

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE NATHANAEL COUSINS, MAGISTRATE

IN RE: )  
DANIEL CARLOS LUSITAND YAIGUAJE, )  
et al., ) NO. C 11-80087 CRB(NC)

IN RE: )  
DR. DIEGO GARCIA CARRION ) NO. C 11-80110 CRB(NC)

San Francisco, California  
Wednesday  
September 28, 2011  
9:11 a.m.

**TRANSCRIPT OF PROCEEDINGS**

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1           **THE COURT:** Good morning. Please be seated. And, if  
2 we can start -- thank you all for being here. I regret to  
3 inform that there are no Mai Tais or ice cream left over from  
4 Judge Chen's party last night, but we'll do our best to  
5 accommodate you.

6           **MR. NEISPOLO:** You made it here, your Honor.

7           **THE COURT:** Yes. Yes, despite long odds.

8           We've got two motions pending, as well as some  
9 follow-up on the protocol that we discussed last week, by  
10 telephone. I did review the letter and comments this morning  
11 that were submitted last night. And I appreciate those got in  
12 before this morning.

13           Unless the parties have a different idea, I thought  
14 maybe we'd start with the easier -- at least, for me, because  
15 we dealt with it some last week, which was the protocol. There  
16 were noted in this submission last night a few issues that were  
17 still in dispute. I think we can get to those pretty quickly,  
18 unless the parties think that that's not time efficient. I  
19 suggest we start with that. So if we could, start there. And  
20 everyone speak slowly, because we are still recovering from  
21 yesterday.

22           Appearances.

23           **MR. CASSMAN:** That's fine with Mr. Borja, your Honor.

24           **THE COURT:** Thank you.

25           **MR. EWING:** And with the Republic.

1           **THE COURT:** Great. So come on up. And let's start  
2 with the protocol.

3           **THE CLERK:** Counsel, can you also state your  
4 appearances for the record?

5           **MR. ROTH:** Good morning, your Honor. Dan Roth, for  
6 Mr. Borja.

7           **THE COURT:** Good morning, Mr. Roth.

8           **MR. CASSMAN:** Together with Ted Cassman, your Honor.  
9 Good afternoon -- good morning.

10          **THE COURT:** Good morning.

11          **MR. NIESPOLO:** Your Honor, George Niespolo and  
12 Ms. Jennifer Fisher, on behalf of Eric Mason, Joe Parisi, and  
13 the Mason Group.

14          **THE COURT:** Good morning, Mr. Niespolo.

15          **MR. NIESPOLO:** Good morning, your Honor.

16          **MR. DETTMER:** Your Honor, Ethan Dettmer, from  
17 Gibson Dunn, on behalf of Chevron.

18          **THE COURT:** Good morning, Mr. Dettmer.

19          **MR. DETTMER:** Good morning.

20          **MR. EWING:** Good morning. Greg Ewing and  
21 Richard Lapping, on behalf of the Republic of Ecuador.

22          **THE COURT:** Good morning, Mr. Ewing. Good morning,  
23 Mr. Lapping.

24          **MR. LAPPING:** Good morning, your Honor.

25          **THE COURT:** All right. So I'm turning to the

1 revised -- I'm not going to count how many originals there have  
2 been -- thankfully you've been pulling the oars on that one --  
3 Document 181: The revised joint protocol, with some notes  
4 inside as to what's in dispute still, and what's been agreed  
5 upon.

6 I'm going to run through it, kind of in order.  
7 Paragraph 3, we had a note that the Borja would be informing  
8 the Republic and Chevron whether he's able to access particular  
9 e-mails accounts, what have he we learned since last week on  
10 that.

11 **MR. ROTH:** We have made the request, but have not yet  
12 learned whether or not there will be access.

13 **THE COURT:** And what's the prognosis on when that  
14 will appear?

15 **MR. DETTMER:** Your Honor, we've been making inquiries  
16 on that, and will get back to the party when we have an answer.

17 **THE COURT:** So another week or so?

18 **MR. DETTMER:** Certainly before then, your Honor.

19 **THE COURT:** We'll expect -- we'll do it in a week.

20 Let's see. Four parties will agree on  
21 confidentiality agreement within seven days of an expert being  
22 named. What's the progress on identifying an expert and  
23 working on your confidentiality agreement?

24 **MR. EWING:** Your Honor, Dan Roth had proposed three  
25 experts. We don't oppose or we don't object to the first named

1 expert, Winston Krone. And, assuming that he can pass  
2 conflicts, then we are amenable to that.

3 **THE COURT:** All right. So Winston Krone is the -- at  
4 this point, the putative expert subject to completion of the  
5 conflict process. What's the time period in which that is  
6 expected to get cleared or not cleared?

7 **MR. EWING:** Your Honor, we have not even mentioned  
8 this to him, so I don't know that we can commit on his behalf;  
9 but I would expect it would be a relatively quick process.  
10 Usually they are.

11 **THE COURT:** So I shouldn't order him into the case  
12 with that in mind. All right. So we'll maybe have a week  
13 check-in on that process, as well. And if things have taken  
14 more time, let us know. Does that make sense?

15 **MR. ROTH:** With respect to the confidentiality  
16 agreement, would that be within a week of confirmation of  
17 conflict?

18 **THE COURT:** That sounds good. Weeks are -- I think,  
19 in fact, that's what we talked about before, was --

20 **MR. EWING:** The only.

21 **THE COURT:** -- having some days of an expert being  
22 in.

23 **MR. EWING:** I only request, your Honor, just to get  
24 that process going, you know, if -- now, Winston Krone -- does  
25 that mean for next week, then, we can have a confidentiality

1 agreement? Is that what you're contemplating?

2 **THE COURT:** We draft up -- or you draft up -- the  
3 parties can agree on a confidentiality agreement within seven  
4 days of an expert being named. I don't know that you need to  
5 wait on drafting of the confidentiality agreement until you  
6 actually have an expert, but if you can --

7 **MR. ROTH:** Well, I guess it depends -- also, it may  
8 depend on the standard confidentiality agreement that that  
9 particular expert signs on to, so if --

10 **THE COURT:** All right. Well, we'll structure it as  
11 seven and seven. And see if we can actually complete the  
12 expert within seven days of today. And then get the  
13 confidentiality agreement, et cetera, et cetera.

14 (Reporter requests clarification)

15 **MR. ROTH:** We will contact Mr. Krone immediately.

16 **THE COURT:** All right. Now I'm jumping ahead. And  
17 please feel free to correct me if I'm skipping something you  
18 think is important. Paragraph 8, which is that the -- there's  
19 an apparent objection from Borja as to the proposed language.  
20 And the Republic believes it provides important stuff. So  
21 let's start with the Republic as to why this is an important  
22 paragraph.

23 **MR. EWING:** Your Honor, we think that this paragraph  
24 basically makes explicit what the rest of the protocol makes  
25 implicit; that the expert has access to all of the data, the

1 images, et cetera.

2           So this was -- to be honest, we stole this from one  
3 of the protocols that Chevron has proposed. We didn't object  
4 to it. It seemed like a good idea. So just to make clear that  
5 he has access to everything. Sort of a safe harbor.

6           **THE COURT:** All right. And, as an aside, stealing is  
7 permitted in protocols, but --

8           **MR. ROTH:** Our position is that it seems to be --  
9 well, one man's safe harbor is another's *carte blanche*.

10           And this -- we believe that the protocol sets out  
11 pretty clearly elsewhere what the expert is to do. And, you  
12 know, given the -- given the firewalls, et cetera, and  
13 protections that Judge Breyer said would be in place, it makes  
14 sense to, instead of having a blanket provision like this, just  
15 have all of the other language that specifically limits what  
16 the expert will be doing; especially this last bit about  
17 "appears to be relevant to this case." It smacks more of a  
18 fishing expedition of, whereas the rest of the provisions  
19 clearly delineate what the expert is to be doing.

20           **THE COURT:** All right. And anyone else have anything  
21 to say on this one?

22           **MR. DETTMER:** Your Honor, we don't have a strong  
23 position on this. I do think it's somewhat extraneous, given  
24 the rest of the protocol; but it's not something that we take a  
25 strong position on.



1           **THE COURT:** All right. I also feel like it's  
2 extraneous, and probably if we exclude it, it's not going to  
3 prevent the expert from doing what they're otherwise -- intends  
4 they're going to do. So I'm going to strike paragraph 8.

5           Paragraph 10. Sounds like there's a considered  
6 objection. So has there been further consideration since last  
7 night at 11:00?

8           **MR. ROTH:** There has. We do believe that the data  
9 set that's provided to us should be limited to data that has  
10 not been previously produced to the -- to the Republic. And we  
11 were conferring a bit just before this morning's hearing. And  
12 it doesn't seem like there's an objection in principle, but  
13 there may be just some technical questions as to a  
14 deduplicating procedure that the expert would take on.

15           I'll let Mr. Ewing speak to that.

16           **MR. EWING:** Your Honor, in principle, we don't to be  
17 minimizing the work that they have to do. It's -- we're not  
18 trying to push that on them, but our concern is that we don't  
19 eliminate results that should not necessarily be eliminated.  
20 And so that may be simply a technical question that we can talk  
21 to our expert about, but our concern here is that we've  
22 already -- we're going to be narrowing down the results based  
23 on the search terms, and to items that are in Mr. Borja's  
24 possession, anyway.

25           So the concept that there is -- it just doesn't seem

1 like there should be that much to go through.

2           That said, again, as Mr. Roth represented, we don't  
3 believe object to the principle of it. We just are concerned  
4 about unnecessarily removing responsive material.

5           **THE COURT:** And it seems as if you might know more on  
6 this issue once you've run searches and consulted with the  
7 expert about how the process is actually working, but once you  
8 have done that, then maybe there won't be an issue, or you can  
9 work together to work out whatever problem there might be.  
10 That's just my observation.

11           My instinct is to leave it as drafted, with everyone  
12 knowing that if you -- as this goes along, if further  
13 consultation is appropriate, of course, you'll be doing that  
14 with each other. And if you need to return to me to say,  
15 "Well, we've learned something through this process that we  
16 didn't anticipate," we can address it in that way.

17           Does that seem reasonable?

18           **MR. EWING:** That sounds reasonable, your Honor.  
19 Thank you.

20           **THE COURT:** All right. Then I see next note in  
21 paragraph 11 about a log of nonresponsive documents. What are  
22 the parties' thoughts on, first, the need for a nonresponsive  
23 document log?

24           **MR. EWING:** Yes, your Honor. Our understanding here  
25 is that the -- what is going to happen is that the expert is

1 going to search Mr. Borja's material for --

2 And we submitted these last night: The key words.

3 **THE COURT:** Right.

4 **MR. EWING:** You know, we've got a significant number  
5 of key words, but all of the -- if any of these people or  
6 subjects come up in Mr. Borja's materials, our argument is that  
7 it is, by definition, relevant and responsive.

8 We have done our best to narrow these down to items  
9 which would not be a part of normal discussion. You know, we  
10 took out Mr. Borja's name, for instance, which would have  
11 obviously captured almost everything, but this -- the people  
12 and the items here, by definition, should respond or should  
13 return only responsive material.

14 So our concern is that if then we find out that  
15 Mr. Borja has removed items as nonresponsive, yet they match  
16 these search terms, it just doesn't seem to make sense to us.

17 **MR. ROTH:** Your Honor, this is one where we do  
18 disagree quite strongly, for two reasons. One is that, as we  
19 discussed with your Honor last week on the phone and on the  
20 status conference, the purpose of this review is to focus on  
21 the forensic analysis, and finding documents that were not  
22 previously found in a previous forensic analysis. And that --  
23 this search that Borja's counsel did before and will do now  
24 with these documents is not in question.

25 And this opens the door to questioning what we are

1 doing with these documents. So that's the first thing, in  
2 principle.

3           And that, as a matter of just the facts before us,  
4 and the -- getting to the list of search terms, we had no  
5 quarrel with the list that was provided; didn't object to it;  
6 but you know, there -- it is very broad. It's four and a half  
7 pages long. And there are terms like "lab," for example. And,  
8 you know, I don't know if Mr. Borja has a black lab -- or  
9 someone might. I mean, there are a lot of words, like  
10 "sample," "led," et cetera, that could -- any drafting of a  
11 list of search terms is going to bring up nonresponsive  
12 documents. That just seems indisputable.

13           And so, to the extent that we believe we can be  
14 trusted to do a reasonable and ethical review, which has not  
15 been called into question, it doesn't seem necessary. And it  
16 seems quite burdensome to require us to log all nonresponsive  
17 documents.

