts in the Napo Concession Area; (2) their knowledge of contamination by TexPet's operations in the Napo Concession and/or any deleterious effects of that contamination; and (3) communications with, meetings with, or payments to any testifying experts in the Lago Agrio Litigation. In the parties' written pre-hearing submissions (Dkt. No. 655, at 13-21 & Dkt. No.666 at 1 and 10) and at the hearing on December 21, 2012, Defendants argued that the requested discovery was relevant, *inter alia*, to rebut Chevron's repeated assertions that the Lago Agrio litigation constituted

"sham" or "objectively baseless" litigation, in addition to proving or rebutting other claims or defenses.

In response, the Court observed that what Chevron intended to prove by its allegation that the Lago Agrio Litigation was a "sham" (mentioned literally or substantively in the Amended Complaint twenty times, see attached Exhibit 1 for quotes from particular paragraphs) could bear on the appropriate scope of the expert discovery to which Defendants would or would not otherwise be entitled. The Court commented to Chevron's counsel:

> The point made by your colleague at the back table is you allege they brought sham litigation. They said they're entitled to show that there was at least some scientific evidence of which you were aware that suggests otherwise. I understand the point. I am going to defer on this one Number 35 and I am going to suggest that all of you go back to the drawing—to the conference room on this. It may be that Chevron really means to assert by using the term "sham litigation" that it was a lawsuit that transparently had no merit at the inception if in a scientific sense. And it may mean, it may be that they're really asserting something else. And if they're really asserting something else, that may change the scope of the discovery that may be appropriate here and I don't see any reason why I should rule on this particular point before you have exhausted the ability, the possibility of resolving it along those lines.

December 21, 2012 Hearing Tr. (rough) at 137:14 – 138:4.

The Court's initial observation was in regard to the Donziger Defendants' request for production number 35, but the same instruction was subsequently made with respect to Donziger Defendant requests 37, 124, 152 – 159, 175, 176 and Camacho and Piaguaje requests 1 – 3, 29 – 44, 46 – 73, 83, 91 – 108, 140 – 207 (collectively, Defendants' "Science and Expert-Related Document Requests"). In reserving rulings on Defendants' many Science and Expert-Related Document Requests, the Court further observed that, "it is my working hypothesis that this sham litigation argument is going to go away because you are going to resolve it by virtue of Chevron stating more specifically what their allegation is and what it isn't." Hearing Tr. at 189:11 – 14.

Chevron's Statement. Chevron intends to prove that the Lago Agrio litigation was pursued in a corrupt and fraudulent manner—as directed and substantially executed from the United States—that took advantage of an Ecuadorian judiciary lacking independence and able to be corrupted. Defendants fabricated what they claimed were expert findings and corruptly manipulated the weak Ecuadorian judicial system to give the false impression those findings were "independent" when they were no such thing. For example, Defendants ghostwrote the court expert's global damages report, and went to great lengths to hide that fact, because the court expert (Cabrera) was supposed to be "neutral" and "independent;" and in other instances (*e.g.*, Calmbacher), the Defendants made expert submissions that were the product of forgery and unauthorized editing to give the opposite impression of those experts' actual findings. Defendants' misconduct in the propagation of this litigation includes acts of fraud, blackmail, intimidation, bribery, and ghostwriting in Ecuador and the United States. In short, Chevron's case is not about whether there is any good-faith dispute among scientists about environmental conditions in the Oriente or TexPet's operations there from the 1960s to the 1990s, but rather, about fraud, extortion, and corruption so deep in the manner of prosecuting that it fundamentally denied Chevron due process and a fair trial. Chevron has been injured because, among other things, the threatened and then actual judgment used to extort Chevron resulted from a corrupt process that included the secret ghostwriting of the judgment itself using Defendants' confidential internal work product. Chevron will prove that Defendants then used that fabricated and fraudulent record they created in Ecuador to extort Chevron in the United States by touting the supposedly "independent" findings of experts and the court there that, in reality, were the product of fraud, ghostwriting, and corruption. Chevron does not intend here to relitigate the environmental conditions existing in the Oriente or the relative, substantive merit of scientists' expert opinions on that subject. In that regard the discrete inquiry here will be whether

the judgment's findings have any support untainted by fraud in the record that existed before the Ecuadorian court at the time the judgment was issued.

