UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION, Plaintiff, v. STEVEN DONZIGER, et al., Defendants.	:	11-CV-0691 (LAK)

CHEVRON CORPORATION'S OBJECTIONS TO JUDGE FRANCIS'S ORDER DENYING CHEVRON'S MOTIONS FOR A PROTECTIVE ORDER AND TO QUASH THE DEPOSITIONS OF JOHN WATSON AND EDWARD SCOTT (DKT. 1119)

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PRELIMINARY STATEMENT

Pursuant to Federal Rule of Civil Procedure 72(a), Plaintiff Chevron Corporation ("Chevron") respectfully objects to Magistrate Judge Francis's May 7, 2013 order denying Chevron's motions for a protective order and to quash deposition notices to two of Chevron's high-ranking corporate officers, John Watson and Edward Scott (Dkt. 1119) (the "Order"). Chevron agrees with Judge Francis that this is "far from a trivial case," *id*., such that depositions of senior corporate executives could, in theory, be warranted. But this would be true only if—and to the extent that—such witnesses possessed unique personal knowledge on relevant topics, and the proponents of the discovery had first exhausted less-intrusive means to obtain the information. Here, Defendants have satisfied neither of these prerequisites to an "apex" deposition, and thus the Court should grant Chevron's motion for a protective order, quashing or limiting the depositions.

The Order exceeds Rule 26(b)'s limits on the permissible scope of discovery because it authorizes Defendants to question two of Chevron's most senior executives on subjects that this Court has already ruled are irrelevant, or that are otherwise protected by the attorney-client privilege or work-product immunity. For instance, the Order requires Mr. Watson to testify about "the environmental issues underlying the Ecuador litigation," Dkt. 1119 at 4, but this Court has ruled—as recently as today—that this subject is not at issue in this case. Dkt. 1130 at 3; Dkt. 720 at 2. There also has been no showing that these apex witnesses have "unique" personal knowledge and that Defendants have exhausted other less-intrusive means before seeking to depose them, particularly given that Defendants' Rule 30(b)(6) deposition notice covers these same topics.

And even if the depositions should not have been quashed in their entirety, the Order should have limited the scope of the depositions to minimize the burden and harassment on Chevron and its executives. The depositions themselves should be limited to half a day each, in

accordance with Rule 26(b)(2)(C) and (c), should be restricted to subjects that are relevant to issues in the case, and should not be duplicative of matters testified to by Chevron's 30(b)(6) witnesses. This is particularly so in the case of Chevron's CEO and Chairman, Mr. Watson, who, while receiving updates on the case, attests to having no "unique personal knowledge" about the relevant issues in the litigation and derives his knowledge from others like Mr. Scott and the several witnesses whom Chevron will be producing as the company's 30(b)(6) deponents. Therefore, Mr. Watson should not have to testify at all, especially if Mr. Scott (who knows more about the relevant issues) is deposed.

The Court should sustain Chevron's objections and issue protective orders precluding Defendants from taking the depositions of Messrs. Watson and Scott or, alternatively, limit the scope and duration of such depositions.

ARGUMENT

Under Rule 72(a), a party may object to a magistrate's ruling on a non-dispositive matter, and the district judge must "modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). An order is "clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Sahu v. Union Carbide Corp*., 746 F. Supp. 2d 609, 613 (S.D.N.Y. 2010). An order is "contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *Id*.

I. The Order Exceeds Rule 26(b)'s Limits on the Permissible Scope of Discovery.

Parties may obtain discovery "regarding any *nonprivileged* matter that is *relevant* to any party's claim or defense." Fed. R. Civ. P. 26(b) (emphases added). Thus, the first step in resolving an "apex" deposition motion is for the "party seeking discovery" (here, Defendants) "to establish the relevance of the material sought from the . . . executive." *Alliance Indus., Inc. v.*

Longyear Holding, Inc., No. 08CV490S, 2010 WL 4323071, at *4 (W.D.N.Y. Mar. 19, 2010). But the Order takes as its apparent starting point the idea that "principles relating to apex witnesses are in tension with the broad availability of discovery." Dkt. 1119 at 2. The Order relies on two general discovery cases for the proposition that the proponent of discovery need not show that the deponent has relevant knowledge, but these cases do not involve the apex doctrine and are thus inapplicable. *See In re Garlock*, 463 F. Supp. 2d 478 (S.D.N.Y. 2006); *Naftchi v. NYU Medical Center*, 172 F.R.D. 130 (S.D.N.Y. 1997). Indeed, in *Naftchi*, the court acknowledged that there were "some exceptions" to the general rule about the broad availability of discovery—and the cited exception was the apex doctrine. *See* 172 F.R.D. at 132 ("Courts on occasion have barred the depositions of senior corporate officers where it was clear that the witness lacked personal familiarity with the facts of the case.").