18           **THE COURT:** All right. Anything else to add to that?

19           All right. Well, my view on this one is very much  
20 guided by the fact that, by my analysis, you have a very  
21 complete list of key words. And I, of course, don't know  
22 enough about the case to do a careful analysis as to particular  
23 key words and whether they're appropriate or not, but it seems  
24 that it's broad. And I appreciate that the parties have agreed  
25 on it. And I'm very much guided by the fact that you have not

1 objected to half of them, and are saying, "Oh, this is too  
2 much. We need to have a much smaller set."

3           Given that you've agreed to all of these key search  
4 terms, my view is that a log of nonresponsive documents is  
5 overkill. I've unfortunately never had the experience of  
6 working in a law firm and creating a nonresponsive document  
7 log, but I do know enough to know that it could be a burdensome  
8 process.

9           And here, as you've said, there's not an assertion --  
10 there's not a basis that there has been some monkey business in  
11 what's gone on before. This is a process. And using these key  
12 search terms and the other things in this protocol are going to  
13 assure that there's proper review of materials. So I think  
14 it's overkill.

15           **MR. EWING:** Your Honor, if I may.

16           **THE COURT:** Mm-hm.

17           **MR. EWING:** At the end of the day, if the log is not  
18 necessarily as important, it is the vehicle for us to  
19 challenge. If we come back and there are, you know, a thousand  
20 documents, and they say 500 are nonresponsive -- I don't know  
21 about you. While I agree this term -- this list is broad, the  
22 majority of these terms are not going to be in Mr. Borja's  
23 material.

24           **THE COURT:** And I don't know that right now. I mean,  
25 you'll find out.

1           **MR. EWING:** Right.

2           **THE COURT:** And you both may have different views on  
3 what this is going to -- what -- you know, what these search  
4 terms will reveal. We'll find out.

5           **MR. EWING:** Yeah.

6           **THE COURT:** If we find out there's a need for further  
7 action, having done that, you did your best in creating the  
8 search terms. And if it turns out that you need to do a redo  
9 once you put this into practice, well, then, we'll address it  
10 at that time.

11           **MR. EWING:** So just to be clear, your Honor, we would  
12 just like to reserve the right to challenge the responsiveness  
13 review if it turns out seems there's some trouble or some  
14 problem with it.

15           **THE COURT:** I'm not going to add a reserving right to  
16 challenge. You're going to continue to meet and confer with  
17 each other as this process goes along. It may be that it  
18 doesn't -- you drafted all this, just like you draft a  
19 constitution. It turns out you need amendments once it goes  
20 into, you know, practice.

21           So as this is going along, and you say, "Hey, we need  
22 to revise the protocol," you'll, of course, confer with each  
23 other first. And I suspect that many of the things, you could  
24 work out. Actually, you've already worked out some things you  
25 disagree about; but if you can't agree, come back, and we'll

1 look at it again.

2 **MR. EWING:** Sounds good. Thank you, your Honor.

3 **MR. ROTH:** Thank you, your Honor.

4 **THE COURT:** All right. So I think that's all of the  
5 issues that were in dispute. Am I wrong on that?

6 **MR. EWING:** You are correct, your Honor.

7 **THE COURT:** All right. So if I could ask you to do a  
8 further revision -- I won't call it "final," because I'm  
9 experienced enough to know that that's probably inaccurate --  
10 with each of those notations made.

11 And, of course, you need to finalize the retention of  
12 Mr. Krone, and work on the confidentiality agreement. And then  
13 we'll get the -- that to final protocol revise-ment. All  
14 right? So thanks very much on that.

15 **MR. ROTH:** Thank you, your Honor.

16 **MR. EWING:** Thank you, your Honor.

17 **THE COURT:** All right. Turning next to the motions  
18 which are in case -80110 and -80887, originally filed docket  
19 entries 46 and 89, I think there's a revision to motion to  
20 compel with submitted Document 90.

21 I have reviewed -- of course, the most important  
22 document's probably the order from Judge Breyer on August 5th.  
23 Let me make sure I've got all of the forms in here.

24 I have some questions. I've obviously got a lot of  
25 papers from the parties. I expect I'll need to review those

1 further, but how would the parties like to proceed?

2 **MR. TYRRELL:** Good morning, your Honor. My name is  
3 James Tyrrell, from the firm of Patton Boggs, and I represent  
4 the Largo Agrio plaintiffs.

5 **THE COURT:** Good morning, Mr. Tyrrell.

6 **MR. TYRRELL:** And, if your Honor will indulge me in a  
7 personal observation, while I was not fortunate enough to be  
8 invited to last night's party, I did fly in from the East  
9 Coast, so I think my usual "New York speak" will be slowed  
10 down, but if I --

11 **THE COURT:** Much appreciated.

12 **MR. TYRRELL:** Thank you, your Honor.

13 Your Honor comes into a matter that is 18 years old  
14 that is currently pending in 16 federal courts in the  
15 United States. I was privileged to argue before the Second  
16 Circuit two weeks ago; the Third Circuit before that. It's at  
17 The Hague. It's on appeal in Ecuador. It's a mess,  
18 your Honor.

19 And what I'm going to try to do -- but I'm concerned  
20 that the decision you have to make requires at least some  
21 background. So I'm going to try to place the decision you have  
22 to make in a context; but it will take me a few minutes, with  
23 the Court's permission, to do that.

24 **THE COURT:** You have my permission. I appreciate  
25 that. Having read what I've read, I do feel the need to have



1 more background.

2           And particularly, I'm concerned that I make some  
3 decision that conflicts with what some other court has already  
4 held or that they're contemplating doing, and making a decision  
5 where I don't even realize how I'm interfering with other parts  
6 of this very complicated litigation.

7           So if the parties -- not just you, but anyone who  
8 speaks -- can remind me of guideposts that have already been  
9 set up in the case and issues that are in play in other courts,  
10 that will be very helpful for the Court.

11           **MR. TYRRELL:** Thank you very much, your Honor. I'll  
12 give you just a moment on deep background, and then I'll focus  
13 on the issues that pertain to the Mason Investigative Group.

14           For 30 years, Chevron had a concession to drill oil  
15 in a rain forest area of the Amazon, in Ecuador.

16           The people who live in that area -- 30,000 of them --  
17 commenced a lawsuit in 1993 in the Southern District of  
18 New York, claiming that their lands were contaminated; their  
19 water was contaminated. They were personally injured as a  
20 result of that these activities.

21           Nine years of litigation in the Southern District of  
22 New York, up and down to the Second Circuit, led to a dismissal  
23 on *forum non conveniens* grounds, with specific promises made by  
24 Texaco. And at that point, they had been acquired by Chevron.

25           Chevron's lawyers stood in the courtroom and

1 reiterated those promises. They included that they would  
2 submit to service of process; that they would accept  
3 jurisdiction in Ecuador; that they would be bound by an  
4 Ecuadorian judgment, subject only to the New York recognition  
5 act, but that was a unilateral reservation on their part.  
6 There was no stipulation that the action had to be in New York.

7           The action goes back to Ecuador. And the Ecuadorians  
8 persist, and file an action in their own courts, as a so-called  
9 "representative action," which is a little like our class  
10 action, but I'm not good enough on Ecuadorian procedure to  
11 really tell you the differences.

12           Nine more years of litigation go on in Ecuador. A  
13 200,000 page record is created -- probably the biggest in the  
14 history of Ecuador -- leading up to February 14 of this year,  
15 in which the Ecuadorian judge, pursuant to their Civil Code  
16 system, renders 187-page opinion, finding Chevron liable for  
17 many of the things -- not all of the things -- that were  
18 alleged, and awards a judgment of approximately \$18.2 billion.

19           Immediately prior to that -- and, of course, it was  
20 Chevron that demanded that this go to Ecuador.

21           And I'm a great believer in sort of not blinking  
22 reality. A huge American oil company would not want to go to  
23 Ecuador if it didn't have a good reason to do so. And I  
24 suggest that reason was its relationship with the Ecuadorian  
25 government. And, indeed, releases last week by WikiLeaks --

1 cables -- confirm some interesting activities down there, which  
2 I'll touch upon in a moment.

3           Nonetheless, it goes to Ecuador. Seeing that an  
4 Ecuadorian judgment, which they tried to delay for years -- and  
5 succeeded in doing so -- was going to be close -- the new judge  
6 on the case -- and they rotate judges down there -- indicated  
7 he was going to make a decision -- Chevron attacks.

8           What they do is they first attack in 16 different  
9 federal courts, under Section 1782 -- the kind of proceeding  
10 we're here before you on now -- claiming loudly that the whole  
11 system of Ecuador is fraudulent; that the judgment was obtained  
12 by fraud. And they get a broadcast discovery.

13           Most importantly, from Judge Kaplan, in New York,  
14 they obtained 18 years' of the documents in the lead American  
15 lawyer's file, with waiver of all privileges, allegedly because  
16 there was a procedural misstep; namely, that a privilege log,  
17 under the rules of the Southern District, was not submitted  
18 contemporaneous with a motion to narrow the subpoena or quash  
19 the subpoena.

20           We appealed that to the Second Circuit.

21           The Second Circuit said the only reason this would  
22 stand is because of the emergency issue about two Chevron  
23 employees facing criminal charges in Ecuador. And we  
24 directly -- we suggest the Court go back and reexamine this.

25           Judge Kaplan never did it. It let it stand. And it

1 became extrapolated from there.

2           Other courts throughout the country basically felt  
3 Judge Kaplan had the lead on this, and he had ordered this.  
4 And, although the courts went both ways, fundamentally, the  
5 Ecuadorians were stripped of all of their privileges. They  
6 were even pushing it at the time I succeeded in getting a  
7 universal stay of what Judge Kaplan was doing from the Second  
8 Circuit last week. They were pushing that there was derivative  
9 waiver; that -- that the failure to log documents by  
10 Mr. Donziger somehow required penetration of the files of every  
11 other law firm in the country who was not involved in the  
12 Donziger proceedings.

13           Now, I tell you that because what we're going to be  
14 urging you later is some balance; some level playing field.

15           Let me focus now not on the big issues. Of course --  
16 and I guess the last big issue is Judge Kaplan -- Chevron went  
17 to Judge Kaplan and got him to enter a worldwide injunction,  
18 prohibiting enforcement of a nonexistent, at that time,  
19 judgment in Ecuador; prohibiting me and the other lawyers from  
20 counseling our client; prohibiting us from raising money to  
21 fight against Chevron.

22           We took that up on mandamus and emergency appeal to  
23 the Second Circuit. The Second Circuit immediately lifted the  
24 prohibitions on advice to counsel and funding; set an expedited  
25 schedule. I argued it before the Court on the 16th of

1 September. Three days later, the Court, to use its language,  
2 which I treasure greatly, vacated Judge Kaplan's order, quote,  
3 "in its entirety," unquote. Opinion to follow, so I can't tell  
4 you the reasons or the basis of what they did.

5           Meanwhile, our side, who certainly doesn't have  
6 Chevron's great resources -- and frankly, I -- this is my first  
7 venture into being the lawyer on the plaintiffs' side. I've  
8 spent my whole career on the other side, so I have a great  
9 appreciate of what lack of resources now means.

10           **THE COURT:** Mm-hm.

11           **MR. TYRRELL:** Slowly, we began to try to level the  
12 playing field by initiating a few Section 1782 proceedings.  
13 What we began to focus is the incident which your Honor is  
14 going to need to know the facts about.

15           The proceeding in Ecuador, Chevron concluded, was not  
16 going well for it. And therefore it decided, we submit -- our  
17 allegations, but there's a lot of evidence of it -- to  
18 basically orchestrate a sting on the Ecuadorian judge.

19           And how that is done is that a Mr. Borja, who later  
20 Chevron claimed was just a good-spirited, American businessman  
21 who was just down there in order to report and tell us that  
22 there were these serious judicial offenses --

23           We later, of course, find out that Mr. Borja not only  
24 was a past employee -- his family, for 20 years -- but a  
25 current employee of Chevron.

1           Mr. Borja teams up with an informant international  
2 drug smuggler: Mr. Hansen.

3           Mr. Hansen and Mr. Borja buy a video pen, apparently  
4 off of SkyMall, and decide that they're going to see if they  
5 can impugn the integrity of the sitting judge, who has said  
6 that he will be deciding the case soon. And so they conduct  
7 three sting operations, the transcripts of which are now  
8 available in the record, in which they video the judge, and ask  
9 him leading question after leading question.

10                   "Haven't you predecided this case?