Accordingly, just as the 27 subpoenas Defendants issued largely to Chevron experts in the Lago Agrio case were found by this Court to "go far beyond the bounds of appropriate discovery here" (Dkt. 679 at 11, 16), the sweeping discovery that Defendants seek in their Science and Expert-Related Document Requests is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence for any claim, or for any legitimate defense or counterclaim in this case. The environmental and scientific issues defendants seek to inject into the case via their Statement are beyond the scope of the Court's inquiry regarding Chevron's use of the term "sham litigation" and in any event these issues are not material (much less a defense) to their corrupt conduct. Defendants' motions to compel should therefore be denied as to those requests in their entirety.

Defendants' Statement. At the hearing the Court recognized how the requested documents might be used to rebut Chevron's repeated claims of "sham litigation." Therefore, the Court instructed the parties to confer on the matter to see whether and to what extent the parties could agree on what discovery of this type is needed if Chevron should state "more specifically what their allegation is and ***what it isn't***." As mentioned above, Chevron's Amended Complaint makes repeated factual assertions that the Lago Agrio Litigation constituted "sham litigation" and "objectively baseless, improperly motivated sham litigation." *See* Exhibit 1. It also alleges that Petroecuador, not TexPet, is responsible for any environmental contamination since "at least 1992" and that the petroleum contamination in Ecuador's Oriente region is merely "alleged." *See id.* For any of the Science and Expert-Related Document Requests propounded by Defendants not to be properly within the scope of discovery pursuant to Rule 26(b)(1), *i.e.* "relevant to any party's claim or defense," Chevron must seek leave to amend

its Amended Complaint to strike all of the language highlighted on Exhibit 1. The statement proposed by Chevron above does not constitute an amendment to its operative pleading. Furthermore, Chevron's statement does not clearly and definitely state what its allegation of "sham litigation" and "objectively baseless, improperly motivated" litigation is ***not*** alleging as contemplated by the Court. As part of any amended complaint, in addition to deleting or clearly limiting the scope of the references listed in Exhibit 1, Chevron should specifically admit the existence, extent, and effects of the contamination and what knowledge Chevron, its experts, consultants, contractors, and the court experts had of those facts. Chevron also should affirmatively disclaim any intent to challenge or disprove the substantive merit of any of the analyses or conclusions submitted by any of the Ecuadorian Plaintiffs' testifying experts and any of the court experts, including Cabrera. Only then can Defendants and the Court properly assess whether specific Science and Expert-Related Document Requests would no longer be relevant to any of Chevron's claims and needed to address Chevron affirmative allegations. Regardless of any amendment by Chevron as to the "sham litigation" allegations, much of the requested discovery would still be relevant to: (1) corroborating Defendants' mental state, *i.e.* that they had no intent to defraud but subjectively believed in the merits of the allegations of catastrophic contamination and deleterious effects on the soil, groundwater, rivers and streams, and air in the Napo Concession Area causing significant health, economic, and cultural damage to the Afectados both when the Lago Agrio litigation was brought and when Defendants denied that the case was "sham litigation;" (2) causation of damages from Defendants' actions that Chevron alleges to constitute a RICO conspiracy or third-party fraud; (3) corroborating the analyses and conclusions contained within the reports and other submissions of the Ecuadorian plaintiffs' testifying experts and those of the court-appointed experts, including Cabrera, (4) Defendants' "unclean hands" defense to any equitable relief sought by Chevron; (5) Donziger's

counterclaims, including his claims that Chevron has misrepresented the environmental and human health impact of TexPet's operations in the Napo Concession Area and the "legitimate evidence" concerning that impact and that Chevron improperly manipulated its own scientific testing and analysis during the Lago Agrio Litigation, and (6) testing the opinions of Chevron's experts denying the existence, extent, or effects of the contamination. For these reasons, Defendants continue to seek compulsion for Chevron to produce or log any documents responsive to the subject requests for the grounds asserted in the previous submissions (Doc. #655 and 666) and at the hearing on December 21, 2012.

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