UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHEVRON CORPORATION,

Petitioner,

v. **Misc No. 11-409 (JMF)**

THE WEINBERG GROUP,

Respondent.

MEMORANDUM ORDER

Before me is Chevron Corporation's Amended Motion to Compel the Weinberg Group to Produce Documents Pursuant to Federal Rule of Civil Procedure 45 [#16].[1]

Every once in a while, the facts in a case are so startling and interesting that one wonders why someone does not make a movie about it. That is true here, but somebody has already made a film about the facts of this case called "Crude."

The *mise en scene* of the film first includes a lawsuit brought against the Chevron Corporation by what are known as the "Lago Agrio Plantiffs" ("LAPs"). Lead counsel for those plaintiffs is a lawyer named Steven Donzinger ("Donzinger"). He and his associates succeeded in securing a multibillion dollar judgment against Chevron in a court in Ecuador for damages stemming from the pollution of the Amazon rainforest. See Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 594 (S.D.N.Y. 2011).[2] Chevron has now brought an action before Judge Kaplan

[1] Hereafter all submissions by the parties will first be identified in full by their caption. Thereafter, they will be identified only by docket number, i.e. [#1].

[2] Hereafter "Kaplan" followed by the page citation to the Federal Supplement 2d.

claiming that the Ecuadorian judgment was procured by fraud, "led in major degree by a New York City lawyer, Steven Donzinger, substantial parts of which were conducted in the United States." Id. Chevron sought a preliminary injunction against the LAPs enforcing the Ecuadorian judgment. Judge Kaplan granted their application by the opinion just cited and has now set a trial for November 15, 2011, on Chevron's application for a declaratory judgment that "any judgment by the Lago Agrio court would be unenforceable on the ground that it would have been obtained through fraud and without procedures compatible with due process." Chevron Corp. v. Salazar, No. 11 Civ. 3718 (LAK)(JCF), 2011 WL 3424486, at *3 (S.D.N.Y. Aug. 3, 2011).[3]

Judge Kaplan concluded that Chevron had established a likelihood of success on its claims that Ecuador did not provide impartial tribunals and due process and that the Ecuadorian judgment was procured by fraud. Kaplan, 768 F. Supp. 2d at 632-38.

To return to the film, Judge Kaplan has described its impact upon the litigation in Ecuador:

> First, a great deal of the evidence of possible misconduct by Mr. Donziger and others, as well as important evidence regarding the unfairness and inadequacies of the Ecuadorian system and proceedings, consists of video recordings of the words of Donziger and others made by a New York documentary film maker, Joseph Berlinger, whom Donziger invited to film activities in relation to the Ecuadorian case and who ultimately released a documentary film about it called *Crude.* Still more comes from e-mails and other documents between and among Donziger and others working with him that were produced in related cases.

Id. at 595.

A crucial piece of evidence in the Ecuadorian litigation was the Cabrera report. In March

[3] Hereafter "Francis" followed by the page citation to Westlaw.

2007, the Ecuadorian court appointed Richard Stalin Cabrera as a neutral and independent Ecuadorian expert. Id. at 603. He was to make a global assessment of environmental damage done by Chevron. He was sworn in on June 13, 2007, and was obliged to "perform his duties faithfully and in accordance with science, technology, and the law, with complete impartiality and independence vis-á-vis the parties." Id. (internal quotations omitted).

To comment on the report, the LAPs hired Stratus Consulting, Inc. Judge Kaplan concluded "Cabrera was anything but independent and Stratus, in purporting to comment on Cabrera's work, in fact was commenting on its own—it actually had written all or most of the Cabrera report." Kaplan, 768 F. Supp. 2d at 604.

The facts detailed in the Kaplan opinion convinced the Judge to conclude that there was evidence that the Ecuadorian judge presiding over the LAP litigation had appointed Cabrera in exchange for the LAPs' agreeing not to file a complaint against that judge, and that Cabrera had been paid and promised more compensation by the LAPs if they prevailed. Id. at 607.

As the facts pertaining to the preparation of the Cabrera report came to light, the LAPs and their lawyers had to repair the damage done. According to Judge Kaplan, their strategy was to cleanse the Cabrera report by submitting an apparently "new" report that "would appear to be independent but that would be premised on the data and conclusions purportedly reached by Cabrera." Id. at 610.

The plan led to the retention of what have become known as the cleansing experts. Judge Kaplan stated as to their work:

> New reports were obtained and submitted. Nevertheless, the new consultants largely reviewed certain sections of the Cabrera report rather than conduct their own independent fact finding. Nearly all

> of the new experts completed their reports in less than a month without (1) visiting Ecuador, (2) conducting any new site inspections, (3) taking any new samples, (4) conducting any other form of environmental testing, or (5) taking steps independently to verify the data in the Cabrera report or other findings upon which they relied.

Kaplan, 768 F. Supp. 2d at 611 (internal citations omitted).

In an e-mail, one of the LAP lawyers expressed the desire that the cleansed report should address the Cabrera findings in "such a subtle way that someone reading the new expert report (the Court in Lago or an enforcement court elsewhere) might feel comfortable concluding that certain parts of [the] Carbrera [report] are a valid basis for damages." Id. at 610.