11           Tell us. Tell us what you're going to  
12 decide."

13           He doesn't do anything.

14           You know, some suggest -- Chevron later suggested  
15 that it was a bribe, and he took a bribe.

16           And how do we know that Chevron and others were  
17 intimately involved in this?

18           Well, between Sting 3 and 4, Chevron and their  
19 lawyers at Jones Day, who were with them and working on this,  
20 decided they weren't really getting what they wanted. So they  
21 flew them back to the United States, and had a planning session  
22 in California with the Jones Day lawyers, and, apparently, the  
23 in-house lawyers for Chevron, and told them what the script  
24 should be to really sting this judge on -- on Number 4.

25           And they fly back to Ecuador. And they conduct a

1 fourth sting operation.

2           **THE COURT:** And I'm sorry. The "they" you're  
3 referring to are Mr. Borja and Hansen?

4           **MR. TYRRELL:** Mr. Borja and Hansen. Yes.

5           Whether there were people from -- we don't know.  
6 We've been trying to get other discovery as to how deeply  
7 involved some others were.

8           But they go back. They conduct the fourth sting.  
9 They get what they get.

10           Interestingly, two months later, Chevron goes public  
11 with a huge splash of the corruption, and just how they  
12 stumbled across it. Okay? And, of course, then *The New York*  
13 *Times* and others began to look at the details of this. And the  
14 story began to unravel. And the discovery we're still trying  
15 so desperately to get is making that story continue to unravel.

16           Immediately, Chevron flies Mr. Borja, his family,  
17 Mr. Hansen, out of the country of Ecuador, because they know  
18 that a sting operation on a judge in Ecuador is a violation of  
19 Ecuadorian criminal law. So they whisk that man and his family  
20 out of the country, and set him up on a posh golf community  
21 near their headquarters in San Ramon, California. And then  
22 they blanket him with highly sophisticated lawyers and other  
23 consultants, and immediately put him on the payroll.

24           Now, because of the agreements that were reached in  
25 the Borja matter, which is what Judge Breyer addressed before

1 these 502 stipulations, I cannot, in open court, say the kind  
2 of money that was being paid to Mr. Borja, so I won't,  
3 obviously. I will simply say it would make a Jones Day or a  
4 Kirkland & Ellis partner proud if they got that kind of money.

5           The senior partner of the Jones Day firm in  
6 San Francisco gets personally involved in basically being a  
7 go-between -- and his lawyers -- between Chevron and Mr. Borja,  
8 and, secondarily, Mr. Hansen, to the extent to which,  
9 ultimately, they are answering his demands. Okay? There's  
10 e-mails we've now gotten, showing that the senior partner is  
11 concerned about whether Mrs. Borja likes her refrigerator and  
12 stove. Okay? There are e-mails showing that they get  
13 Mrs. Borja a job down in Texas.

14           And, in any event, how do we now get to Mr. Hansen  
15 and the Mason Group?

16           **THE COURT:** Mm-hm.

17           **MR. TYRRELL:** Well, Mr. Hansen decides he's being  
18 snookered. Mr. Borja is being very well taken care of; but, in  
19 his view, he is not.

20           And so we get, if I can find it, your Honor --

21           **THE COURT:** Mm-hm.

22           **MR. TYRRELL:** We get Mr. Hansen communicating with  
23 one of Chevron's private investigators. That says,

24                   "Wait a minute. You're taking care of  
25 Diego. What about me? If you're not



1 taking care of me, I am very worried that  
2 maybe I should go down and confess, and ask  
3 forgiveness to Judge Nuñez as to the scheme  
4 that I was involved in. If I don't hear  
5 from you within three days about me being  
6 taken care of -- okay? -- I can't tell you  
7 what I'm going to do."

8 By this point in time, of course, Chevron has brought  
9 in the Arguedas firm -- an outstanding, well-known firm -- to  
10 represent Mr. Borja. And the Arguedas firm brings in their,  
11 apparently, regularly used private investigators: The Mason  
12 Group.

13 Instructions come down from Chevron to Jones Day  
14 passed on to Arguedas to the Mason Group that says,

15 "Start shadowing Hansen. He could be  
16 dangerous to us."

17 And so they begin drive-bys -- the Mason Group  
18 does -- of his home. They begin phone calls -- hang-ups -- to  
19 find out where he is.

20 Meanwhile, our side slowly begins to try to conduct,  
21 to deal with this -- the sensational descriptions of fraud --  
22 tries to conduct some discovery here in California, to get to  
23 the bottom of this particular issue. There are many others.

24 **THE COURT:** Mm-hm.

25 **MR. TYRRELL:** And ultimately, out of the Central

1 District of California, after a huge fight and huge delay, a  
2 subpoena issues to take the deposition of Mr. Hansen.

3 Four days later -- okay? -- an e-mail communication  
4 is sent from lawyers at Jones Day to lawyers at the Arguedas  
5 firm that says,

6 "We think Hansen is in a V.A. Hospital  
7 in" --

8 **MR. CASSMAN:** Excuse me, your Honor. I believe  
9 Counsel's referring to matters that are under seal and  
10 inappropriate for disclosure in a court.

11 **THE COURT:** Okay.

12 **MR. CASSMAN:** The content.

13 **MR. NIESPOLO:** That's absolutely true.

14 **MR. TYRRELL:** Your Honor, I thought the money was  
15 under seal. Okay? I don't --

16 I'll try to tell my story more generally.

17 **THE COURT:** Let me make sure I'm looking in the right  
18 place in the record. Under what order is it under seal?

19 **MR. CASSMAN:** Oh. Well, that's a good question; but  
20 these were documents that were provided to counsel as part of a  
21 502 agreement that has previously been litigated before  
22 Judge Breyer. And he found that they -- and Counsel, himself,  
23 has already indicated that he's not at liberty to discuss their  
24 contents in court. And I thought I heard him beginning to  
25 discuss the contents of one such document, which is an e-mail

1 communication.

2 **MR. TYRRELL:** And if I have spoken incorrectly,  
3 trying to remember all of the 502 documents, I do not intend to  
4 do so; but I do urge your Honor to look at them.

5 **THE COURT:** Okay, but the basis is that Judge Breyer  
6 order. And the particular objection you have is to discussion  
7 of 502 documents?

8 **MR. CASSMAN:** And Judge Chen's previous 502-protected  
9 orders.

10 Ted Cassman, on behalf of Borja.

11 **THE COURT:** Thank you, Mr. Cassman.

12 **MR. CASSMAN:** Thank you, your Honor.

13 **THE COURT:** Proceed.

14 **MR. TYRRELL:** I'm trusting Counsel, because I don't  
15 claim to be fully expert in this. I spend my time in the  
16 Second Circuit most recently; and not with these documents.

17 I'm trying very hard to walk on eggshells, and not  
18 tell you the whole story, though I know the story is available  
19 to your Honor. In any event, Mr. Hansen -- hopefully, they'll  
20 correct me if I'm wrong -- is located in V.A. Hospital in L. A.  
21 And somehow, magically, within days of that subpoena issuing,  
22 Mr. Hansen is found in a fishing village in Peru.

23 Now the Mason Group says,

24 "Nothing to do with that. We had no  
25 direct contact with Mr. Hansen."

1           But we know later -- I hope they'll correct me if I'm  
2 wrong -- an e-mail comes from Mr. Hansen to the Mason Group,  
3 copied on it, saying,

4                        "How about a big house with three  
5 bedrooms, and a pickup truck? And things  
6 are really good down here in Peru."

7           Now, if you didn't know anything about the Mason  
8 Group, what did you do? Look them up in the Yellow Pages and  
9 decide they're a good group of people to come down and invite  
10 down there and send them an e-mail? It defies credulity.

11           I suggest to your Honor that the Mason Group is into  
12 this up to their ever-loving eyeballs.

13           And so we now come down to a discussion of why  
14 they're attempting to hide, respectfully, 700 documents, and  
15 only produce 13 that were already publicly available. Okay?

16           I should just finish the story because this is not --  
17 affects their documents, and it's not secret.

18           Chevron goes public two months later, attempting to  
19 impugn the entire Ecuadorian judicial system with this  
20 cock-and-bull story about Mr. Borja and Mr. Hansen.

21           Unfortunately for them, in the meantime, Mr. Borja --  
22 so proud of what he's accomplished; that he's now in good stead  
23 to get a lot from Chevron -- has a conversation with his  
24 childhood friend in Canada. And in that conversation, by  
25 Skype -- and I must confess to your Honor I'm old enough not to

1 know much about what Skype is, but apparently you can record  
2 it. And the guy in Canada records it. And in that  
3 conversation, what does Mr. Borja admit?

4 He admits there was never a bribe of Judge Nuñez. He  
5 admits that he managed to get rid of the Judge, because the  
6 Judge, though saying he did nothing wrong, recused himself in  
7 the interests of justice; that he managed to get rid of the  
8 Judge in three days, when it took Chevron a year, and they  
9 didn't succeed. Okay? And then he says,

10 "And I've kept a record, so that I  
11 basically can put it over Chevron's head.  
12 If it turns out that they turn on me, and  
13 don't deliver to me and my family what I  
14 want, I've got the goods on them. And if  
15 the goods were ever revealed to a  
16 United States court, the entire company of  
17 Chevron would go under."

18 -- whatever he meant by that. I don't know.

19 It's in that context that we talk about the arguments  
20 and the issues today.

21 The Mason Group was served.

22 And, your Honor, it's my binder on the desk I  
23 couldn't even read on the plane on the way out here. And I've,  
24 for good or bad, spent a year and a half on this case now. So  
25 I have great sympathy to your Honor having to figure out what

1 the heck's going on.

2           Nonetheless, the subpoena directed to the Hansen  
3 Group [sic] -- we're fighting for months.

4           Why?

5           Because they're trying to run out the clock. Okay?  
6 They know that the time in which the record remains open for  
7 the intermediate appellate court in Ecuador where *de novo*  
8 evidence is allowed to be submitted will not be forever. So if  
9 we can't get this evidence before the court down there -- okay?  
10 -- they're never going to see it.

11           **THE COURT:** What is the clock down there? I mean, as  
12 far as it is known.

13           **MR. TYRRELL:** To my knowledge -- okay? -- it's still  
14 opened. And they're still deliberating; but whether they'll  
15 decide next week or six months from now, we just can't say.  
16 They don't have some --

17           **THE COURT:** It's akin to the court here. There's not  
18 an -- they have not announced a deadline by which they're going  
19 to be issuing their opinion?

20           **MR. TYRRELL:** When that question was put to me two  
21 weeks ago by the Second Circuit, one of the judges smiled and  
22 said,

23                   "Is it like us; that we have discretion  
24 as to how long it takes to write our own  
25 opinions?"

1           And I said,

2                   "I think so, but I'm not sure."

3           So time is of the essence.

4           And, in addition, you remember I said before that so  
5 much happened because of the purported criminal proceedings  
6 against the two Chevron lawyers. Now, what do I have had out  
7 just ten days ago? That a Jones Day lawyer has become the  
8 complainant on a criminal complaint in Ecuador against my  
9 clients and their lawyers. And my clients had been summoned to  
10 appear before a prosecutor -- whoever they do -- down there.

11           So if my friends at Chevron went around this country  
12 for a year, saying, "Urgency, urgency, urgency. Two of our  
13 people are facing criminal proceedings," is not the same true  
14 when they have now initiated criminal proceedings or an  
15 investigation -- criminal investigation -- against my clients  
16 in Ecuador, who are supposed to appear before the Prosecutor  
17 General this past week?

18           And, frankly, as to some magical reason, in Ecuador,  
19 the person who initiates it is supposed to serve the other  
20 side. And my clients don't even know about the hearing,  
21 because they never get served.

22           So, both because the 1780 -- but the appeal in  
23 Ecuador will close down at an unknown time.

24           And now, with reference to this proceeding -- and  
25 counsel for the Republic were good enough to let me lead, to

1 describe the background -- okay? -- but they've got their same  
2 need with respect to the BIT arbitration at The Hague, which is  
3 an attempt -- another global attempt to quash the judgment in  
4 the forum of Chevron's choice.

5           So all three of these things now coalesce into what  
6 I've described to you.

7           So counsel for the -- let's not mistake this. And  
8 I'm not faulting counsel. Okay? I've spent most of my life on  
9 the defense side; but if you were to ask them in private who's  
10 paying for all of these people, I would suggest to you it isn't  
11 the Mason Investigative Group. They're doing -- I respectfully  
12 submit -- Chevron's bidding.