The Order thus mistakenly compels two high-level executives to testify about subjects that fall well outside the permissible scope of discovery in this action.

First, the Order concludes that Chevron's Chairman and CEO, John Watson, is likely to have "personal knowledge of the environmental issues underlying the Ecuador litigation." Dkt. 1119 at 4. But "[t]his Court has repeatedly ruled that this case will not retry the claims made in the Lago Agrio case." Dkt. 902 at 2. This Court has also clarified that references in Chevron's amended complaint "to the Lago Agrio litigation being a 'sham' shall . . . not be construed as making any assertions with respect to the environmental conditions existing in the Oriente in the 1960s to the 1990s or the relative, substantive merit of scientists' expert opinions on that subject." Dkt. 720 at 2; *see also* Dkt. 1130 at 3 (finding that issues related to remediation in Ecuador "are not relevant on the basis of considerations that the Court has expressed more than

once"). The topic of "environmental issues underlying the Ecuador litigation" is thus not relevant or discoverable in this action.[1]

Second, the Order likewise finds that Mr. Watson must testify about: (a) his experience as CEO "monitor[ing] litigation that creates potential liability for Chevron in the tens of billions of dollars," and (b) Chevron's "integration effort following the Chevron-Texaco merger." Dkt. 1119 at 3. These subjects have no possible bearing on Chevron's claims or the affirmative defenses asserted in this action. In ruling today on Defendants' 30(b)(6) deposition notice, this Court held that the following subjects are "not relevant": (24) "[t]he relationship between CHEVRON and 'Chevron-Texaco' and/or 'TEXACO'"; (25) "[t]he types and amounts of payments or transfers of assets or consideration made between CHEVRON and TEXACO or their subsidiaries before, during, and since the 2001 merger"; (26) the post-merger relationship and transactions between Chevron and "TEXACO"; and (27) "[l]itigation other than this case in which a party has sought to impute liability to CHEVRON for TEXACO's or its subsidiaries' conduct, obligations or liabilities, under any legal theory." Dkt. 1130 at 3.

Third, with respect to Mr. Scott—who serves as Vice Present and General Counsel of Chevron's Global Upstream and Gas Group, and whose knowledge of relevant facts would have come largely from privileged discussions—the Order finds that Defendants must be given the opportunity to "develop the record" and to test whether a privilege is properly being asserted. Dkt. 1119 at 5. This misapplies the law. Unlike in the authorities cited in the Order, Defendants were unable to articulate any potentially relevant *non-privileged* subjects on which they could permissibly question Mr. Scott, and thus there is no need to provide Defendants leeway to in-

[1] Underscoring their non-litigation, public relations motives for seeking to depose Mr. Watson, the LAPs' press releases are already trumpeting Judge Francis's ruling, stating for example that Mr. Watson "will finally have to answer questions under oath about the environmental crimes committed by an oil company he recommended Chevron purchase." *http://thechevronpit.blogspot.com/2013/05/after-spending-hundreds-of-millions-of.html* (last visited May 9, 2013).

quire as to those non-privileged subjects.[2] And to the extent these are found to be proper subjects for deposition and not privileged or protected by work-product, the Rule 30(b)(6) depositions will provide Defendants with an adequate opportunity. (*See infra* at 6-8.)

Fourth, any topics relevant only to Donziger's counterclaims, such as Chevron's alleged meetings with "government officials to apply pressure on the Republic of Ecuador" (Dkt. 1079 at 2), are beyond the scope of discovery here because Judge Francis has recommended that such counterclaims be dismissed. Dkt. 1025; *see* Dkt. 1130 at 3 (ruling on Defendants' 30(b)(6) deposition notice: "Any examination on [issues related to the Donziger counterclaims] should be deferred unless and until the Court rejects Magistrate Judge Francis' recommendation that Donziger's counterclaim be dismissed.").