In a footnote to his quotation of that e-mail, Judge Kaplan described the hiring of the Weinberg group:

> Although the LAP representatives contemplated hiring one new expert they hired the Weinberg Group, another scientific consulting firm, and subcontracted with several new experts.

Id. at 610 n.116.

Thus, the Weinberg Group was hired to coordinate the work of the cleansing experts. The Weinberg Group is based in Washington D.C. and Chevron has served upon it a subpoena calling upon it to produce (*inter alia*) all communications with the cleansing experts, the LAPs' counsel and "any other person" concerning Chevron. Memorandum of Points and Authorities in Support of Chevron Corporation's Amended Motion to Compel the Weinberg Group to Produce Documents Pursuant to Federal Rule of Civil Procedure 45 [#17] at Exhibit 21.

In its July 29, 2011 privilege log the Weinberg Group claimed 1,115 documents as privileged and identified 348 other documents as redacted. [#17] at 2.

Chevron insists that the only privileges claimed by the Weinberg Group, attorney-client and work product, are lost when the communications claimed to be privileged were uttered to advance a crime or fraud. [#17] at 9. Chevron understandably points to Judge Kaplan's holding that the evidence before him permitted the conclusion that the LAPs' submission of the cleansing reports was part of a fraudulent effort to deceive the Ecuadorian court into believing that the cleansing reports were not based on the discredited Cabrera report when in fact they were. Id. at 10. It is undisputed that in this jurisdiction, a prima facie case that a crime or fraud has been committed suffices to invoke the crime fraud exception to the attorney-client and work product privileges. The Weinberg Group's role in the preparation and submission of the cleansing reports was clearly a part of such an alleged fraud and its claim of privilege cannot survive.

Indeed, Judge Kaplan referred to Magistrate Judge Francis the claims of privilege asserted by the LAPs' attorneys. As it does here, Chevron claimed (*inter alia*) that the crime fraud exception to the attorney-client and work product privileges applied. After a hearing, Judge Francis concluded that:

> Judge Kaplan had made findings that required application of that exception to information relating to three different subjects: (1) the report to which an expert's name had fraudulently been appended (the "Calmbacher report"); (2) the report that was purportedly independent but had been ghostwritten by agents of the LAPs (the "Cabrera report"); and (3) the memoranda that were purportedly independent reports intended to supercede the Cabrera report, but which in fact simply repeated that report's findings (the "cleansing memos"). (Tr. at 152–53). I further found that the crime-fraud exception was limited to these areas and that there was not sufficient evidence to support Chevron's assertion that the entire Lago Agrio litigation was fraudulent from its inception. (Tr. at 153). Finally, I concluded that there was no evidence of criminal or fraudulent intent on the part of the Respondents but noted that such evidence would not be necessary for the crime-fraud exception to

apply.

Francis, 2011 WL 3424486, at *3.

Since Judge Francis concluded that Judge Kaplan's findings require that (*inter alia*) information pertaining to the creation of the cleansing reports (or "memos") be subject to the crime fraud exception, it has to follow that the information that the Weinberg Group has as to that topic is just as subject to that exception.

The Weinberg Group refuses to accept Judge Francis's conclusion and attacks its validity. It demands that this Court reject it as incorrect ("not based on any independent analysis whatsoever"[4]) and instead rely on (1) a Third Circuit decision, In re Chevron Corp., 633 F.3d 153, 166 (3d Cir. 2011), that it claims rejected the "same allegations as a basis to apply the crime-fraud exception" ([#20] at 23) and (2) a decision by the District Court in Vermont, Chevron Corp. v. Allen, No. 2:10-mc-00091, Memorandum and Order at 13 (D. Vt. Dec. 12, 2010), that reviewed the communications of one of the cleansing experts (named Allen) and found no evidence of fraud. Id.

But, as Chevron correctly points out, the Third Circuit did not reject the "same allegations" as underlie Judge Francis's decision. See Chevron Corporation's Reply Brief in Support of Its Amended Motion to Compel the Weinberg Group to Produce Documents Pursuant to Federal Rule of Civil Procedure 45 [#22] at 14. In the Third Circuit case, the issue presented dealt not with the cleansing experts but with a man named Villao, who was said to have provided information to Cabrera for his report. Chevron, 633 F.3d at 159. More to the point, the court held that showing that Villao's dual employment by a third party and Cabrera

[4] [#20] at 23.

was sufficient to satisfy the crime fraud exception, but remanded the case for in camera inspection of the documents in question. Id. at 167. Thus, it is incorrect to say that the Third Circuit rejected the same allegations that Judge Francis accepted.

Finally, the Weinberg Group's brief statement of the holding of an unreported Vermont case in which a court is said to have reviewed the communications of one of the "cleansing experts" and found no evidence of fraud is hardly inconsistent with Judge Kaplan's conclusion that there was evidence supporting a finding that the enterprise of replacing the discredited Cabrera report with a new one while disguising the experts' reliance on the Cabrera report was fraudulent.

