UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CHEVRON CORPORATION,

Plaintiff,

-against-

11 Civ. 0691 (LAK)

STEVEN DONZIGER, et al.,

Defendants.

- x

MEMORANDUM AND ORDER

LEWIS A. KAPLAN, *District Judge.*

This matter is before the Court on plaintiff's motion for an order striking the purported amended answers of certain of the defendants.

The Facts

The pleadings in this case were closed long ago. The deadline for the filing of amended pleadings or motions for leave to amend expired in August 2012. Defendants Piaguaje and Camacho (the "LAP Representatives") and Steven Donziger, Donziger & Associates PLLC and The Law Offices of Steven R. Donziger (collectively, "Donziger") timely moved for leave to amend their answers. Their motions were denied in all material respects by orders dated November 27, 2012.[1]

Notwithstanding that their motions for leave to amend were denied, the LAP

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[1] Dkt. 637, 638. Donziger's motion for leave to amend was granted to the extent it sought to assert counterclaims.

Representatives and Donziger each filed purported amended answers on January 22, 2013.[2] The principal purpose of the purported amendments to their prior answers was an attempt to drop their contention that the Ecuadorian judgment that is at the heart of this dispute has *res judicata* and/or collateral estoppel effect in this case – precisely the attempted amendment that this Court's November 27, 2012 orders declined – for the second time – to permit.

Discussion

Rule 15(a) of the Federal Rules of Civil Procedure governs pretrial amendments to the pleadings. It provides:

> "(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:
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> (A) 21 days after serving it, or
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> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.
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> "(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.
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> "(3) *Time to Respond.* Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later."

In this case, these defendants were not entitled to amend as of course under Rule 15(a)(1). Their previous answers had been served well over 21 days before the service of the purported answers here at issue, so Clause (A) does not apply. The LAP Representatives' previous answer contained no counterclaims, in consequence was not a pleading "to which a responsive pleading [wa]s

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[2] Dkt. 731, 732.

required," and could not have been amended as a matter of course under Clause (B) even within the 21 day periods there referred to. And while Donziger was granted permission in November to amend his answer solely to assert counterclaims, to which a responsive pleading was required, he filed his amendment adding the counterclaims on November 28, 2012.[3] Accordingly, his January 22, 2013 filing of a purported amended answer did not come within the 21 day periods set out in Clause (B).

These defendants nevertheless argue that they were entitled to amend as of course under Rule 15(a)(3) because the Court in substance amended plaintiff's complaint by issuing an order, pursuant to Rule 16(c)(2) and 16(d), and following a Rule 16 conference that adopted plaintiff's construction of the word "sham" as used in the amended complaint rather than a different interpretation advanced by defendants for the obvious purpose of broadening discovery in a manner entirely unnecessary to the resolution of this action.[4] This argument is entirely baseless.

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[3] Dkt. 643.

[4] *See* Tr., Dec. 21, 2012, at 130:3-133:20; Dkt. 705.

The suggestion that this somehow was inconsistent with the Court's treatment of defendants' attempt to "construe" their *res judicata*-collateral estoppel defense is baseless for at least two reasons.

First, it ignores the fact that the Court found that defendants' attempt in that regard was economical with the truth. The facts are these. These defendants pled affirmative defenses of *res judicata* and collateral estoppel. Chevron moved for partial summary judgment dismissing those defenses insofar as they were based on the Ecuadorian judgment on the ground that undisputed facts showed that the the Ecuadorian judgment was not recognizable or enforceable here, a conceded prerequisite to its having any preclusive effects. In an effort to avoid meeting Chevron's argument on its merits, these defendants pretended that they had not previously asserted the Ecuadorian judgment as having preclusive effect here when, in fact, their own statements and actions made clear that that was exactly what they had done. *Chevron v. Donziger*, __ F. Supp.2d __, No. 11 Civ. 0691 (LAK), 2012 WL 3538749, at *16-19 (S.D.N.Y. July 31, 2012) ("In sum, the SJ Defendants' current position that they have not asserted, and did not intend to assert, any alleged preclusive effect of the Judgment in response to Chevron's amended complaint is (1) inconsistent with their pleadings, (2) inconsistent with their statement to the Court of Appeals in *Naranjo*, and (3) inconsistent with their statements to this Court as well as with other evidence. It is a recently conceived argument intended to avoid meeting Chevron's motion on its merits without moving to discontinue the defense

To begin with, Rule 15(a)(3) merely fixes the time within which a required response to an adversary's amended pleading must be served. It does not confer a right to amend as of course in the absence of such a right under Rule 15(a)(1) or (2).

