

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.
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ORDER

LEWIS A. KAPLAN, *District Judge.*

On March 4, 2011, the two defendant Lago Agrio plaintiffs who have appeared by counsel in this action (the “Lago Agrio Representatives”) moved for leave to file supplemental papers in opposition to Chevron’s motion for a preliminary injunction. The stated purpose of the motion is to place before the Court recently discovered evidence in support of an argument that Chevron’s motion should be denied on the ground of unclean hands in the conduct of the Ecuadorian litigation, specifically alleged misconduct on the part of alleged Chevron “operatives,” Borja and Hansen. DI 173.

All papers in opposition to the preliminary injunction motion were to have been filed on or before February 11, 2011. DI 77 at 2. On February 18, 2011, the Court made clear at the preliminary injunction hearing that the record on that motion was closed subject to the filing of responses to questions raised by the Court concerning Ecuadorian procedure. Tr., Feb. 18, 2011, at 77-78, 81-82.

Although the Lago Agrio Representatives filed 95 pages of memoranda and over 1,200 pages of evidence in opposition to the preliminary injunction motion on or before February 11, 2011, they raised no unclean hands defense. They first raised this issue in an untimely and unauthorized filing on February 28, 2011, only days before the temporary restraining order previously entered must expire. Their co-defendant Donziger first alluded to it in his untimely papers of February 25, 2011. DI 137 at 29-32.

For reasons set forth in the opinion granting the preliminary injunction that is being filed today, the Court declines to consider the untimely February 28, 2011 filing on this motion. The same reasoning supports the denial of the present motion. The circumstances here, in the Court’s

view, demand a ruling on that motion before the TRO expires on March 8, 2011. Moreover, the refusal of the Lago Agrio Representatives to agree to an extension of the TRO to permit more deliberate consideration of the preliminary injunction motion supports this conclusion. But there is even more.

The Lago Agrio Representatives' allegations regarding Borja and Hansen are not new. They were made by the Lago Agrio plaintiffs on December 30, 2010, in an application for Section 1782 discovery filed in the United States District Court for the Northern District of California. *In re Yaiguaje, et al.*, No. 10-MC-80324 (CRB), DI 2. Accordingly, while the Court understands that the present application seeks to place before it evidence that the Lago Agrio Representatives obtained only days ago as a result of the *Yaiguaje* proceeding, that evidence is offered in support of a defense to the present motion of which they were well aware by the time this action was filed, but neglected to advance in the voluminous papers that they filed on or before February 11, 2011.¹ Thus, their failure to advance the unclean hands defense and its last-minute injection of the issue at the end of this month, if permitted, would deprive their adversary of any meaningful opportunity to respond and the Court of any meaningful opportunity to consider it fairly.

This of course is not to say that the Court has foreclosed the assertion of the defense in this action or passed on its merits. It has not. Indeed, as the Court has made clear on prior occasions, it does not "assume *a priori* that anyone's hands in this matter are clean. Anybody's." Tr., Apr. 30, 2010, at 33 (*In re Chevron Corp.*, No. M-19-111, S.D.N.Y.). Those defendants who have not defaulted are free to assert it in their answers and to pursue it by other appropriate means. What they cannot do is ignore the Court's scheduling order, fail to assert the defense on a preliminary injunction motion within the allotted time, and then attempt to inject it into the motion at the last minute when they have been making similar assertions in a related case elsewhere since at least as early as December 30, 2010.

Moreover, these defendants had every opportunity to obtain more time within which

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The failure by the Lago Agrio Representatives to file all of their papers on time was not attributable to their counsel lacking the personnel or other resources. Although the appearances on behalf of the Lago Agrio Representatives in this case have been filed only by New York counsel who practice in small firms or, in one case, as a single practitioner, the Lago Agrio plaintiffs are represented quite broadly by at least one large international law firm which has been quite involved in this case behind the scenes. At least the first submission on behalf of the Lago Agrio Representatives in opposition to Chevron's motion was prepared by the firm of Patton Boggs, Tr., Feb. 8, 2011, at 21, 24, the firm that prepared the *Invictus* Memo, although it was signed only by local counsel. Patton Boggs, moreover, appeared on behalf of the LAPs in the district courts in at least three of Chevron's § 1782 proceedings, appeared for the LAPs on appeal in at least two of them, *Lago Agrio Plaintiffs v. Chevron Corp.*, Nos. 10-4341-CV, 10-4405-CV, 2010 WL 5151325 (2d Cir. Dec. 15, 2010), and *In re Chevron Corp.*, No. 10-4699 (3d Cir. filed Jan. 12, 2011), and are their counsel in their own § 1782 proceeding in San Francisco, *In re Yaiguaje, et al.*, No. 10-MC-80324 (CRB). According to its web site, Patton Boggs is a firm of over 600 lawyers with nine offices.

to marshal their defenses and their evidence. All that was necessary was for all defendants to agree to extend the TRO or find some other way to give Chevron assurance that no effort would be made to enforce the Ecuadorian judgment pending a more relaxed handling of Chevron's motion. They declined to do so.

The motion for leave to supplement the record [DI 172] is denied.

SO ORDERED.

Dated: March 7, 2011



Lewis A. Kaplan
United States District Judge

(The manuscript signature above is not an image of the signature on the original document in the Court file.)