More to the point, I am not permitted to "shop" among opinions and accept the ones that the Weinberg Group likes. A judge in this case has concluded that there was sufficient evidence that the process by which one report was replaced by a second was fraudulent and a second judge, basing his conclusions on those findings, held that this prima facie showing meant that persons and groups involved in that process could not claim the attorney-client or work product privileges. The Weinberg Group does not even hint at a legal principle that would require me to disregard those findings. The most fundamental principles of comity and the efficient administration of justice compel the conclusion that when the court that will ultimately try a matter has reached conclusions that speak directly to a claim of privilege, another court should accept those conclusions except in the most extraordinary situations. Thus, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Arizona v. California, 460 U.S. 605, 618 (1983); Cohen v. Brown Univ., 101 F.3d 155, 167 (1st Cir. 1996) (relitigation of legal issues presented in

successive stages of a single case is precluded); Avita v. Metro. Club of Chicago, 49 F.3d 1219, 1227 (7th Cir. 1995) (ruling at one stage of lawsuit will be adhered to throughout); Flint Elec. Membership Corp. v. Whitworth, 68 F.3d 1309, 1312 (11th Cir. 1995) (prior decisions in the same case are binding unless (1) new and substantially different evidence material to the issue has been presented; (2) controlling authority has been rendered which is contrary to the law of the previous decision; or (3) the earlier ruling was clearly erroneous and would work a manifest injustice if implemented); United States v. Barsh, 69 F.3d 864, 866 (8th Cir. 1995) ("The law of the case doctrine prevents the relitigation of a settled issue in a case and requires courts to adhere to decisions made in earlier proceedings in order to ensure uniformity of decisions, protect the expectations of the parties, and promote judicial economy."); Kori Corp. v. Wilco Marsh Buggies and Draglines, Inc., 761 F.2d 649, 657 (Fed. Cir. 1985) (earlier decision of coordinate court in same case will not be reconsidered unless exceptional circumstances are shown).

Thus, there is simply no good reason for me to do anything else but apply and enforce the decisions of Judges Kaplan and Francis.

I hasten to add, however, that if the question were an open one, I would find that the evidence marshaled by Judge Kaplan and then applied by Judge Francis to the privilege question convinces me that there is more than sufficient evidence of a prima facie case that the Weinberg Group's work was part of a fraud upon the Ecuadorian court.

Finally, as has been explained, the Weinberg Group's privilege log invokes the work

product and attorney-client privileges.[5] The Weinberg Group, however, devotes a portion of its brief to establishing, as it were, a new privilege for a "consulting expert," even thought it insists that its representatives played no substantive role whatsoever in the creation and articulation of the opinions the experts expressed. It insists that the depositions of the experts establish that "each of those experts had full control over the ultimate substance of their reports." [#20] at 14.

There is no dispute that in providing the assistance it did to the lawyers in the litigation, the Weinberg Group functioned as those lawyers' agents and therefore can claim the work product privilege. Fed. R. Civ. P. 26(b)(3)(A). However, it does not follow that such persons have a second privilege because they are "consulting experts."

Another subdivision of Rule 26 exempts from disclosure "facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial." Fed. R. Civ. P. 26(b)(4)(D). Surely, the word "expert" in that rule must be defined in accordance with Rule 702 of the Federal Rules of Evidence, which permits a witness, called an expert, to express an opinion not based on his perception but on facts or data that may not be admissible if "reasonably relied upon" by her fellow experts. Fed. R. Evid. 703. See Fed. R. Civ. P. 26 advisory committee note, 1993 amendments ("For convenience, this rule [i.e. Rule 26] and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical or other specialized matters.").

[5] The Weinberg Group provides me no reason to conclude that its communications with the experts was shielded by a privilege that protects confidential communications between a client and an attorney made for the purpose of securing legal advice or legal services.

It would stand to reason that the non-testifying or consulting expert who can shield the facts she knows and the opinions she holds must first be an expert under Rule 702–a person who can claim a technical expertise that permits her to express an opinion as to an issue that is beyond the ken of a layperson. The Weinberg Group is not claiming that its employees had a technical expertise that would have allowed them to testify as to a technical, environmental issue that was being litigated in the Ecuadorian courts had they been called upon to do so. To the contrary, as just explained, it insists that the experts with whom it worked expressed their own opinions.

There is simply no reason to interpret the Federal Rules of Civil Procedure and Evidence to create for the Weinberg Group two privileges, one as an agent of an attorney and another as a "consulting expert." Thus, the Weinberg Group's claim of privilege must be based on the work product privilege and nothing else. That privilege yields to the crime fraud exception and therefore the only claim of privilege that the Weinberg Group can make fails.

Accordingly, **IT IS ORDERED** that Chevron Corporation's Amended Motion to Compel the Weinberg Group to Produce Documents Pursuant to Federal Rule of Civil Procedure 45 [#16] is **GRANTED**,

SO ORDERED.

Digitally signed by John M. Facciola
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JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE