MEMO ENDORSED

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October 23, 2012

VIA HAND DELIVERY

The Honorable Lewis A. Kaplan
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: *Chevron Corp. v. Donziger, et al.*, Case No. 1:11-cv-00691 (LAK)

Dear Judge Kaplan:

We represent Steven Donziger, The Law Offices of Steven R. Donziger, and Donziger & Associates, PLLC (collectively, "Donziger") in this action.

On Friday October 5, 2012, after the close of business, Chevron filed a Motion for Summary Judgment on its Eighth Claim for Relief and Memorandum of Law in Support. Dkt. Nos. 583 & 584. In connection with this motion, Chevron filed a 55-page Local Civil Rule 56.1 Statement of Material Facts that recites 164 purportedly material and undisputed facts, and which references thousands of pages of documents, numerous deposition excerpts, and expert reports and declarations. Dkt. No. 585. Chevron did not provide any advance notice to Donziger of its intention to file this motion.

Chevron's motion is premature, and it would be unfair and contrary to law to require Donziger to oppose the motion at this time. Therefore, for the reasons discussed in detail below, the Court should continue the deadline for Donziger to respond to Chevron's motion to a date after the May 31, 2013 close of discovery in this action.[1]

[1] Shortly after Chevron filed its motion, and before Donziger had fully assessed the extent to which Chevron's motion was based upon discovery that Donziger does not have and did not participate in, the parties stipulated to a short extension of the briefing schedule. *See* Dkt. No. 589. However, that stipulation expressly was made "without prejudice to any parties [sic] right to seek additional time from the Court pursuant to the Federal Rules of Civil Procedure, the Local Civil Rules of this District, and the Court's individual practices." *Id.*, at 1-2.

The Second Circuit has made clear that "[o]nly in the rarest of cases may summary judgment be granted against a [party] who has not been afforded the opportunity to conduct discovery." *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000). As the Second Circuit repeatedly has explained: "The nonmoving party should not be 'railroaded' into his offer of proof in opposition to summary judgment. The nonmoving party must have had the opportunity to discover information that is essential to his opposition to the motion for summary judgment." *Trebor Sportswear Co. v. The Ltd. Stores, Inc.*, 865 F. 2d 506, 511 (2d Cir. 1989); *see also Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 301-07 (2d Cir. 2003) (holding that grant of defendants' summary judgment motion was "premature" where district court denied Rule 56(f) relief and did not afford plaintiff the opportunity to conduct discovery to oppose defendants' motion); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980) ("At least when the party opposing the motion has not been dilatory in seeking discovery, summary judgment should not be granted when he is denied reasonable access to potentially favorable information.").

In this case, Donziger has yet to have a sufficient opportunity to conduct discovery into the factual issues raised by Chevron's motion. To the contrary, Chevron's motion is based in significant part on depositions, expert reports, and document discovery in prior actions in which Donziger did not participate and had no opportunity to participate.

For example, Chevron relies upon deposition testimony of Ann Maest, Douglas Beltman, Mark Quarles, Vincent Uhl, and Charles Calmbacher in support of its motion. *See, e.g.*, Dkt. No. 585 (fact numbers 2, 46, 48, 52, 61, 72, 75, 89, 90, and 112). However, Donziger was not a party to the 28 U.S.C. § 1782 proceedings in which these depositions occurred and had no opportunity to attend the depositions and examine these witnesses. *Cf.* Fed. R. Civ. Pro. 32(a)(1)(A) & (a)(8). Moreover, although Donziger has requested copies of these deposition transcripts from Chevron, Chevron has refused to provide them to Donziger. Thus, Donziger does not even have complete copies of these deposition transcripts; he only has the carefully selected excerpts Chevron has chosen to attach to its motion and to other filings.

Chevron's motion also is based in significant part on the expert opinions of Michael F. McGowan and Gerald R. McMenanim. *See, e.g.*, Dkt. No. 585 (fact numbers 29, 37, 38, 39, 44, 56, and 58). Donziger has not had any opportunity to test these experts' opinions through cross examination at deposition. McMenamim's expert report upon which Chevron relies was prepared in connection with the *Chevron v. Salazar*, 11-civ-3718, action. But McMenamim was not deposed by any defendant before that action was stayed and then dismissed.

