UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION, Plaintiff, v. MARIA AGUINDA SALAZAR, *et al.*, Defendants, -and- STEVEN DONZIGER *et al.*, Intervenors.	CASE NO. 11-CV-3718 (LAK)

DEFENDANTS HUGO GERARDO CAMACHO NARANJO'S AND JAVIER PIAGUAJE PAYAGUAJE'S MOTION FOR CONTINUANCE

The trial setting on this case must be continued. The Ecuadorian Plaintiffs cannot adequately prepare this case for trial under the schedule currently set. The Court's "streamlined" procedure is now bloated into a trial on the merits with fact discovery due to be completed in five weeks. A trial on this schedule would not only be unfair to the Ecuadorian plaintiffs but would also not be consistent with procedures compatible with due process. Here are the reasons why a continuance is necessary:

Trial on this schedule for a case of this complexity is not in accord with due process.

The Ecuadorian Plaintiffs do not have a final judgment. The Ecuadorian Plaintiffs did not file to enforce a judgment in New York. Nonetheless, Chevron, after shopping the country for a favorable forum, filed a premature, preemptory action in this court to declare invalid a non-existent final judgment. Not only did the Court choose to exercise jurisdiction over the claim and over the Ecuadorian Plaintiffs (who continue to object to jurisdiction) but it also set the

matter for trial on November 14, 2011, giving the Ecuadorian Plaintiffs a few months to marshal evidence in a case that was fought for nearly two decades before the parties obtained even a preliminary judgment. Now, the Court has set an unrealistic discovery and trial schedule which will allow Chevron to put on its pre-packaged set-piece featuring the alleged shenanigans of counsel and a retrial of certain aspects of the underlying case. The time allowed makes it impossible for the Ecuadorian Plaintiffs, who are not the well-organized "entity"[1] Chevron has portrayed to the press and to the Court, to adequately gather their witnesses and evidence. Chevron counts on the Court forgetting that the Ecuadorian Plaintiffs are two individuals who live in the Amazon River basin, far from what Chevron calls civilization, an area that Chevron despoiled for three decades with below standard drilling and production practices. The truncated schedule plays right into Chevron's hands as it does not allow the Ecuadorian Plaintiffs to develop the evidence they need for trial, not the least of which is evidence of Chevron's own misdeeds in Ecuador, to their great prejudice and against the interests of justice.

Discovery cannot be completed on this schedule.

The Court-mandated date for completion of fact discovery is September 15 and for expert discovery is September 29, 2011. The Court indicated in its Order of August 8, 2011 that it intended to allow Chevron to present evidence from some 16 experts on errors of law and science made at the trial of the case in Ecuador. ("But the Court will not, at least in the present context, foreclose the plaintiff [Chevron] from attempting to walk that line by excluding these

[1] On August 8, mere hours after the Court Ordered that Chevron be permitted to keep 16 expert witnesses who offer testimony irrelevant to the topics available to invalidate a judgment under the New York Recognition Act, Chevron issued a subpoena to "THE ENTITY" which Chevron identified as "the Lago Agrio plaintiffs' enterprise." No such entity exists, of course. This notice is part of Chevron's counsel's standard tactic in these foreign judgment cases: allege a RICO enterprise and see if the Court will bite on waiver of privilege issues and allow subpoenas, such as the one attached to Chevron's notice of deposition here. But when the Court severed Count 9, it stayed discovery on Chevron's RICO claims. This subpoena—which is more than 40 pages long, seeks depositions on 30 topics, and demands 52 categories of documents—violates that discovery stay, indicates Chevron's complete confidence in the Court's acquiescence in its ability to ignore the Court's instructions without penalty, and opens the discovery up in ways that make it further impossible to try this case by November 14.

proposed experts.") The Court is now prepared to permit experts who testified in the underlying trial to offer testimony in this case about what testimony there is in the record. What next—fact witnesses on the record to testify about what fact testimony is in the record?