Second, the purported answers here were not responses – let alone required responses – to any amended pleading served on these defendants. Chevron filed no new amended complaint.

Third, the Court's Rule 16 order expressly relied on its "authority [under Rule 16(c)(2)] to formulate and simplify the issues, avoid unnecessary proof, and otherwise to facilitate the just, speedy and inexpensive disposition of the action." It did not amend the pleadings, at least in any sense relevant here.

Fourth, even if the Rule 16 order narrowing and simplifying issues could be said to have "amended" a pleading, there was no "amended" pleading here to which a response was required or permitted. Indeed, a contrary view would threaten chaos. Many district court orders "amend" pleadings in some sense in that they dismiss some claims for insufficiency, strike some allegations, limit proof, or otherwise take action that cuts down on the claims and defenses pleaded in complaints, answers and counterclaims. If every such order were treated as an amendment to the "affected" pleading for purposes of triggering a right in the opposing party to amend, pleadings in federal civil actions seldom

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without prejudice and risking an adverse ruling.").

Second, the claim of inconsistency ignores that the defendants' attempt to recast their answers to avoid litigating the recognizability of the Ecuadorian judgment in this action – after having litigated it here for more than a year and, moreover, to do so without prejudice to their ability to litigate it later in other *fora* – would have been extremely prejudicial to Chevron and constituted bad faith forum shopping. *Id.* at *23; Dkt. 637, at 1-2. Here, on the other hand, the effect of the narrowing of issues accomplished at and as a result of the Rule 16 conference was, at worst from the defendants' point of view, to limit the scope and nature of the claims against them. Moreover, as has been pointed out, it was the defendants who previously contended that this case is not an appropriate vehicle for relitigating the merits of the environmental pollution claims they advanced in Ecuador, which is the position that the Court consistently has adopted. *See Chevron Corp. v. Donziger,* No. 11 Civ. 0691 (LAK), 2012 WL 6634680, at *3-4 (S.D.N.Y. Dec. 19, 2012).

if ever would be closed.

Finally, sight must not be lost of what these defendants are trying to accomplish by this argument. The Rule 16 order here did no more than narrow and make more specific Chevron's "sham" allegation. But defendants purported answers were neither necessary nor use to address that allegation, which they previously had denied in any case, as it now has been clarified. The purported amended answers instead were a new attempt to obtain a "without prejudice" withdrawal of an affirmative defense that they have litigated for almost two years in order to shop it in other *fora* – a tactic that the Court had rejected twice before.

Conclusion

These defendants were not permitted to amend as of course under Rule 15(a)(1). They obtained neither the plaintiff's written consent nor the Court's leave as required by Rule 15(a)(2). Rule 15(a)(3) does no more than regulate the timing of the service of required responses to adversaries' amended pleadings. Accordingly, the purported amended answers filed on January 22, 2013 were filed improperly and are nullities.[5] Plaintiff's motion to strike them (Dkt. 742) is granted in all respects. Moreover, defendants' actions in filing the purported amended answers, without leave after the Court (1) made clear that leave to amend in this fashion would be denied and then (2) denied the defendants' subsequent motions for leave to amend, at least borders on being – and may well be – indefensible. The defendants had this Court's position on this question months ago. They are entitled to disagree with it

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[5] *Chevron Corp. v. Salazar*, No. 11 Civ. 3718 (LAK), 2011 WL 3628843, at *2-3 (S.D.N.Y. Aug. 17, 2011). *Accord*, *Murray v. Archambo*, 132 F.3d 609, 612 (10th Cir.1998) ("Generally speaking, an amendment that has been filed or served without leave of court or consent of the defendants is without legal effect."); *Hoover v. Blue Cross & Blue Shield*, 855 F.2d 1538, 1544 (11th Cir.1988) (same); *Ritzer v. Gerovicap Pharm. Corp.*, 162 F.R.D. 642, 644 (D. Nev.1995) (same); *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197, 204 (E.D.N.Y.1992) (same).

and, if they suffer an adverse judgment, to raise the point on appeal. But they are not entitled to continue to relitigate it *ad infinitum.*

SO ORDERED.

Dated: February 20, 2013

Lewis A. Kaplan
United States District Judge