UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION, Plaintiff, v. STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER; et al., Defendants.	Case No. 11-CV-0691 (LAK)

OBJECTIONS TO RULINGS BY THE SPECIAL MASTER IN THE JUNE 6, 2013 DEPOSITION OF DANIEL E. KARSON (KROLL, INC. 30(b)(6))

Donziger Defendants submit the following objections to rulings made by Special Master Gitter at the June 6, 2013 Deposition of Daniel E. Karson, the FRCP 30(b)(6) designate of Kroll, Inc. ("Kroll"), which prevented Defendants from gaining testimony to which they are entitled.

I. SPECIAL MASTER'S ORDER PREVENTING DEFENDANTS FROM INQUIRING INTO KROLL'S SURVEILLANCE ACTIVITIES ON THE BASIS OF THE COURT'S ORDER CONCERNING THE 30(B)(6) DEPOSITION OF CHEVRON WAS ERRONEOUS

Prior to any substantive questioning beginning counsel for Chevron objected on the ground quote: [redacted]

This holding is erroneous. First and fundamentally, the Court's order concerning Subject 21 of the Chevron 30(b)(6) Notice ***applies only to the Chevron 30(b)(6) notice***. The relevant portion of the order states: "Any examination on Subject 21 should be deferred unless and until the Court rejects Magistrate Judge Francis' recommendation that defendant Donziger's counterclaim be dismissed, as it is relevant only to that." Dkt. 1130, ¶ 5. There is no basis on

which to "read this language to apply generally." There is not even a discussion of the substance of Subject 21 of Chevron 30(b)(6) notice in the order; thus, the only way in which the language could be read to apply generally is to find that all subjects bearing the number 21 are stayed. This would not only be absurd, it would make it impossible to apply to the Kroll 30(b)(6) deposition as there is no subject 21 in that Kroll 30(b)(6) subpoena. Indeed, if Chevron wanted to bar questioning of Kroll's designate by Defendants concerning certain subjects it had the opportunity to seek a protective order that provided such protections. Instead, it sought only an order quashing the subpoena out right. It lost. Chevron is not entitled to a special dispensation that, in the event it fails to request the desired relief in the proper context, it may simply point to relief granted to it another context and say "oh, we'd like that to apply here as well" and receive it. If Chevron wanted a protective order preventing the questioning of Kroll on its investigative activities, it should have made a motion for one. It didn't, and contrary to the SM's ruling, the omission is not excused on the ground it sought such relief concerning a different deposition.

II. BY MISAPPLYING THE COURT'S ORDER IN THIS WAY THE SM PREVENTED DEFENDANTS FROM PROCURING TESTIMONY THAT LIKELY WOULD HAVE BEEN HIGHLY RELEVANT

If not prevented by the SM's erroneous application of the Court's order concerning the Chevron 30(b)(6) deposition, defendants would have sought to pursue testimony highly relevant to a number of major issues in this matter, independent of whether Donziger's counterclaims.

These issues include whether Guerra ghost wrote portions of the judgment, as he claims, or, if, in fact, Zambrano wrote the judgment himself. Guerra has alleged that he met with Zambrano on multiple occasions at Zambrano's house and at other locations in the course of the alleged ghost writing. If Kroll was surveilling Zambrano and/or Guerra during the period in which this was alleged to have occurred, whether Kroll observed Guerra frequently (or ever) coming in and out of Zambrano's home or otherwise meeting with Guerra would be highly probative of what actually occurred in this regard. Defendants would have sought testimony concerning these facts from Mr. Karson bur for the SM's ruling preventing them from doing so.

Furthermore, Guerra has alleged that he met Fajardo in person on occasions, including on occasions in which he alleges that he received money from Fajardo. The extent of Kroll's

surveillance of Fajardo and whether during such surveillance these meetings were ever observed is very probative as to whether these alleged meetings and payoffs actuallty occurred.