13           In the course of doing Chevron's bidding, they  
14 produce to us 12 documents, and one e-mail; all publicly  
15 available. They hold back on the purported privilege log 160  
16 entries, 700 pages. Moreover -- which is totally ludicrous.

17           We have four different iterations of their log. When  
18 they thought either we didn't have the resources or we weren't  
19 smart enough to figure out how to do it or wouldn't be  
20 persistent enough, they tried to blow us off with a log that  
21 said,

22                   "E-mail regarding travel. E-mail  
23                   regarding greetings."

24           Now you look at those e-mail descriptions, and, boy,  
25 do they have every bit of the right buzzwords that you would



1 expect Gibson Dunn or Jones Day to use in describing why the  
2 very same document that was about a greeting card before is now  
3 about important work-product considerations.

4           Indeed, I'd submit to your Honor that you could look  
5 at that, and make a decision of waiver based on that, alone;  
6 but I turn now to my legal arguments, hopefully, if your Honor  
7 does not have any other questions. I'm sorry the background  
8 has taken so long.

9           **THE COURT:** No. No apology. I do -- and I'll give  
10 every other party the benefit of telling me any background you  
11 think I might need to know, as well. I think it's appropriate  
12 in this case.

13           **MR. TYRRELL:** When I clerked many years ago, your  
14 Honor, for the Third Circuit, the judge I clerked for -- it was  
15 his first year on the Circuit. He said,

16                       "Always start with the standard of  
17 review of the burden of proof."

18           So I try to do that. And as I tried to put forward  
19 in our brief, the burden of proof here for those who claim  
20 privilege is on those who claim the privilege. And we've cited  
21 the cases in this District, in this Circuit. And I need not  
22 review that, but it's a high burden. It's a high burden. It's  
23 not the burden you meet by playing games with four different  
24 privilege logs.

25           So I turn now to my first substantive argument.

1           We submit to your Honor that third-party  
2 communications between the Mason Group and various third  
3 parties are not entitled to work-product protection.

4           And, of course, their main claim, though they also  
5 claim -- they claim work product for every single one of these  
6 documents, and attorney-client for every single one of these  
7 documents.

8           Some of it is patently ludicrous, including three  
9 letters to a United States Court. I didn't know United States  
10 Courts were in the business of rendering opinions to private  
11 parties that would qualify for legal advice, but that's the  
12 kind of thing we see here. It's a desperation.

13           I start with the analysis of from and to. It is  
14 generally held -- and we've set forth the case law -- that  
15 documents sent to a party -- sent to a person -- in this case,  
16 the Mason Group -- they're not a party to any of the underlying  
17 litigation. They're just a private investigative group.  
18 Documents sent to them for third -- by third parties, it is  
19 almost universally held, were not prepared in anticipation of  
20 litigation by a party. These were communications that came  
21 from outside sources.

22           And so we submit that any of these third-party  
23 communications from an outside source to the Mason Group do not  
24 qualify for work product.

25           **THE COURT:** And your proposal is that, if they're not

1 a party, and it's going to Mason Group, no work-product  
2 privilege?

3 **MR. TYRRELL:** The answer is yes, but the reason I  
4 say -- you know, they will cite a couple of cases which are  
5 inapposite, and we've distinguished them in our reply brief;  
6 but the reason for it is, sure, if a lawyer is sharing with a  
7 private investigator their mental impression of case strategy,  
8 and says something substantive about that to a private  
9 investigator, there's an arguable case, subject to showing  
10 substantial need -- but there's an arguable case for privilege.

11 But if you look at all of the cases that they cite,  
12 that's not what happened here. These are miscellaneous third  
13 parties.

14 Moreover, look at how removed. You know, they've  
15 watered down their claim of privilege by their attempt to  
16 isolate Chevron from what went on. Mason works for the  
17 Arguedas firm. The Arguedas firm represents Borja; not  
18 Chevron, nominally -- okay? -- but the Arguedas firm is brought  
19 in by Jones Day. Jones Day represents Chevron.

20 I mean, how can you say that Chevron's or anybody  
21 else's strategy --

22 Mr. Borja's not a party. He has no litigation  
23 strategy. Okay?

24 The Mason Group was brought in here by Borja.

25 So when you -- when you peel back the onion, nobody

1 who's a third party can legitimately claim that any of those  
2 third-party "from" communications qualify for core mental  
3 attorney-client privileges to a party in a litigation.

4           Reciprocally, their communications to third parties  
5 cannot qualify. Same analysis, but even more so.

6           If you want to claim work-product privilege, you have  
7 to demonstrate by objective evidence that you could rely on the  
8 fact that the person you were sharing this information with was  
9 going to maintain confidences.

10           How can you do that with travel agents? How can you  
11 do it with all of the other people that the Mason Group sent  
12 this information to? They're not entitled to work product.

13           What about the specifics? And it's the specifics  
14 that really count. Okay? I start off with Mr. Sandy Harris.  
15 They have e-mail communications that they're copied on with  
16 Mr. Harris, which is critical to us.

17           Why?

18           Well, your Honor wouldn't know, but for the  
19 background, who is Sandy Harris?

20           Sandy Harris runs a Mexican company not available to  
21 us by process. But for these e-mails, we're not going to get  
22 anything on this. That was the company -- I'm not good at  
23 Spanish; some water-irrigation company -- that Mr. Borja and  
24 Mr. Hansen claimed that they worked for at the time they  
25 conducted the sting on Judge Nuñez. Hardly more relevant.

1 Did they really work for him?

2 What does he say in these e-mails?

3 Why, in -- after these events are all over, with --  
4 Mr. Hansen's whisked out of the country to avoid the subpoena,  
5 sitting in a fishing village in Peru, and asking for a bigger  
6 cut of the take, who copies the -- who copies both this man,  
7 Sandy Harris, and the Mason Group -- how can that stuff be  
8 subject to a work product?

9 They even claim attorney-client privilege.

10 **THE COURT:** So how many documents fall in that  
11 category? The documents to Sandy Harris.

12 **MR. TYRRELL:** I think there are three or four of that  
13 nature.

14 And, of course, the notion that they could  
15 communicate with Mr. Harris and expect that they had a  
16 reasonable basis to believe that he would, for work product,  
17 preserve everything as confidential, again, is ludicrous.  
18 There's no submission to that. Okay? This guy in Mexico, who,  
19 if he allowed it, allowed them to use the name of his company  
20 to conduct a sting on an Ecuadorian judge -- he's to be trusted  
21 to maintain attorney-work-product confidences?

22 Mary McNamara. Mary McNamara is an attorney.

23 **THE COURT:** I know Mary McNamara.

24 **MR. TYRRELL:** I do not know Ms. McNamara. And  
25 whether she was at the party last night, I cannot speak to, but

1 I know she wasn't on the plane with me.

2 Ms. McNamara, first of all, there's no proof -- there  
3 was some discussion that she was to be retained to represent  
4 Mr. Hansen. There's no proof in the record that she was ever  
5 so retained, that I'm aware of.

6 Moreover, the claim of now, which just got born in  
7 the most recent iteration of privilege claims -- I mean, this  
8 is basically -- you know, it's like the loaves and the fishes.  
9 Okay? You start out with a couple of privilege claims, and now  
10 we've got every privilege claim known to man. Their most  
11 recent one is common interest. But when you, again, peel back  
12 the onion, what do you find?

13 If there was a common interest-- and we don't think  
14 there was, because they weren't the attorney. Okay? -- that  
15 occurred sometime in 2011 -- okay? -- when and if she was  
16 brought in as an attorney; but the documents that they're  
17 holding back were from 2009. How could there about be a  
18 common-interest privilege with a lawyer who probably, at best I  
19 could tell, wasn't even on the scene at the time the documents  
20 are being held back?

21 Travel agents. This is a good one. If your Honor  
22 will bear a moment with me as I get Judge Francis' language in  
23 front of me. They claim that it is somehow their -- an  
24 attorney mental-impression work-product that they had  
25 communications with travel agents that, I guess, determined

1 whether they flew to Ecuador. Maybe they were in the same  
2 plane as Mr. Hansen. Maybe they went to Peru. Okay? I don't  
3 know that, but I suggest I'm entitled to know that, when  
4 Chevron goes around the country saying we're a bunch of frauds.  
5 Okay? And they get every single one of our documents.

6 Judge Francis addressed that issue. And, if I can  
7 put the right page in front of me -- if I can't, I'll tell you  
8 what he said. Judge Francis said that he was entrusted by  
9 Judge Kaplan, before he was vacated, with dealing with these  
10 kinds of privilege things that your Honor is looking for. He  
11 said that communications that are about travel logistics are  
12 entitled to neither the attorney-client nor the work-product  
13 privilege. Those are not the kinds of documents that can  
14 qualify for privileges.

15 **THE COURT:** And is there a particular order you're  
16 looking at?

17 **MR. TYRRELL:** I can give it to your Honor in a  
18 minute. I have the quote here in my notes. And if I could  
19 find it, just bear with me a moment. Give me a moment,  
20 your Honor. I can't at the moment. Again, it's a long plane  
21 flight. Somewhere in my notes I do have it, and I will give it  
22 to your Honor.

23 **THE COURT:** Mm-hm.

24 **MR. TYRRELL:** Okay. We talked about travel agents.  
25 The next specific, Serrano and Merkl -- whoever these

1 guys are. Mr. Serrano and Mr. Merkl, we think -- we're not  
2 sure -- were some kind of subagents of the Mason Group. They  
3 claim that, you know -- that this whole derivative chain --  
4 that whatever they talked to with these guys -- we don't really  
5 know who they are -- should be covered by all of these  
6 privileges, too.

7 Well, you know what? You can't have it both ways.

8 Either if they were employed by these guys, and they  
9 were a business, there had to be some agreement that indicated  
10 that they were employees, or a pay stub, or something. None of  
11 that's been produced in this litigation. So if none of it's  
12 been produced, how are they now to be close confidants -- part  
13 of a control group or something -- as to which privileges  
14 extend?

15 And my last one, which I suggested to your Honor  
16 before, but I jumped the gun on my outline, which is  
17 preposterous: Communications to the United States District  
18 Court. There are three of those. Okay? And I won't repeat my  
19 argument there.

20 My second main argument: Even if you were to  
21 conclude that any of these things were worthy of some  
22 work-product privilege, the privilege logs that had been  
23 submitted to support that privilege are not sufficient. They  
24 are nothing more than boilerplate.

25 If I can find the right case on this, your Honor,



1 here, basically, the law says that you must be particular in  
2 your privilege-log descriptions.

3           If I can tell your Honor, here, I have found part of  
4 the thing from Judge Francis. As we've been all over the  
5 country on this, we have been faulted and faulted and faulted  
6 for the adequacy of our privilege logs. Meanwhile,  
7 respectfully, what we get back from Chevron and their allies is  
8 garbage. We can't tell what those privilege logs mean.  
9 Finally, Judge Francis had the courage to address that within  
10 the last couple of weeks. And in Judge Francis' order, which  
11 we can provide to your Honor --

12           **MR. CASSMAN:** We haven't seen it.

13           **MR. TYRRELL:** I'd be more than happy, if  
14 Mr. Westenberger has it, to give you a copy.

15           **MR. CASSMAN:** That would be very kind.

16           **MR. TYRRELL:** And Judge Francis --

17           And there are so many moving parts to this  
18 litigation, I don't fault you; but keeping up with what's  
19 happening in New York is pretty useful.

20           Judge Francis, in the Southern District, addressed  
21 the adequacy -- or lack thereof -- of Chevron's privilege log.  
22 And here's what he wrote:

23                   "Inspection of individual documents  
24                   reveals the categorization process engaged  
25                   in by Chevron obscures rather than

1           illuminates the nature of the materials  
2           withheld. Distressingly, Chevron has taken  
3           a view of its own discovery  
4           responsibilities sharply different from the  
5           obligations it seeks to impose on the  
6           defendants and on nonparties. The manner  
7           in which Chevron has implemented its  
8           categorical privilege logs has thus impeded  
9           the defendants' ability to challenge  
10          Chevron's assertion of privilege and  
11          discovery immunity."

12          It entered that order shortly before the Second  
13 Circuit shut down the whole affair in the Southern District.

14           **THE COURT:** And was Judge Francis' ruling -- it was  
15 not on these particular privilege logs --

16           **MR. TYRRELL:** No, no, no. It was on --

17           **THE COURT:** -- but different privilege logs.