Furthermore, Donziger only has certain documents from many of the document productions[1] which also stem from 28 U.S.C. § 1782 proceedings to which Donziger was not a party—from which Chevron has culled the exhibits it cites in support of its motion. Specifically, as best Donziger can determine based upon the information provided by Chevron, Donziger

[1] Among other deficiencies, Chevron's partial reproduction to Donziger of documents Chevron obtained in prior actions fails in many cases to carry over the original product bates numbers for

does not have the "KAMP-NATIVE" production, the "STRATUS-NATIVE" production, the "JB-NONWAIVER" production, the "MB-NONWAIVER production, or the "DONZIGER-HDD" production.[3] And Donziger only received the multi-thousand-page "VU" production from Chevron on October 4th, the day before Chevron filed its motion. Consequently, Donziger has not had an opportunity to review and analyze these productions to determine if they contain additional documents or correspondence that explain or contradict or are otherwise relevant to the cherry picked documents cited by Chevron.[4] Nor has Donziger had any opportunity to depose the authors, recipients, and custodians of many of these documents, including, for example, Ann Maest, Douglas Beltman, and Vincent Uhl, as well as other relevant witnesses, including Chevron witnesses.

Donziger has been diligent in pursuing discovery in this action. Donziger propounded a comprehensive set of requests for production to Chevron on July 10, 2012—only fifteen days after the Court lifted the stay of discovery. *See* Dkt. No. 494, at 1. And since receiving Chevron's responses on August 13, 2012, Donziger has engaged in multiple meet and confer teleconferences with Chevron's counsel, spanning more than ten hours, in an effort to address Chevron's litany of objections to his requests. Despite these efforts, Chevron only started producing documents to Donziger on September 4, 2012, and its production of documents relevant to the issues raised in Chevron's motion remains far from complete. For example, Chevron has yet to produce documents regarding its own *ex parte* contacts with Ecuadorian judicial officers and court-appointed experts in the Lago Agrio litigation, and its own payments to court-appointed experts.

Moreover, Chevron has refused to produce some of the very same materials it relies on in support of its motion. As noted, Chevron has refused to produce to Donziger complete copies of deposition transcripts, including those it relies upon in support of its motion, and has instead only produced cover pages for the transcripts. Chevron also has refused to produce some or all of the documents it obtained in the Berlinger 28 U.S.C. § 1782 action, including we believe the "JB-

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the documents, making it exceedingly difficult, if not impossible, to ascertain information regarding the origin of the documents.

[3] The "DONZIGER-HDD" production is *not* a production that ever was made by Donziger. Rather, we understand that documents bearing this bates number prefix are documents that Chevron forensically extracted from the images of Donziger's hard drives that were turned over to Chevron as a result of the Court's discovery sanctions against Donziger in the *In re Application of Chevron*, 10-mc-0002, action. Although Donziger's counsel in the 10-mc-0002 proceeding has copies of these images, without knowing what computer tools and protocols Chevron used to search these images, it is not possible independently to reconstruct the set of documents that Chevron extracted from the images.

[4] Chevron relies upon selected documents from these productions in support of numerous of its alleged material facts. *See, e.g.*, Dkt. No. 587 (fact numbers 1, 3, 15, 21, 35, 44, 45, 46, 47, 49 51, 55, 57, 62, 63, 64, 66, 67, 68, 69, 70, 74, 81, 96, 112, 149, 150).

NONWAIVER" and "MB-NONWAIVER" productions it relies upon in support of its motion, claiming it cannot do so because of a protective order in that action.