More generally, testimony concerning the extent of Kroll's surveillance work is also relevant to issues of Donziger's *mens rea*. Each of the predicate acts on which Chevron bases its RICO claims has a *mens rea* element. See *United States v. Autuori*, 212 F.3d 105, 115 (2d Cir. 2000) (mail and wire fraud); *United States v. Jackson*, 180 F.3d 55, 71 (2d Cir. 1999) (extortion (Hobbs Act)); *People v. Cuddihy*, 151 Misc. 318, 324 (N.Y. Gen. Sess. 1934) (extortion (N.Y. state)); *United States v. Quattrone*, 441 F.3d 153, 170 (2d Cir. 2006) (obstruction of justice); *United States v. Evergreen Int'l*, 206 Fed. Appx. 71, 75 (2d Cir. 2006) (money laundering); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705-706 (2005) (witness tampering). In the face of no direct evidence probative Donziger having the required *mens rea*, Chevron has indicated its intention to prove this circumstantially, through *inter alia* proof that Donziger and others took measures to secret their communications. *See* Dkt. 238, ¶ 162 ("Fajardo and Donziger also devised ways to hide their misconduct by creating special email addresses and code names to be used in planning and discussing their scheme."). Evidence that Donziger and Fajardo were the subject to an intensive surveillance operation by their litigation opponent is highly probative of an alternative explanation for such actions: they took them because of a well founded belief that their confidential attorney-client and work product protected communications were being monitored by their litigation opponent. Testimony concerning the nature and extent of Kroll's surveillance, which Defendants were prevented from gaining, would have been directly relevant to this issue.

The testimony of Karson would further have been relevant to determine the origin and credibility of documentary and testimonial evidence that Kroll has gather on behalf on Chevron's behalf. Evidence has already been adduced that Chevron has gained testimony through coercive tactics of private security personnel operating on its behalf. *See* Dkt. 1218, Ex. 5. Defendants should have been provided an opportunity to query Karson concerning what documents and testimony and Kroll procured for Chevron and the circumstances of its procurement, as such testimony goes to the heart of the evidence credibility.

III. ANY WORK PRODUCT PROTECTION THAT COULD APPLY TO SUCH TESTIMONY WOULD BE OVERCOME BASED ON SUBSTANTIAL NEED

Given the critical importance of the above described testimony – going *inter alia* to issues related to whether the alleged judicial bribery ever occurred and whether Donziger had the required *mens rea* – and the in ability of Defendants to attain substantial equivalent materials by other means, Chevron would not have been entitled to protected the testimony sought based on work product protection. *See* Fed. R. Civ. P. 26(b)(3). Indeed, courts have consistently held that any work product protection over surveillance materials is overcome in analogous contexts for similar reasons. *See, Bachir v. Transoceanic Cable Ship Co*., 98-4625 1998 U.S. Dist. LEXIS 19528, 2-4 (S.D.N.Y. Dec. 15, 1998) ("Surveillance evidence, available only from the one who obtained it, fixes information available at a particular time and place under particular circumstances, and therefore cannot be duplicated. Accordingly, because the substantial need/undue hardship requirements of Rule 26 for the discovery of work product material is satisfied, the Court concludes that surveillance evidence is discoverable, its work product status notwithstanding.") (collecting cases, internal quotation omitted, noting further at *2-3 the need to disclose *all* surveillance materials not just those that the surveilling party selects to use at trial); *Martin v. Long Island R. R. Co*., 63 F.R.D. 53, 55 (E.D.N.Y. 1974); *Evan v. Estell*, 203 F.R.D. 172, 173 (M.D. Pa. 2001); *Ward v. CSX Transportation, Inc.,* 161 F.R.D. 38, 40-41 (E.D.N.C. 1995); *Smith v. Diamond Offshore Drilling, Inc*., 168 F.R.D. 582, 586 (S.D. Tex. 1996); *Smith v. CSX Transportation, Inc*., 93-373,1994 U.S. Dist. LEXIS 21400, (E.D.N.C. May 19,1994); *Snead v. American Export-Isbrandtsen Lines, Inc*., 59 F.R.D. 148, 150-151 (E.D. Pa. 1973).

IV. WORK PRODUCT IS ALSO POTENTIALLY WAIVED ON CRIME FRAUD

There is, furthermore, a significant probability that any work product protection over Kroll's surveillance activities is waived based on crime fraud. Specifically, there is evidence adduced that Chevron has engaged private security personnel to engage in actions that potentially run afoul of law preventing witness tampering, obstruction of justice, stalking, and foreign bribery. Defendants should have been allowed to ask questions of Karson that probative of whether Kroll engaged in any of these prohibited activities, which if shown would waive any work product protection claimed by Chevron over them.

Respectfully submitted,

Dated: June 17, 2013

By: */s/ Steven R. Donziger*

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