18           **MR. TYRRELL:** No, but one sort of learns when Chevron  
19 is pulling the strings behind the scenes for Jones Day, Jones  
20 Day for Arguedas, Arguedas for Mason, one would think that --

21           (Reporter requests clarification)

22           **MR. TYRRELL:** I'm slipping into New York. I do  
23 apologize for that, because I'm waking up slowly.

24           Basically, it was Chevron's approach to a privilege  
25 log; but of course, Chevron controlled Jones Day. Jones Day

1 hired Arguedas. Arguedas hired Mason.

2           It would be difficult to believe that an entirely  
3 different approach would be taken, since that was the Chevron  
4 general game plan.

5           So, to go back, what you got is boilerplate. And  
6 boilerplate, the courts in this District and in this Circuit  
7 say, just isn't enough.

8           I go now to the July 15 log, the first log that they  
9 said. What did they say in it?

10                   "E-mail regarding travel."

11           Now, that's informative, and certainly helps you  
12 probe whether or not there's any privileges.

13                   "E-mail regarding greetings."

14           Okay?

15           Next one -- sorry. I've already read to you my point  
16 with respect to Judge Francis on page 10.

17           And I will go on, but I make the following: You  
18 can't have four iterations of the same privilege log, and have  
19 the same description for the same document that goes from one  
20 extreme, on July 15th, to something that looks like it is the  
21 most intimately confidential, attorney-work-product, CIA-type  
22 security. It just -- it defies credulity.

23           And moreover, they had virtually the same description  
24 type for every document. We've categorized it. There are  
25 maybe four basic standards that they use. And they slap that

1 label on every one of these documents.

2 That just doesn't cut it under the standards, we  
3 submit, in this District.

4 **THE COURT:** Has Judge Francis done any *in camera*  
5 review of any documents on privilege logs in the litigation  
6 there?

7 **MR. TYRRELL:** He has done some *in camera* review --  
8 okay? -- but basically he got first to the threshold question,  
9 which is: I've looked at some of these documents. The  
10 descriptions are so far off from the documents. Go back and  
11 redo the privilege log. Do it document by document. Okay?  
12 And then the freeze came about. So they haven't do it yet; but  
13 in order to have concluded that the whole approach to privilege  
14 logs was inadequate, and entirely dissimilar from what they  
15 were demanding of the other side, he had to look at a few of  
16 the documents, and he saw there was no match; nothing  
17 informative between the documents and the descriptions.

18 If I can reference one case, here's the one I was  
19 looking for, your Honor, which I think sets the standard in  
20 this district. Okay? This is a Northern District of  
21 California decision, *Kaufman & Broad Monterey Bay versus*  
22 *Travelers Property and Casualty*, decided June 2, of 2011.

23 In that case, the Court rejected --

24 **MR. CASSMAN:** Do you have a copy for us, Counsel?

25 **MR. TYRRELL:** I don't, Counsel. It's a publicly

1 available case.

2 **THE COURT:** Who's the judge in that case?

3 **MR. TYRRELL:** I don't have that, either, your Honor.

4 I've only got my notes.

5 **THE COURT:** All right.

6 **MR. TYRRELL:** -- rejected the assertion of

7 work-product protection because, quote,

8 "The party claiming work-product

9 protection bears the burden of

10 demonstrating that the doctrine applies.

11 And defendant failed to show" --

12 And here's the key words.

13 -- "by specific evidentiary proof of

14 objective facts -- specific evidentiary

15 proof of objective facts -- that a

16 reasonable anticipation of litigation

17 existed when the document was produced, and

18 that the document was prepared and used

19 solely to prepare for that litigation, and

20 not to arrive at or buttress some claimed

21 decision" --

22 -- which is an insurance issue.

23 That standard isn't met here. There's no objective

24 facts. There's no even attempt to elucidate. And we'll

25 provide your Honor with the case and the citation and what have

1 you. And, of course, we'll do the same for counsel; but you  
2 remember work product is about anticipation of litigation.  
3 Let's take ourselves back in this complex case.

4           What litigation was the Mason Group supposedly  
5 anticipating that it would be involved in -- it would be  
6 involved in; not Chevron -- that would lead to these exchanges  
7 that could be work product?

8           I suggest to you it had no anticipation of any  
9 litigation at the time. And it sure didn't anticipate this  
10 case.

11           This is a 1782 action for discovery. Is there a --  
12 the slightest of suggestions that the Mason Group, when they  
13 were hired to do whatever they did that I can't talk you about,  
14 but I hope you read about -- okay? -- with Mr. Hansen? --  
15 okay? -- that they thought at that point that they needed to  
16 have work-product exchanges to prepare for the ultimate  
17 issuance of a Section 1782 proceeding? I daresay, because I  
18 didn't hear much about it until a year and a half ago, the last  
19 thing that they thought about was the possibility of a 1782  
20 discovery proceeding. So they're just not entitled to claim  
21 work product.

22           **THE COURT:** And your view is that it has to be  
23 anticipation of -- it has to be anticipation of this  
24 litigation? It has to be anticipation of 1782 litigation, or  
25 could it be a broader anticipation of litigation?

1           **MR. TYRRELL:** I mean, if they thought they were going  
2 to be and could make a demonstration by concrete facts that  
3 they were going to be named as a defendant or in some other way  
4 in the litigation between Chevron and the Ecuadorians, we would  
5 certainly want to listen to their thinking on that; but there  
6 isn't a hint of that in the record. And so therefore, the only  
7 thing we can basically deal with is what's here: The  
8 litigation that eventuated. 1782.

9           And I doubt there was any anticipation that they were  
10 going to be dragged in to give discovery. Okay.

11           **THE COURT:** All right.

12           **MR. TYRRELL:** If I can finish up, your Honor, I've  
13 said most on attorney-work product -- okay? -- because much of  
14 what I've said covers attorney client.

15           **THE COURT:** Right.

16           **MR. TYRRELL:** But they've claimed attorney-client for  
17 every single document. And, if you go back to *Hickman* and  
18 *Taylor*, basically, in order for attorney-client, there has to  
19 be the getting of legal advice.

20           Well, the Mason Group wasn't given any legal advice.  
21 And they certainly have made no demonstration that other people  
22 were conveying legal advice through them to God knows who;  
23 certainly not to these people I've mentioned specifically. Not  
24 to Mr. Hansen, whom they claim they've never talked to.

25           That's all I'll say about attorney-client. Okay?

1           There are some of the documents, if your Honor looks  
2 at them on their face, that I submit are inherently incapable  
3 of being the subject of any privilege.

4           Document types: Billing invoices. And why is that  
5 important? Boy, is that important.

6           The Mason Group worked for a bunch of time in 2009.  
7 And billed for it. Okay?

8           Then -- and then the case went dormant for a while.  
9 And then, all of the sudden, we had this fanfare when the  
10 Central District of California issues its subpoena out. And we  
11 find Mr. Hansen winds up out in Peru. All of a sudden, the  
12 billing starts going up again, after either no or very little  
13 billing. It's something I think we're entitled to take a look  
14 at; not to have this all held back. So those billing invoices,  
15 200 pages of documents --

16           **THE COURT:** Mr. Niespolo's standing. So, yes,  
17 Mr. Niespolo.

18           **MR. NIESPOLO:** I've sat here and listened for 40  
19 minutes --

20           **THE COURT:** You have been very patient.

21           **MR. NIESPOLO:** -- to rants and raves. And I  
22 understand. And I'll have something to say about that in a  
23 minute, but I have to object at this point, because he is  
24 disingenuously trying to mislead you. And -- instead of coming  
25 forth and telling you two things.



1           One: He has the billing records. They were given to  
2 him by Borja. They were appropriately redacted; that is, the  
3 substance of the content. And that's why he knows some of this  
4 stuff.

5           And, two, we have said to them that we would be happy  
6 to give them another copy redacted of the billing records; but  
7 he sits here in front of you, and adds this to his venom and  
8 his vitriol, just like he tried to do in front of Breyer. And  
9 like they tried to do in their papers, all of which was  
10 rejected.

11           So, you know, I've been sitting here. I've been  
12 quiet --

13           **MR. TYRRELL:** I can finish in a minute, your Honor.

14           **MR. NIESPOLO:** -- but I've had about enough.

15           **MR. TYRRELL:** And I'm happy to give 40 minutes to the  
16 other side.

17           **THE COURT:** Right. I appreciate it, Mr. Niespolo.

18           And I've given you a lot of time. It's my first  
19 hearing in the case, there's a lot to learn.

20           **MR. NIESPOLO:** I understand. And that's why I'm  
21 patient.

22           **THE COURT:** Thank you for your patience.

23           **MR. TYRRELL:** -- on my outline. My point is that  
24 document types, like billing records -- and I want them  
25 unredacted, of course -- are not appropriate to claim

1 privilege. There's 200 pages of reports of one type or  
2 another. There's documents downloaded from the Internet --  
3 okay? -- that we'd like to see, that can't be privileged --  
4 either attorney-client or work-product. They're downloaded  
5 Internet documents.

6           So I come to my last argument. If your Honor  
7 disagrees with me as to any of these things -- at least, as to  
8 work product -- your Honor is well aware, under Rule 26(b)(3),  
9 that even if it was work product -- and it isn't -- that if we  
10 can show a substantial need, and hence all of the reason for 40  
11 minutes -- and you have been most generous -- okay? -- there is  
12 a substantial need here, for the reasons that I have  
13 articulated; but particularly as to those third-party  
14 documents; particularly as to those communications involving  
15 the Mason Group and Mr. Sandy Harris, the Mexican. Okay? We  
16 can't get anything out of Mexico.

17           What is said there is critical as to Mr. Hansen, and  
18 the relationship of that company, basically, being a front for  
19 the sting in Ecuador.

20           A big issue that's coming down -- and I'll end with  
21 this -- before all of the courts in the United States is that  
22 the Chevron story is unraveling as we speak. There is no  
23 accident to the Third Circuit Court of Appeals twice clamping  
24 down on Chevron's shenanigans, saying that they've never seen  
25 anything in American jurisprudence like their use of

1 Section 1782s purportedly for an international proceeding,  
2 really to build, for a year, a case against Mr. Donziger and  
3 others in New York.

4           When they filed that action in New York, we had three  
5 days to respond to a 7,000-page Temporary Restraining Order.  
6 This was not lost on the Second Circuit.

7           In the Third Circuit, they faulted exactly what --  
8 frankly, what Judge Kaplan was about. Okay?

9           And then the Second Circuit, who had direct  
10 responsibility, came in and reversed completely in its  
11 entirety. Okay?

12           This story is unraveling. If anybody deserves a  
13 press account as to their conduct with respect to fraud, it  
14 isn't my side. It's the folks, respectfully, at Chevron. And,  
15 yes, I don't mean vitriol, but I am passionate about this.

16           I need those documents. I need to prove our case. I  
17 need a level playing field.

18           Chevron has every one of my lead lawyers' documents  
19 for 18 years.

20           We're quibbling over one here or there. That's not a  
21 level playing field, and that's not what justice is about.

22           And we ask your Honor's thought.

23           And I am more than happy to provide copies of the  
24 cases or the judges' orders. I will -- there's one order that  
25 was entered an hour before we came here, your Honor. Chevron

1 asked to have Judge Kaplan re-open the proceedings in the civil  
2 RICO case which he severed. Judge Kaplan declined to reopen  
3 the proceedings. So things in New York, on the basis of which  
4 there has been so much predicate negativism towards my client,  
5 have been vitiated for their entirety, and stayed for the  
6 foreseeable future.

7 **THE COURT:** All right. Thank you, Mr. Tyrell.

8 **MR. DETTMER:** Ethan Dettmer, on behalf of Chevron.

9 **THE COURT:** Yes.

10 **MR. DETTMER:** Your Honor's patience with listening to  
11 that -- and I'm going to be blunt -- that diatribe, it was --  
12 to call it one-sided is incredibly overgenerous. It was  
13 disingenuous and dishonest. And I say that not lightly.

14 I'm not going to stand here for half an hour and give  
15 you the history of this whole case, but I will hit a couple of  
16 high points, just to make my point. And I'll say this is  
17 not -- these are not my documents. These guys will have things  
18 to say about the documents. And --

19 **THE COURT:** You're starting with some of the deep  
20 background, and they'll get to the documents.

21 **MR. DETTMER:** Well, I really just want to hit a  
22 couple of points, your Honor.

23 **THE COURT:** Go ahead.

24 **MR. DETTMER:** One: The notion that this has been  
25 unfairly one-sided in discovery is absurd.