Anticipating the unfairness of the position the Court's August 8 Order places the Ecuadorian Plaintiffs in, the Court wrote, "Nor can the LAP Representatives claim unfair prejudice by being placed in a position of having to respond to this testimony. As they pointed out during oral argument, all or most of the plaintiff's experts in this category gave evidence in Ecuador." Respectfully, the Court's observation provides the reason why the Ecuadorian Plaintiffs cannot respond on this schedule–the Ecuadorian Plaintiffs did not anticipate that the Court would permit the "streamlined" proceeding to mushroom into a re-trial of the merits of the underlying action in Ecuador or into a "through the looking glass" proceeding where witnesses testify about what they testified about before. The Ecuadorian Plaintiffs filed their Motion to Strike because they did not believe the evidence from Chevron's experts was relevant to the elements necessary to invalidate a judgment under the New York Recognition Act; moreover, such evidence was repetitive, and certainly was not in conformance with the notion that the Count 9 trial would be limited in scope. Who would have guessed that the Court would not strike an expert on the Ecuadorian oil industry and its importance to its economy?

Nor is it as simple as it might seem to respond to this kind irrelevant testimony from 16 experts. The Court notes in its Order that since Chevron offered testimony of this nature in Ecuador to which the Ecuadorian Plaintiffs responded, the Ecuadorian Plaintiffs should thus be "in a position to do so here." This statement overlooks the complex nature of assembling testimony from multiple witnesses in Ecuador in a manner admissible in this Court and overestimates the organization and resources available to the Ecuadorian Plaintiffs. The Court

seems to have accepted Chevron's characterization of these Ecuadorians as some sort of sophisticated organization with resources comparable to those Chevron has assembled to swamp this and other Courts. That characterization is not true. Unlike Chevron, the Ecuadorian Plaintiffs do not have their experts or fact witnesses on retainer. The Ecuadorian Plaintiffs, unlike Chevron, lack the resources to put former employees in nice homes to insure their loyalty as Chevron and its agents or those working in concert with the company have done. Many of the fact witnesses, individuals who could describe how decades of pollution impacted their lives and property, live in remote villages, are afraid to come to the United States and lack the money to do so in any event.

Chevron's head start cannot be overcome in this time frame.

Chevron has taken more than 20 depositions related to this dispute in Section 1782 proceedings.[2] Chevron's first §1782 deposition was taken in 2009. Ostensibly for use in foreign proceedings, Chevron's §1782 discovery served as the basis for this lawsuit. The Ecuadorian Plaintiffs cannot possibly catch up to this factual discovery advantage in the four weeks left for fact discovery and could not have caught up even if they had begun two months earlier. Federal Rule of Civil Procedure 30(a) limits the number of depositions to 10 per side. The Ecuadorian Plaintiffs could not duplicate Chevron's 24 depositions in this Count 9 suit.

Among the other advantages Chevron gained in its §1782 strategy was to obtain copies of the outtakes of the movie "Crude" regarding the conduct of the trial in Ecuador. Chevron has used the outtakes as part of its program to attack the lawyers. Based on only a small sampling, Chevron removed the outtake selections it used from their proper context. The Ecuadorian Plaintiffs, who do not have a copy of the outtakes, have asked Chevron to produce the outtakes

[2] Chevron to date has taken 24 §1782 depositions, a list of which is attached as Exhibit 1.

so that they can review the outtakes to restore context to the outtakes Chevron used. Based on information and belief, the outtakes alone entail more than 600 hours of material. Using one employee to watch the outtakes continuously would take 15 weeks of 40 hours per week, just to review the video, much less to sort it in a responsive manner.

Chevron refuses to take depositions in Ecuador.

Chevron, understanding the difficulties the Court's August 8 Order imposes on the Ecuadorian Plaintiffs, now refuses to take depositions of fact or expert witnesses in Ecuador. Three of the Ecuadorian Plaintiffs' expert witnesses—two former members of the Ecuadorian Supreme Court and one former judge in this case—live in Ecuador. The Ecuadorian Plaintiffs have arranged dates for three of their expert witnesses to be presented for deposition in Quito. Many of the important fact witnesses on the extent and duration of Chevron's pollution of the rainforest live in the Amazon River basin, as do the Ecuadorian Plaintiffs themselves. Nonetheless, without any justification for its position other than its apparent confidence that the Court will sustain any argument Chevron makes, Chevron insists that depositions take place in the United States, and, when any conflict arises about location, in New York where Chevron's lawyers are stationed.

The Ecuadorian Plaintiffs have further identified five fact witnesses whose depositions they desire to take in Ecuador. Chevron will not agree to take any of them in Ecuador where the witnesses work and live.