In short, despite diligently pursuing discovery in this action, Donziger has not yet had an adequate opportunity to obtain, much less review, assess, and test, the complete document productions and testimony upon which Chevron's motion is based, or to obtain additional documents and testimony necessary to oppose to Chevron's motion. Under these circumstances, Donziger should not be required to oppose Chevron's motion at this time. *Cf. Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 925 (2d Cir. 1985) ("a denial of access to relevant information weighs in favor of the party opposing a motion for summary judgment"); *Landmark Land Co., Inc. v. Sprague*, 701 F.2d 1065, 1070 (2d Cir. 1983) (reversing grant of partial summary judgment in part because "discovery . . . was frustrated by [the moving party's] failure to make a timely response to requests for documents"). Rather, Donziger's deadline to oppose Chevron's motion should be continued to a date after the close of discovery, as contemplated by the Court's June 25, 2012 scheduling order. Dkt. No. 494, at 1 (setting May 31, 2013 as the date by which discovery must be completed and June 30, 2013 as the deadline to move for summary judgment); *see Miller*, 321 F.3d at 303 ("[W]hen a party facing an adversary's motion for summary judgment reasonably advises the court that it needs discovery to be able to present facts to defend the motion, the court should defer decision of the motion until the party has had the opportunity to take discovery and rebut the motion." (internal quotation marks and citation omitted)).

If required to respond to Chevron's motion at this time, Donziger will formally request a continuance pursuant to Rule 56(d) of the Federal Rules of Civil Procedure to permit Donziger to obtain the discovery outlined in this letter. However, we believe that raising this issue with the Court as soon as possible by letter is the most sensible and appropriate course of action, especially in light of the Court's comments during the October 18, 2012 status conference regarding the need for this case to be brought under control. This Court has wide discretion to manage its docket, including managing when motions may be brought and heard. *See, e.g., Bey v. City of N.Y.*, 454 Fed. App'x. 1, 4 (2d Cir. 2011) ("district courts have broad discretion to manage their caseload and dockets by scheduling motions"). And under circumstances such these, where discovery has only recently commenced, the formal requirements of Rule 56(d) do not necessarily apply. *See, e.g., Crystalline H2O, Inc. v. Orminski*, 105 F. Supp. 2d 3, 6-7 (N.D.N.Y. 2000) ("There is a critical distinction, however, between cases where a litigant opposing a motion for summary judgment requests a stay of that motion to conduct *additional* discovery and cases where that same litigant opposes a motion for summary judgment on the ground that it is entitled to an opportunity *to commence* discovery with respect to Plaintiff's claims and its counterclaims." (emphasis in original)); *accord Penn Mut. Life Ins. Co. v. Madow*, No. CV 07-3188 (AKT), 2009 WL 804719, at *4 (E.D.N.Y. Mar. 26, 2009).

It also should be emphasized that there is no good reason why Chevron's motion for partial summary judgment needs to be resolved at this time. Chevron's motion is only directed toward its eighth claim for relief. Thus, the motion will not resolve Chevron's RICO and fraud claims, or the core factual disputes related to those claims, and will not significantly streamline

discovery or trial. Indeed, there would seem to be little purpose to Chevron's seeking summary judgment on this ancillary claim, other than to set a "gotcha" trap by proffering dozens of allegedly undisputed facts, knowing that Donziger lacks the discovery necessary to marshal a complete response. For the same reasons, Chevron is unlikely to suffer any prejudice if its motion is continued until after discovery is completed. Moreover, Chevron is only seeking nominal damages of $1 on its eighth claim for relief, so Chevron will not suffer any pecuniary harm if resolution of the motion is postponed. Chevron certainly will not suffer prejudice proportionate to the prejudice Donziger will suffer if he is obliged to oppose Chevron's motion without having access to much of the evidence upon which Chevron's motion is based and having not had an opportunity to depose the witnesses and experts upon which Chevron relies.

Donziger, through counsel, informed Chevron of his need for discovery to opposed Chevron's motion and requested that Chevron stipulate to a continuance of its motion. Chevron, however, refused Donziger's request. Donziger, therefore, has no alternative but to seek relief from the Court. Accordingly, Donziger respectfully requests that Court continue Donziger's deadline to respond to Chevron's Motion for Summary Judgment until after May 31, 2013.

Respectfully submitted,

JOHN W. KEKER

JWK:mls

cc: All Counsel of Record (via email)

Denied w/o prejudice to a 56(d) application.

SO ORDERED

LEWIS A. KAPLAN, USDJ

11/25/12

See Dkt. No. 584, at 26-27.