1           We have pursued a lot of 1782 actions. And many  
2 courts, outside of just Judge Kaplan, although he has been one  
3 of them, have made findings of fraud in the accomplishment of  
4 this judgment; remarkable fraud. And much of those findings  
5 are based on the words of the plaintiffs' lawyers and  
6 representatives in videos or in the record in front of  
7 Judge Breyer that led up to that August 5th hearing. You can  
8 go look at them in the record. And you can read these various  
9 court cases that we've cited that talk about this. If the  
10 discovery is one-sided, there is a reason for it, your Honor.

11           Now, let me contrast that with what we have here with  
12 respect to Mr. Borja. They have got a bunch of privileged and  
13 work-product documents that Mr. Borja produced to them under  
14 502 orders. And Mr. Tyrell walked you through all of the their  
15 wild conspiracy theories about what those mean. Mr. Hansen  
16 being spirited out of the country, and so forth.

17           Judge Breyer looked at those. There was a hearing  
18 over that. Your Honor has read that August 5th ruling.

19           Judge Breyer said that that leads to nothing but, you  
20 know, speculation, essentially, that this is true. He said  
21 there's no basis for finding the crime of fraud waiver here.

22           So all of Mr. Tyrell's sort of hyperbolic vitriol  
23 about this theory, and about what these mean -- Judge Breyer's  
24 looked at that. He said no. And those were privileged and  
25 work-product documents, as Judge Breyer confirmed.

1           Let me just make a couple more points. And I'm not  
2 going to answer, tit for tat, everything he said, because we'd  
3 be here forever.

4           **THE COURT:** You pick the things that are most  
5 important to you.

6           **MR. DETTMER:** Thank you, your Honor.

7           Mr. Borja, A, was not a Chevron employee, as  
8 Mr. Tyrell said. He was an independent contractor.

9           As Chevron has announced from the first time it  
10 released these videotapes of a judge overseeing this case  
11 meeting in a hotel room with a bunch of people, talking about  
12 the case that he was overseeing, Mr. Borja came to Chevron with  
13 those tapes, and subsequently, had to come to the U.S. because  
14 his life was in danger. The United States has granted him  
15 asylum here, based on that danger. So this is not a Chevron  
16 operative. He was not active at Chevron's insistence. In  
17 fact, Chevron didn't know about these videotapes until after  
18 three of them had already been taken. They know this.

19           Finally, let me just address -- and I really -- I  
20 couldn't be up here forever talking about all of these details,  
21 but they're in the record, if your Honor wants to read them.  
22 And this is a discovery motion about a privilege issue. And I  
23 just wanted to rebut the big points.

24           **THE COURT:** Mm-hm.

25           **MR. DETTMER:** The notion that Judge Francis has

1 attacked Chevron's privilege log -- one very important point  
2 that Mr. Tyrell left out: Several weeks before that privilege  
3 log was due, the Southern District of New York put in place a  
4 new local rule that allowed categorical privilege logs;  
5 explicitly said categorical privilege logs are okay.

6           So what we were doing was something new. We were  
7 putting together a categorical privilege log, as provided under  
8 the local rules. It involved and involves enormous number of  
9 documents, as your Honor probably will not be surprised to  
10 hear. This is something new.

11           Judge Francis didn't think it was the way it should  
12 be done. And we, before the stay went in place, went back, and  
13 are putting together a document-by-document log in the  
14 traditional way. The notion that we were trying to hide  
15 something by putting together a log that was explicitly  
16 permitted under the local rules is just wrong. We were  
17 operating under the local rules. Judge Francis later disagreed  
18 that it was the right way to work, so we're redoing it. I  
19 don't think there's anything unusual about that.

20           Finally, the whole notion that Chevron's story's  
21 unraveling is just not true, your Honor. And we have all of  
22 this evidence that we've put in front of a number of different  
23 places. And you don't need to listen to the characterization  
24 that would take, I think, a long time to thoroughly rebut, but  
25 let me just turn this over, I think, to these gentlemen whose

1 documents are actually being sought here.

2 **THE COURT:** Okay. Thank you. Mr. Dettmer.

3 **MR. DETTMER:** Thank you, your Honor.

4 **MR. CASSMAN:** So how does the Court wish to proceed?

5 **THE COURT:** Let me check one moment before we start.

6 Go ahead, Mr. Cassman.

7 **MR. CASSMAN:** So we've heard some global and  
8 ridiculously false allegations for supposed context that were  
9 presented to Judge Breyer, and rejected on August 5th. And the  
10 Court has that order.

11 **THE COURT:** I have the order. If you would like,  
12 though, if there are particulars of things that you think are  
13 unfair and ridiculous, to rebut them, you have the opportunity  
14 to do that. And that doesn't mean you have to address every  
15 one of them; but if there are particular things that you think  
16 I might be misinformed on, I want to give you the opportunity  
17 to address them.

18 **MR. CASSMAN:** I don't believe the Court's misinformed  
19 on anything. I know the Court's read the August 5th order, and  
20 it understands that everything that was presented orally to  
21 this Court this morning was previously presented to Judge  
22 Breyer; every allegation, including the substance of some of  
23 the documents that he refers to, which have been  
24 inappropriately presented to the Court, in violation of a 502  
25 agreement with us, which Judge Breyer also found to be correct.



1 All of that's been decided. All of it's been  
2 presented. There is not a scintilla of evidence suggesting  
3 that there was any collaboration to get Mr. Hansen out of the  
4 country, or any effort to do so. There's not a scintilla of  
5 evidence suggesting that Chevron is controlling Borja or his  
6 counsel for the Mason Group. It's just false. And it's  
7 baseless. And it's wrong.

8 And I'm sorry the Courts had to hear it all, all over  
9 again, for no apparent reason, except that, apparently,  
10 plaintiffs can't get over the fact that, in fact, the  
11 crime-fraud exception was found to be true as to their  
12 attorneys in New York, and therefore, the privilege and the  
13 work-product doctrine were pierced.

14 So that's my global response.

15 Should we wait to hear what other counsel has to say  
16 about the --

17 **THE COURT:** I think that's a good suggestion.

18 **MR. CASSMAN:** Okay, unless Mr. Niespolo has something  
19 else to say first.

20 **THE COURT:** No. Let's move on to the particulars of  
21 the motion.

22 **MR. CASSMAN:** Okay.

23 **THE COURT:** Or not move on. Let's focus -- continue  
24 to focus on that issue.

25 **MR. EWING:** Your Honor, Greg Ewing, for the Republic

1 of Ecuador.

2 Your Honor, I would like to take a step back from the  
3 facts. As you are well aware, there are 18 years of litigation  
4 going on --

5 **THE COURT:** Mm-hm.

6 **MR. EWING:** -- but I represent, today, just the  
7 Republic of Ecuador.

8 **THE COURT:** Mm-hm.

9 **MR. EWING:** And we believe that the legal arguments  
10 here don't require some of the factual discussion that  
11 Mr. Tyrrell and Mr. Dettmer are discussing.

12 What I'd like to do, your Honor, is give a little bit  
13 of a procedural history as a background to my argument.

14 As I think we made clear in our papers, we think  
15 there are three completely independent, completely sufficient  
16 reasons why the Mason Group cannot assert work-product or  
17 attorney-client privilege over any of these documents. I have  
18 their privilege log here. We don't believe that any of their  
19 work-product claims are appropriate.

20 **THE COURT:** And, to save time, if you're going to say  
21 the same things that have already been represented on work  
22 product, you can save yourself the time; but if there are other  
23 additional arguments --

24 **MR. EWING:** Your Honor, I would like to stay out of  
25 weeds, which it seems to me a little bit like we into there. I

1 would like to talk globally here.

2 **THE COURT:** All right.

3 **MR. EWING:** First, Mason, as Mr. Dettmer just got up  
4 here and said -- or sorry. Mason was Borja's agent. There's  
5 no dispute that Arguedas, Cassman & Headley hired Mason to do  
6 their work for them. No one disputes that.

7 Second, there's no dispute that Borja's subpoena  
8 required him to produce or log this information. He produced  
9 the similar information that was in Arguedas, Cassman &  
10 Headley's possession; similar information that was in Borja's  
11 possession; similar information that was in other of his  
12 agents' possession, including his accountants and his tax  
13 attorneys; but he did not present anything from Mason. Borja  
14 did not produce any of the information or log any of the  
15 information from Mason.

16 Consequently, we believe that he has waived any right  
17 to claim privilege over any of these documents.

18 They were due in December -- on December 15th. And  
19 I'll get into that in a second.

20 Second reason, Federal Rule 26 and the Circuit  
21 Court's clear finding in *In Re: CPUC* states that a party  
22 cannot claim work product where they are not a party to the  
23 litigation for which work product is -- or the discovery is  
24 sought.

25 That's the case here.

1           Mason Borja can be -- never will be -- never were --  
2 a party to the treaty arbitration. And we, as the Republic of  
3 Ecuador, seek this discovery in aid of the treaty of  
4 arbitration.

5           And, third, with regard to the attorney-client  
6 privilege, there's an eight-part test that the Circuit has laid  
7 out. They haven't even begun to satisfy that. We can quibble  
8 over some of the details, but we'll talk about some of the  
9 areas where I think that they have just failed to carry their  
10 burden.

11           Additionally, I think there are specific reasons.  
12 And Mr. Tyrrell got into those. And for now, I will stay out  
13 of that; but to provide a little bit of procedural history to  
14 my first argument, I drew together a time line of the docket.  
15 If that would be helpful to your Honor, I have the timeline  
16 here.

17           **THE COURT:** Share it.

18           **MR. EWING:** Yes. I'm going to share it with counsel.

19           (Document displayed)

20           **MR. EWING:** Now, your Honor, this -- may I?

21           **THE COURT:** Yes.

22           (Whereupon a document was tendered to the Court)

23           **MR. EWING:** These are just docket entries pulled from  
24 the various -- the two relevant dockets here, as well as the  
25 dates for the privilege logs, which are not on the dockets.

1           Your Honor, the Republic first filed its application  
2 for Mr. Borja in September of 2010; so, now, over a year ago.

3           And a few days later, the parties entered into a  
4 stipulation where Mr. Borja received a favorable briefing  
5 schedule. He had -- I think it ended up being close to two  
6 months where the briefing took place. And, in return, the  
7 Republic received a guarantee that the documents would be  
8 produced from Mr. Borja if so ordered 14 days after that order.

9           After the hearing, then Magistrate Judge Chen granted  
10 the Republic's order on December 1st.

11           According to the stipulation, documents were due  
12 December 15th.

13           Nothing was produced. No log was given. No  
14 documents were produced.

15           On the 20th -- so five days later -- Mr. Borja filed  
16 a motion for reconsideration, and, *sua sponte*, granted himself  
17 a stay of the District Court's order -- of Magistrate Chen's  
18 order. After briefing and a hearing on this in February of  
19 2011, Judge Chen again ordered that the documents be produced;  
20 noted that they should have been produced on the 15th; and  
21 ordered it -- as I said, again, that they be produced.

22           Mr. Borja provided a privileged log on the 18th,  
23 after the hearing. And we've gotten at least two versions of  
24 his privilege log since.

25           In May and April of 2011, two things are relevant to

1 this case.

2 First is: We filed a motion to compel hard drives or  
3 the electronic stored information, which we've discussed  
4 earlier this morning.

5 And, secondly, the Mason application was filed.

6 On February 15th, after the Court's hearing, we had  
7 the first Mason privilege log, where we, for the first time,  
8 learned of some of these documents.

9 And then on August 5th, Judge Breyer granted the  
10 Republic's order.

11 Your Honor, so you can fully appreciate some of our  
12 concerns, we are acting under a situation where Mr. Borja has  
13 told his confidant/his friend/his acquaintance -- however we  
14 want to qualify or quantify him -- that he has numerous  
15 documents. And we are seeking those in the Borja 1782.

16 All of that led Judge Borja to determine that Borja  
17 was not credible.

18 And what we are now trying to do is understand what  
19 Borja did. What happened?

20 So, with that background, I'd like to turn to my  
21 three legal arguments as to why none of the privileges apply  
22 here.

23 First, as I mentioned in my introduction, Mr. Borja  
24 was obligated, under the subpoena, to produce everything in his  
25 possession, custody, and control. And it's a pretty common

1 triumvirate of details.

2 (Reporter requests clarification)

3 **MR. EWING:** Sorry. I said "triumvirate." Yeah. It  
4 doesn't make a whole lot of sense, though, does it?

5 **THE COURT:** I think that should have been my  
6 objection.

7 **MR. EWING:** It's a common trinity that's used. How  
8 about that? We'll go with that. Okay.