While Chevron's counsel promises the Court a streamlined process and professes a desire to keep the November 14 trial setting, out of sight of the Court, Chevron imposes every possible road block to permitting the Ecuadorian Plaintiffs to prepare the case in a timely fashion and bloats the trial into a proceeding that it will be impossible to be prepared for by November 14.

Chevron's unclean hands.

The Ecuadorian Plaintiffs have uncovered evidence that Chevron's lawyers met with the Ecuadorian trial judge *ex parte* after the law changed to prohibit such meetings. The witness with that testimony lives in Ecuador. The Ecuadorian Plaintiffs have uncovered filmed evidence that appears to prove that Chevron visited judicial inspection sites immediately before the judicial inspection was to occur to identify locations where soil samples could be taken that would not reveal petrochemical pollution; it appears that the Ecuadorian military may have accompanied Chevron on these surreptitious inspections. The Ecuadorian Plaintiffs have uncovered evidence from a witness who recorded conversations with a former Chevron employee regarding Chevron dirty tricks in connection with judicial site inspections. This witness lives in Toronto. The Ecuadorian Plaintiffs have uncovered evidence of Chevron's potential involvement in the "judicial sting" operation. The witnesses with that testimony live in Ecuador, Peru, and Mexico.[3]

The Ecuadorian Plaintiffs are serving a 30(b)(6) request for deposition on these and multiple other topics related to Chevron's unclean hands. This evidence will show that Chevron is not entitled to any equitable relief, such as an injunction, because of Chevron's own iniquitous conduct. As usual, the Court can expect Chevron to object and obstruct these discovery efforts.

[3] There are currently two pending 28 U.S.C. §1782 proceedings brought by the plaintiffs in the litigation in Lago Agrio, Ecuador to obtain discovery from Diego Borja, the Chevron employee involved in Chevron's dirty tricks, and from the Mason Investigative Group ("Mason"). Although Chevron has made frivolous privilege claims in an effort to delay or impede discovery that will be the subject of future litigation, at least one unprivileged document makes plain that Mason communicated with Wayne Hansen, Diego Borja's accomplice in the "judicial sting" operation, and may have had a role in moving Mr. Hansen to Peru. Discovery is ongoing in both of these proceedings. In the §1782 proceeding against the Mason Investigative Group, the application was recently granted and discovery is just beginning. Information obtained in these § 1782 proceedings will be used in the Lago Agrio, Ecuador appeal but is also highly relevant to this proceeding: the information will likely lead to the discovery of admissible evidence in the discovery process in this action, will show Chevron's unclean hands, and will respond (separate and apart from the unclean hands defense) directly to Chevron's claims in its Amended Complaint where the company relies on its dirty tricks to support its Count 9 claims against the Ecuadorian Plaintiffs. (*See, e.g.,* Am. Comp. ¶¶ 91, 93, 94, 301.)

The result of Chevron's tactics will be, as usual, to stonewall the Ecuadorian Plaintiffs from obtaining meaningful fact discovery prior to the close of discovery.

There is no final certified trial court record.

The Court intends to close discovery on September 15 without there being an actual accurate certified final trial court record of the Ecuadorian proceedings. Chevron's experts state that the record does not contain evidence to support the judgment; yet there is no final certified record from the Ecuadorian trial court. Chevron's experts purport to find evidence that the opinion was ghost written because there is no record that certain evidence was filed with the Court although references to the evidence appear in the opinion. How can the Ecuadorian Plaintiffs counter that testimony without a final accurate record of the proceedings? The Ecuadorian Plaintiffs understand that every page of the trial court record must be stamped by the court clerk in order for the parties to know what the actual accurate trial court record consists of and that process is not yet complete.

The Ecuadorian Plaintiffs have not been dilatory.

The Court at least implies in its August 8 Order (and in other orders involving Intervenor Donziger) that the Ecuadorian Plaintiffs have not been diligent in prosecuting their defense. ("the extent to which the LAP representatives were or should have been aware well before July 1 that they would need to meet expert testimony on the subjects on which most of the 16 experts propose to testify. . . . In the Court's judgment, the roughly six weeks between July 1 and August 15 ought to be more than enough for the LAP representatives to meet the proposed testimony with experts of their own.")

First, the Ecuadorian Plaintiffs could not have anticipated that the Court would permit the wide range of irrelevant expert testimony that Chevron is now offering, nor could they have

expected that the Court would dispense with controlling New York law on the issue of intrinsic versus extrinsic fraud.

The Court wrote that "Plaintiff, on the other hand, cites substantial authority for the proposition that CPLR 5304 . . . eliminated the distinction between instrinsic and extrinsic fraud and recognizes either species as a basis for relief." The "substantial authority" referenced by Chevron is a practice guide and a 1968 Buffalo Law Journal article. The apparently insubstantial authority the Ecuadorian Plaintiffs cited was controlling New York case law that applies the distinction and holds that intrinsic fraud is not a basis to invalidate a judgment. There is no New York case that abolishes or has ever abolished the distinction. New York case law is surely more authoritative to a federal court sitting in equity than treatises or law review articles.

Second, the Court granted Smyser Kaplan & Veselka LLP's Motion to Appear Pro Hac Vice on July 26. Counsel had been hired shortly before that date. Chevron's overly burdensome discovery demands and multi-jurisdictional offensive left co-counsel with very little time or ability to prepare the case for trial prior to July 26. The Ecuadorian Plaintiffs, who live in the Amazon rainforest, continue to object to jurisdiction in New York and cannot be expected in the time frame allowed to mount the kind of defense needed to counter Chevron's corporate onslaught.

Third, contrary to the Court's view of the sophistication of the Ecuadorian Plaintiffs, the lack of preparation is not due to laziness but due to the Ecuadorian Plaintiffs' limited resources. In some cases, witnesses who previously served as expert witnesses in Ecuador are no longer able or willing to serve as experts. It is impossible in the time frame provided for this trial to identify and retain new scientific and technical experts to rebut the technical and scientific experts Chevron identified and whom the Court is now permitting to testify. New experts would

have to review the entire record—which is still not available—before they would be able to counter the testimony of Chevron experts based on the entire record.

No basis exists for this unseemly rush to judgment.

There is no final judgment. More than six months have passed since the Court listened to Chevron's request for a TRO based on "imminent irreparable harm." Nothing has happened. The suggestion that U.S. consumers might drive to their neighborhood Chevron and find a pump without gas if this judgment were not invalidated is a fantasy not supported by a shred of fact. Chevron's predecessor, Texaco, made these same fanciful arguments when faced with a similar judgment from Pennzoil many years ago.[4] *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). The courts rejected those arguments then, noting that no legal basis existed to distinguish between a judgment against an impoverished defendant and against a giant corporation. *See Pennzoil,* 481 U.S. at 27 (Marshall, J., concurring) ("Had the sole proprietor of a small Texas grocery sued in the Southern District of New York to enjoin the enforcement of the Texas bonding provision in order to facilitate appeal in Texas from a state-court judgment in the amount of $10,000, the result below would surely have been different, even if inability to meet the bonding requirement and to stay execution of judgment meant dissolution of the business and displacement of employees. The principles which would have governed with $10,000 at stake should also govern when thousands have become billions. That is the essence of equal justice under law.") The law has not changed since then.

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[4] Ironically, Texaco succeeded, just as Chevron has here, in convincing a court in the Southern District of New York that posting a $13 billion bond would materially harm Texaco's business, leading the Court to enter an injunction preventing Pennzoil from taking any action to enforce the judgment. The United States Supreme Court reversed the District Court, directed the District Court to vacate its order and dismiss Texaco's complaint. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). To quote the American Philosopher George Santayana: "Those who cannot remember the past are condemned to repeat it." *See* George Santayana, *Life of Reason*, "Reason in Common Sense" 284 (1905).

The situation is this: without a final judgment, without a complete trial record, without an enforcement proceeding anywhere in the world, let alone in New York, and without any threat to Chevron other than a lawyer's preliminary think-piece on potential judgment enforcement options somewhat grandiosely entitled "Invictus," the Court is accepting uncritically Chevron's cries of "wolf" -- a/k/a disruption of oil supply -- and pushing this case towards a trial date for which the Ecuadorian Plaintiffs cannot possibly be prepared. Continuing on this course will prejudice the Ecuadorian Plaintiffs, deprive them of their due process rights, foster an injustice, and result in a proceeding with the same pre-determined result that Chevron claims was its fate in Ecuador.

For these reasons, the Court should continue this case.

Dated: August 10, 2011

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