II. The Order Misapplies the "Apex" Doctrine by Failing to Require "Unique" or "Superior" Knowledge.

"'Apex' depositions are disfavored in this Circuit . . . ." *Alliance Indus*., 2010 WL 4323071, at *4 (quotation marks and alteration omitted). Courts therefore require the party seeking to depose a high-level executive to establish that the witness has "some unique knowledge" regarding a particular relevant issue in the case. *Six West Retail Acquisition v. Sony Theater Mgmt. Corp*., 203 F.R.D. 98, 102 (S.D.N.Y. 2001); *accord In re Ski Train Fire of November 11, 2000 Kaprun Austria*, No. MDL 1428, 2006 WL 1328259, at *10 (S.D.N.Y. May 16, 2006); *see also Affinity Labs of Texas v. Apple, Inc*., 2011 WL 1753982, at *1 (C.D. Cal. May 9, 2011) (requiring "personal non-repetitive firsthand knowledge of relevant facts"); *Baine v. GM Corp*., 141

[2] In *New York v. National Railroad Passenger Corp*., No. 04cv0962, 2007 WL 4377721 (N.D.N.Y. Dec. 12, 2007), the court denied the motion to quash only after finding that "the subject matter about which [the subpoenaing party] seeks to inquire *is not privileged*." *Id*. at *3 (emphasis added). In *New York v. Oneida Indian Nation of New York*, No. 95cv0554, 2001 WL 1708804 (N.D.N.Y. Nov. 9, 2001), the attorney performed legal and non-legal functions, and the court concluded that the attorney's "observations, nonlegal conversations, [and] personal statements and statements of others that she heard on behalf of the State on this . . . matter are relevant and critical." *Id*. at *5. And in *Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc*., No. 95cv8833, 1998 WL 2829 (S.D.N.Y. Jan. 6, 1998), the court delineated specific subject matters that were outside the privilege and thus permissible subjects for questioning (*e.g*., "work performed by an attorney to prepare and prosecute a patent application"). *Id*. at *4-5.

F.R.D. 332, 334 (M.D. Ala. 1991) ("the unique personal knowledge must be truly unique").[3]

Defendants made no showing that either Mr. Watson or Mr. Scott possesses "unique" or "superior" knowledge of any relevant issue in the case. To the contrary, as the Order acknowledges, it is "not clear" whether these witnesses have any unique knowledge. Dkt. 1119 at 4. And the Order disregarded Messrs. Watson's and Scott's declarations explaining that, in fact, they had only minimal (if any) unique knowledge on relevant subjects (Dkts. 1066, 1068). This was a clear misapplication of the apex doctrine. *See, e.g., Alex & Ani, Inc. v. MOA Int'l*, No. 10 Civ. 4590, 2011 WL 6413612, at *3 (S.D.N.Y. Dec. 21, 2011) ("Where an executive has submitted an affidavit disclaiming unique personal knowledge, it is often appropriate to defer live depositions of that executive unless and until the examining party can demonstrate otherwise.").

III. The Order Misapplies the "Apex" Doctrine by Failing to Require Exhaustion of Less-Intrusive Discovery Measures.

It is well settled that even if an apex witness has personal knowledge about a relevant subject, the party seeking the deposition must show that other less-intrusive discovery has been insufficient to obtain this information. "[W]here other witnesses have the same knowledge, it may be appropriate to preclude a redundant deposition of a highly-placed executive." *Consolidated Rail Corp. v. Primary Indus. Corp.*, No. 92 Civ. 4927, 1993 WL 364471, at *1 (S.D.N.Y. Sep. 10, 1993); *see also Liberty Mut. Ins. Co. v. Superior Court*, 13 Cal. Rptr. 2d 363, 367 (Ct. App. 1992) (court should "first require the plaintiff to obtain the necessary discovery through less-intrusive means").

For instance, in *Six West*, Judge Francis allowed the apex depositions to go forward only because the party seeking them had already taken 30(b)(6) depositions and had already exhaust-

[3] Cf. *Marisol v. Giuliani*, No. 95 Civ. 10533, 1998 WL 132810, at *2 (S.D.N.Y. Mar. 23, 1998) (explaining, in the analogous context of deposing high-ranking government officials, that the deposition must be "necessary in order to obtain relevant information that cannot be obtained from any other source").

ed the knowledge of lower-level employees. 203 F.R.D. at 105 ("Six West has taken depositions of many lower level Sony officials before making the additional requests here."); *see also Treppel v. Bioval Corp.*, No. 03 Civ. 3002, 2006 WL 468314, at *3 (S.D.N.Y. Feb. 28, 2006) (precluding apex deposition where "plaintiff has not explained why the noticed individuals are believed to have personal knowledge of the underlying events, nor why that knowledge is believed to be unique. The plaintiff has made no attempt to depose any lower level executives . . . .").