9 That subpoena also extended to his agents, and  
10 explicitly references investigators.

11 Borja did not log or produce anything from Mason.

12 We did receive one e-mail that Hansen sent to Borja  
13 and Mason. That's the only e-mail that we received that --  
14 from Hansen -- or from Mason. Sorry.

15 **THE COURT:** Let me ask you as to the face of the  
16 subpoena. I don't have it in front of me. Was it for  
17 documents in his possession, custody, or control?

18 **MR. EWING:** Yes.

19 **THE COURT:** And by definition it sought to expand  
20 that to agents, investigators, dentists, accountants, and so  
21 forth?

22 **MR. EWING:** It did not including dentists, your  
23 Honor; but we did include all of his agents.

24 **THE COURT:** Maybe next month.

25 And was part of the response -- I mean, is the

1 response -- well, the documents that Mason possessed were not  
2 documents in his possession, custody, or control?

3 **MR. EWING:** The response in their opposition was that  
4 Mason -- that Borja produced all documents in his possession --

5 **THE COURT:** Mm-hm.

6 **MR. EWING:** -- and that Mason retained different  
7 documents than Borja did. That's the explanation of the  
8 discrepancy; but your Honor, the definition of "you" in the  
9 Borja subpoena included Borja's agents. And Borja interpreted  
10 that to include his agents, including his accountants;  
11 including his tax attorneys; including Arguedas, Cassman &  
12 Headley -- all of documents in their possession.

13 **THE COURT:** So the argument is: They gave an  
14 expansive definition for "you" in other parts of their  
15 response, and explicitly, according to you, avoided Mason in  
16 their response. And that's a waiver.

17 **MR. EWING:** I am not going to attach a motive to not  
18 including it. At the end of the day, our argument is that they  
19 were obligated to produce it. They produced other documents  
20 from their agents. They never objected to the definition of  
21 "you" to include investigators.

22 We're now looking here at the time line. It was  
23 supposed to have been December 15th. It was actually started  
24 to be produced in February 2011. We're now in September. It's  
25 been waived, your Honor.



1           **THE COURT:** All right. Okay.

2           **MR. EWING:** And secondly, and more fundamentally to  
3 the issue of work product here, Federal Rule 26 and this  
4 Circuit's clear holding on their interpretation of Rule 26  
5 state that the rule, on its face, limits its protection to one  
6 who is a party or a party representative to the litigation in  
7 which discovery is sought. That's what it protects.

8           That's the clearly codified language that this -- the  
9 Ninth Circuit has stated is the extent of the protection of  
10 Federal Rule 26.

11           Looking through what they've stated here, Mr. Borja  
12 and Mr. Mason -- neither of them is a party to the treaty  
13 arbitration. And, as I said before, they can't be. It's  
14 between investors and states. They will never be and can never  
15 be party to that litigation.

16           And that is the litigation for which we have sought.  
17 That's why we brought this application. It's in  
18 docket number 1 in our application.

19           Therefore, because they are not parties, and because  
20 we're seeking this documents for use in that arbitration, there  
21 is just -- the validity -- work-product claims are invalid.

22           So, your Honor, those are two general reasons why  
23 every single document -- there are, I think, 97 or -- I forget  
24 the total number of documents. None of them can be considered  
25 work product, your Honor.

1           They claim that the 1782 proceedings could be in  
2 anticipation of; but your Honor, we don't seek this in favor or  
3 for use in those proceedings. And, even if we did, as  
4 Mr. Tyrell said, it defies logic that a party would, two years  
5 ago, generate information so that they could then hide it two  
6 years later. It's just not a reasonable anticipation, as the  
7 Circuit has stated.

8           And, third, they also claim that there may have been  
9 documents that were created in anticipation of criminal  
10 proceedings in Ecuador; but, as they've said over and over  
11 again, at some point -- we have no idea when -- Mr. Borja was  
12 granted asylum. And, as soon as he was granted asylum, none of  
13 these documents could be in anticipation of -- of criminal  
14 proceedings in Ecuador.

15           It just is not legally possible for the Attorney  
16 General to extradite him to Ecuador; but regardless, even if  
17 it's a 1782, even if it's anticipation of the criminal  
18 proceedings, those are still not the proceedings for which the  
19 Republic seeks these documents, and therefore, cannot be the  
20 basis of a work-product claim here.

21           **THE COURT:** Let's go on to your attorney-client  
22 issue.

23           **MR. EWING:** Yeah. Your Honor, there is an eight-part  
24 test for the attorney-client privilege. As the Court laid out  
25 in the *United States v. Graf* -- the Ninth Circuit laid out --

1 they had to seek legal advice from a professional legal  
2 advisor; the communications relating to that purpose, made in  
3 confidence by the client, at his instance, permanently  
4 protected from disclosure, unless the protection be waived.

5           And, your Honor, there is no indication in the  
6 privilege log, as I look through it, of how these  
7 communications were client communications; that there is any --  
8 any client details that are included. There's no indication  
9 that they're provided for the purpose of legal advice.

10           The attorney-client privilege can extend to an agent.  
11 We don't dispute that general principle; but that extends to  
12 someone like a translator. So if Mr. Borja had needed a  
13 translator to talk with his attorneys, we would not be arguing  
14 that that translator's possession of those documents would  
15 waive privilege; but to warrant privilege for any other third  
16 party, they must show that there must be some necessity for the  
17 effective consultation, effective provision of legal advice.  
18 And we included the case cites for that in our briefing.

19           **THE COURT:** Mm-hm.

20           **MR. EWING:** And finally, with regard to the  
21 attorney-client privilege, after Mr. Borja made his recordings  
22 in Ecuador and was brought up to the United States, his sole  
23 role in this case seems to be to provide public affidavits.  
24 He's provided, I think, four U.S. proceedings. He's provided  
25 two that have been submitted in the treaty arbitration. And I

1 think he provided, now, another one in Ecuador at one point or  
2 another. So he's provided quite a few public affidavits.

3 And, as we've cited in our brief, there is just no  
4 basis to claim attorney-client privilege for a communications  
5 with the attorney where the intention is to publicly release  
6 that information in a filed affidavit before the Court. It  
7 just simply does not go with the principles behind the purpose  
8 of attorney-client privilege.

9 So, with that said, your Honor, I will stay out of  
10 the specifics, as Mr. Tyrrell has covered many of those. And  
11 we, as I said, believe none of these documents should be  
12 covered regardless of the specifics.

13 **THE COURT:** Very well. Thank you very much.

14 All right. Mr. Cassman, Mr. Niespolo, how would you  
15 like to proceed?

16 **MR. CASSMAN:** I think I should start, with the  
17 Court's permission. Good morning again.

18 **THE COURT:** Good morning again.

19 **MR. CASSMAN:** I'm going to address the global points,  
20 particularly, that were just raised by counsel. And, because  
21 privilege log was prepared by Mr. Mason and his attorneys, I  
22 think Mr. Niespolo addressing specific questions the Court has  
23 about entries thereon, and procedural history, et cetera.

24 **THE COURT:** Great.

25 **MR. CASSMAN:** I want to make a few general

1 observations; that, as the time line that was presented to the  
2 Court conspicuously fails to note, that Mr. Borja was deposed  
3 for two days. I believe it was in March of this year. So  
4 Counsel sat down with him, after having received all of the  
5 documents that we produced in response to the subpoena to  
6 Mr. Borja, and also as part of a 502 agreement. So many, many  
7 of the documents that they're concerned about, they have.  
8 Mr. Niespolo previously pointed out.

9 My global observations are these.

10 This is not about a level playing field involving  
11 Chevron. This is about Mr. Borja's work-product privilege,  
12 primarily. We have asserted the attorney-client privilege as  
13 well; but primarily, it's about the work-product doctrine.

14 **THE COURT:** Mm-hm.

15 **MR. CASSMAN:** And I agree with one thing that  
16 Mr. Tyrell said. And that is: There has been litigation all  
17 over the world arising from these matters and these issues; and  
18 that it's a mess.

19 And that was certainly true when Mr. Borja came to  
20 our office about two years ago. And it was clear to us -- and  
21 to Ms. Arguedas, in particular, who met with him at that  
22 time -- that there was a potential for a criminal investigation  
23 and prosecution in Ecuador. There was apparently a potential  
24 for a criminal investigation and prosecution in the  
25 United States of America. There was the potential for his

1 embroilment in civil litigation in Ecuador. There was the  
2 potential for his embroilment in civil litigation in the  
3 United States. There was the potential for his embroilment in  
4 ongoing litigation between the parties all over the world, we  
5 understood.

6 **THE COURT:** What was the date that -- to use their  
7 time line, adding things to it -- when was it that --

8 **MR. CASSMAN:** That would have been in the summer of  
9 2009. Were we engaged in 2009? That would have been the  
10 summer of 2009, which is before their time line begins.

11 We anticipated, with reason, that he could be a party  
12 in any of those proceedings, and that he could be a witness in  
13 any of those proceedings. And clearly, he was going to be a  
14 witness of some kind in those proceedings, given the fact that  
15 he had been present at meetings with a Judge during which a  
16 potential bribe was discussed; during which the Judge  
17 inappropriately met with people who were purporting to  
18 represent or be involved in the litigation, or were aware of  
19 the litigation; and during which the Judge -- and this is  
20 undisputed -- stated that he'd already decided how the case was  
21 going to come out, and what the decision was going to be: All  
22 inappropriately. Those are inescapable facts that they have to  
23 grapple with. And I understand they're trying to do so  
24 vehemently.

25 **THE COURT:** Luckily, I don't need to decide that

1 issue today.

2           **MR. CASSMAN:** No, we don't, but the fact of the  
3 matter is we understood that he was an individual from whom the  
4 parties might seek discovery. We understood that he was a  
5 party who might be subject to subpoenas. We understood he was  
6 a person who could be interpleaded by various parties in the  
7 various litigations. We understood that there was every  
8 potential aspect for litigation involving Mr. Borja that one  
9 can imagine.

10           That was true then. It remains true now. It remains  
11 true that, although they've parsed up this particular 1782  
12 proceeding and said it's for the arbitration, there's a  
13 possibility that he could be joined as a litigant in future  
14 litigation here and in Ecuador at any time.

15           **THE COURT:** All right.

16           **MR. CASSMAN:** So that's the reality that we present.

17           **THE COURT:** Got that part.

18           **MR. CASSMAN:** And it's in that context. This is a  
19 very important principle that -- the Court needs to make sure  
20 it's not violated. And that is that opponents and adversaries  
21 are not permitted to use the discovery process to find out the  
22 thoughts and strategies and opinions of opposing counsel.  
23 They're not permitted to do that.

24           And the Court cannot permit them to do that. And  
25 that's all that this proceeding is about.

1           Mr. Niespolo, when this issue was first raised about  
2 taking Mr. Mason's deposition, he offered it up and said,  
3 "Sure. Come depose him."

4           What you don't get is a roadmap to what we were  
5 thinking; what we were trying to do; where we were going; when  
6 we were going there.

7           Traveling agents?

8           Yes, absolutely, travel agents.

9           Why were we going there? When were we going there?

10          That's what they'd like to find out. And that's  
11 precisely what the Court must not permit them to do.

12          **THE COURT:** Okay.

13          **MR. CASSMAN:** So that's the principle.

14          **THE COURT:** All right. How about the waiver  
15 argument?

16          **MR. CASSMAN:** I'm glad you brought it up. That was  
17 my next point.

18          **THE COURT:** All right.

19          **MR. CASSMAN:** The waiver argument. What Counsel  
20 hasn't done is present you with a copy of the subpoena that was  
21 presented to Mr. Borja back a year ago, in September 2010.

22          **THE COURT:** What would it tell me if we had it before  
23 me? I don't --

24          **MR. CASSMAN:** If we had it before you -- and I can do  
25 that, if the Court would like. The Court would see that it is



1 very precise and very succinct. It deals primarily with  
2 engagement or payments or communications with Chevron, and that  
3 the documents -- and I will represent this to the Court -- that  
4 are on the Mason privilege log in response to the Mason  
5 subpoena were not responsive to that subpoena.

6 **THE COURT:** Okay. So your position is these  
7 documents are not responsive to the subpoena; therefore, no  
8 waiver?

9 **MR. CASSMAN:** No waiver.

10 And we do have the subpoena that was issued to  
11 Mr. Borja. I have it available for the Court to review.

12 **MR. EWING:** Your Honor, if I may interject --

13 **MR. CASSMAN:** No, no. I'm speaking now, Counsel.

14 **THE COURT:** Is it just a factual thing?