Here, by contrast, the Order creates an exception to the "exhaustion" requirement because Defendants noticed the apex depositions only recently (on April 5, 2013), and thus do not have the "luxury" of time during which to exhaust other potential avenues to obtain the information they now seek from Messrs. Watson and Scott—such as by taking Rule 30(b)(6) depositions. Dkt. 1119 at 4. But this exception would swallow the rule and create perverse incentives for litigants to delay discovery until "the eleventh hour," *Six West*, 203 F.R.D. at 105, in order to support an apex deposition request. And here, for example, one of the proffered subjects for the apex depositions is Mr. Scott's alleged "participation in meetings with Ecuadorian officials." Dkt. 1079 at 4. But Defendants soon will take the deposition of Chevron's Rule 30(b)(6) witnesses on a variety of subjects including, "Communications and dealings between YOU and ROE (other than judicial officers presiding over the ECUADORIAN LITIGATION) . . . concerning the ECUADORIAN LITIGATION." Dkt. 1067-2 at 11 (Request No. 15).

Defendants made a strategic decision to wait until the eve of the discovery cutoff before noticing their 30(b)(6) depositions and apex depositions. *See id.* (30(b)(6) deposition notice to Chevron dated April 5, 2013). In fact, they noticed Messrs. Watson's and Scott's depositions to occur *before* the dates noticed for Chevron's 30(b)(6) witnesses. Dkts. 1065-1, 1067-1. Thus, Defendants did not even attempt to exhaust other less-intrusive means before seeking to depose

Chevron's high-ranking executives—and to the extent Defendants now lack sufficient time to attempt to do so, this is a problem of their own making. Chevron and its witnesses should not be penalized for Defendants' dilatory discovery tactics. *See Oldenkamp v. United Am. Ins. Co.*, 2008 WL 5083696, at *2 (N.D. Okla. Nov. 26, 2008) (precluding additional discovery based on information learned during depositions "conducted on the eve of discovery cutoff [because] Defendant chose to wait to take the . . . depositions until [the] discovery cutoff."); *Buttler v. Benson*, 193 F.R.D. 664, 666 (D. Colo. 2000) ("A party cannot ignore available discovery remedies for months and then, on the eve of trial, move the court for an order compelling production.").

IV. The Order Fails to Limit the Depositions Under Rule 26.

Finally, and at the very least, the Court should limit the intrusiveness of the apex depositions given "the likelihood of harassment and business disruption" inherent in such depositions. *Six West*, 203 F.R.D. at 102. Rule 26 authorizes protective orders to protect a person or party from "annoyance, . . . oppression, or undue burden and expense," and it is appropriate to limit the scope of discovery to ensure that it is not "unreasonably cumulative or duplicative." Fed. R. Civ. P. 26(b)(2)(C), (c).

First, if Mr. Scott's deposition goes forward, then there should be no reason to subject Mr. Watson to a deposition as well, particularly where the Order credited "Chevron's concern that the deposition has been noticed for purposes of harassment." Dkt. 1119 at 3. Indeed, the LAPs' recent press releases make clear that they are seeking Mr. Watson's deposition for extra-judicial public relations purposes. (*See supra* n.1) And whatever knowledge Mr. Watson has about the facts concerning the RICO case, this has come derivatively through individuals like Mr. Scott and the several witnesses whom Chevron will be producing as the company's 30(b)(6) deponents, so his deposition would necessarily be cumulative.

Second, any deposition of Mr. Watson or Mr. Scott should be limited to a half day of no more than 3.5 hours.

Third, to minimize the burden and redundancy, Defendants should be confined in their questioning during the apex depositions to subjects on which these witnesses have "unique knowledge" regarding a particular relevant issue in the case. *Six West*, 203 F.R.D. at 102. The Order does not identify any such subjects, but before the depositions go forward, the Court should order Defendants to file and serve a list of topics that they contend are relevant and fall within the apex witnesses' unique personal knowledge.

CONCLUSION

For the forgoing reasons, Chevron respectfully requests that the Court sustain Chevron's objections and grant Chevron's motions for protective orders and to quash the deposition notices issued to Mr. Watson and Mr. Scott. At the very least, the Court should limit the depositions of these witnesses to minimize the burden and harassment.

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Respectfully submitted,
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