15 **MR. EWING:** Factual thing. It's Exhibit 3 to our  
16 motion to compel.

17 **THE COURT:** All right. Let's let Mr. Cassman finish.  
18 Go ahead.

19 **MR. CASSMAN:** There is one item -- I believe it's  
20 Number 9 -- that requests communications with Mr. Hansen. You  
21 heard about Mr. Hansen. There was one such communication. It  
22 was on our privilege log. And it was produced to counsel as  
23 part of the 502 agreement.

24 With that exception, there are no responsive  
25 documents that were -- that were not either produced or

1 included on our privilege log; hence, no waiver.

2 **THE COURT:** All right.

3 **MR. CASSMAN:** The issue of whether you're a party --  
4 and that's why I think it's important to understand the scope  
5 of potential litigation that was involved here.

6 **THE COURT:** Mm-hm.

7 **MR. CASSMAN:** We are obviously -- Mr. Borja is  
8 obviously a party to 1782 proceedings. They are governed by  
9 the Civil Rules. We suggest that, under those circumstances,  
10 alone, the Court should find that he is a party to these  
11 proceedings, and is permitted to assert the -- to enforce the  
12 work-product doctrine. The Rules of Civil Procedure do apply  
13 to 1782 proceedings.

14 Judge Breyer made a finding at page 6 of his August  
15 5th order. He made a finding that, in fact, the work-product  
16 doctrine -- here. I'll quote you the language.

17 **THE COURT:** I have it before me.

18 **MR. CASSMAN:** I misspoke. Page 7.

19 The e-mails are documents prepared in anticipation of  
20 litigation by the parties, and they -- or their agents, and  
21 they are work product.

22 That was his finding. It's a correct finding, based  
23 on all of the circumstances that were before the Court then and  
24 are before the Court now.

25 If there were any doubt in the Court's mind as to the

1 appropriateness of Mr. Borja's asserting his work-product  
2 privilege in these proceedings, then we would ask the Court to  
3 look at Rule 45, which we cited in our papers. That certainly  
4 provides the Court with the power and the discretion to permit  
5 Mr. Borja to assert his work-product privilege in these  
6 proceedings.

7           And we cited the *Meyer* case in our papers, which was  
8 decided about three months ago -- I have a copy of it here, if  
9 the Court would like to have it -- in which, on all fours,  
10 directly on point, a Central District Judge found that an  
11 individual who was a nonparty to the actual proceeding that was  
12 before the Court at that time was permitted, under Rule 45, to  
13 assert the work-product doctrine.

14           The *PUC* case that they rely upon is distinguishable  
15 for both of those reasons: It didn't involve a 1782  
16 proceeding, and it was decided before Rule 45 was amended.

17           And when Rule 45 was amended in 1991, the advisory  
18 notes expressly note that it was intended to expand and clarify  
19 the rights of nonparty individuals who became embroiled in  
20 civil proceedings such as this.

21           So we believe, for all of those reasons, that the  
22 Court shouldn't be concerned that there's a problem with  
23 whether Mr. Borja is a party to these proceedings.

24           Any questions so far, your Honor?

25           **THE COURT:** No. I'm reviewing what Judge Breyer held

1 in these issues. Proceed.

2 **MR. CASSMAN:** Okay. I'll move to specific categories  
3 of documents.

4 **THE COURT:** One issue -- and you don't need to just  
5 now; but the substantial need in the tail end of the  
6 work-product discussion, I think it addresses whether there is  
7 or is not a substantial need.

8 **MR. CASSMAN:** I'd be pleased to do that now.

9 I also believe Judge Breyer addressed that. It's  
10 clear to me that the Republic and the plaintiffs have been and  
11 will continue to do aggressive investigation and research, and  
12 search for documents, and legal research, and all -- the whole  
13 panoply of preparation that lawyers undertake in preparing a  
14 case.

15 They have no substantial need to see what we did, or  
16 how we did it, or when we did it. That's what they're  
17 attempting to do here. It's just -- the Hansen issue is a good  
18 example. Everybody was looking for him. Okay?

19 They have a question of whether we found him, or not.  
20 When they talk to Mr. Mason, they'll find out; but what they  
21 aren't entitled to do is find out why we were doing it, or what  
22 our strategy was in doing it, or any of those issues that go to  
23 the thought processes of attorneys.

24 **THE COURT:** And how about the Sandy Harris documents  
25 related to Mexico?

1           **MR. CASSMAN:** The Sandy Harris documents relating to  
2 Mexico -- they have a conspiracy theory that is speculation and  
3 has been rejected by Judge Breyer as to why those documents  
4 might be relevant. So they're not relevant, and they haven't  
5 made any showing that they are.

6           So, in order for there to be a substantial need to  
7 have those documents, they'd have to make a showing that they  
8 were relevant. Is that sufficient?

9           **THE COURT:** Yes.

10          **MR. CASSMAN:** You know, I'll talk about travel  
11 agents, and I'll talk about letters to courts.

12          Would the plaintiffs in the row like to know what  
13 documents we were seeking from a court, and which case, and  
14 which court?

15          You bet they would. I understand why they'd like to  
16 know what we were thinking and what we were doing; but it's not  
17 appropriate. It's work product. It shows what we were  
18 thinking; what our strategy was; and what our concerns were.

19          They don't get to find that out. It's not  
20 appropriate.

21          **THE COURT:** Now, if they're asking you what you're  
22 thinking, I certainly understand that; but what about a  
23 communication to the Court?

24          **MR. CASSMAN:** Right, which is asking -- so we have  
25 identified in our privilege log that we sent a letter to a

1 United States District Court.

2           Now, the whole point is: If they know which Court  
3 that was, what case it concerned, and what document we were  
4 requesting, if that's what it was, then they are finding out  
5 what other strategy was and what we were trying to do. It's  
6 classic work product.

7           And, at pages 7 and 8 of Judge Breyer's order, he  
8 expressly addresses that argument, and upholds it. He says  
9 that's correct. To the extent these otherwise factual,  
10 nonlegal, strategy documents would tend to disclose what an  
11 attorney's purpose or strategy or thoughts or opinions are,  
12 then it's protected under the work-product doctrine.

13           That's why those letters are on our privilege log.  
14 That's why we believe they are subject to protection.

15           And exactly the same argument should be made for the  
16 traveling agents. Why were we -- where were we going and when  
17 were we going there tends to show what we were thinking and  
18 what our strategy was and what our opinions were. So for those  
19 reasons.

20           Communications with third parties, to and from.  
21 Counsel consistently and vehemently, as with their factual  
22 misrepresentations, mis-cites the legal standards. The legal  
23 standard is: Communications with a third party remain subject  
24 to the work-product doctrine, unless the disclosure  
25 substantially increases the likelihood that the documents and

1 their contents would fall into the hands of opposing counsel.

2 Now, there's an easy test to determine whether that's  
3 true. If it were true, they'd have the documents, and they  
4 wouldn't be trying to get them from us. So there has been no  
5 diminution of Mr. Mason's expectation that these documents  
6 would not arrive in the hands of opposing counsel, and no  
7 diminution in our expectation that they would not arise in the  
8 hands of opposing counsel.

9 And that's the legal standard. And it's cited in our  
10 papers.

11 Mary McNamara. Yes, we do know Mary McNamara. I  
12 wager she was at the event last night. And she is an attorney  
13 who, as our papers indicate, was involved for a short period of  
14 time as a potential attorney for Mr. Hansen. And that's the  
15 extent of it.

16 **THE COURT:** What was the date of that? I know it was  
17 addressed in your papers. What was the date of her  
18 involvement?

19 **MR. CASSMAN:** I don't know, off the top of my head.  
20 We'll get that for you.

21 **MR. NIESPOLO:** It's on the log, your Honor. We'll  
22 look it up.

23 **THE COURT:** Okay. Great.

24 **MR. CASSMAN:** I don't have that.

25 **THE COURT:** We'll leave it for Mr. Niespolo.

1           **MR. CASSMAN:** The Serrano and Merkl -- those are  
2 addressed in subsequent papers that have been provided to  
3 counsel. They were private investigators that assisted  
4 Mr. Mason in his work. And that's in the record. It's before  
5 the -- counsel. And they know it.

6           They referred to Sandy Harris. Our privilege logs  
7 refers to him as "Charles Harris." I just want you to know  
8 that might be a discrepancy.

9           **THE COURT:** And it's the same person?

10          **MR. CASSMAN:** They know exactly who he is. And, in  
11 fact, Counsel described him here. He shouldn't have any  
12 problem with the concept that Mr. Mason, in communicating with  
13 him, was acting at the behest of counsel, and in making  
14 communications on behalf of counsel that would tend to disclose  
15 our thoughts, opinions, and strategies.

16          **THE COURT:** All right.

17          **MR. CASSMAN:** I will defer to Mr. Niespolo on the  
18 issue of the adequacy of the privilege logs, unless the Court  
19 has any other questions.

20          **THE COURT:** I do not. Thank you very much.

21          **MR. CASSMAN:** Thank you.

22          **MR. NIESPOLO:** Your Honor, with regard to the  
23 privilege log -- and I can come back to it -- we obviously  
24 think that the descriptions that we've put in the privilege  
25 log, three of which we've produced, and then this fourth one



1 with regard to the Mary McNamara, common-interest privilege --  
2 we've met and conferred with the other side. Those -- those  
3 descriptions were added to, because of objections that were  
4 raised to some of the descriptions.

5 **THE COURT:** That was one I wanted to ask you about,  
6 is: What was the short version of the procedural history as to  
7 how those -- why you have so many privilege logs; how you moved  
8 from one to each; and which --

9 I assume I should be looking at the most recent one.  
10 That's really the live one that's in dispute, but are there  
11 aspects of the changing nature of them that you think are  
12 significant for me to understand?

13 **MR. NIESPOLO:** Well, I think, you know, they've  
14 objected to certain entries.

15 **THE COURT:** Mm-hm.

16 **MR. NIESPOLO:** And you can look at those entries.  
17 And you will see that here's what happened.

18 The hearing was on July 5th. Judge Breyer issued his  
19 order shortly thereafter, and asked us to meet and confer with  
20 regard to a privilege log.

21 We did. And you heard about an e-mail where it said,  
22 "Re: Greeting."

23 And they said, "That doesn't tell us enough."

24 So then we got very specific about what we could tell  
25 them, without disclosing what the content of the communication

1 is, which is the problem that you always face; but we've used  
2 language, you know, in that privilege log, in addition to, in  
3 furtherance of an investigation, that says: Instructions from  
4 counsel, results of investigation, et cetera.

5           So we think -- unless the Court has questions of us  
6 with regard to concerns that you have, we think that the  
7 descriptions are more than adequate to give them the  
8 opportunity to say, "Well, we don't think that work-product  
9 immunity applies to that particular entry because" --

10           And to go any further --

11           You know, are there some that -- you know, might you  
12 find one or two that we could?

13           Maybe, but we think that we've gone as far as we can,  
14 without disclosing the substance of what it is that we're  
15 claiming should and can be protected --

16           **THE COURT:** Mm-hm.

17           **MR. NIESPOLO:** -- under the work-product privilege.

18           Now, you've heard a lot about -- and I don't want to  
19 go over things that you don't need me to go over, but I would  
20 like to make a few points about these third-party documents, I  
21 mean, because this really is a practical application issue.

22           I mean, if you really sit back and you say, "Okay.  
23 So, you know, work product. Is this -- is this thoughts,  
24 strategy, impressions, you know, which becomes opinion, work  
25 product of an attorney, or is it ordinary work product, and,

1 you know, the kind of things that you would expect when you are  
2 a practicing lawyer, or that I expect, as a practicing lawyer,  
3 would be protected as being done in anticipation of  
4 litigation?"

5           And we'll talk about the *Meyer* case in a minute, but  
6 in general, are communications all the time that are  
7 communications with travel agents work product?

8           Answer: Probably not.

9           Okay?

10           In this case, if those communications talk about  
11 where we're sending somebody -- an investigator, for a  
12 particular reason -- that's work product, because that will  
13 communicate to the recipient who's asking for it what our  
14 strategy is, what our thoughts are, what we think is important.

15           Making inquiries of Courts with regard to records  
16 about particular individuals -- same thing.

17           And the fact that we've made these requests to third  
18 parties, or that the communications are from third parties does  
19 not work -- they've kind of tried to analogize it to a waiver  
20 of the attorney-client privilege. It doesn't mean that you've  
21 waived it.

22           And the standard isn't that you have to have some --  
23 the person who's receiving it has to have some confidential  
24 agreement or understanding with you. That's just a factor. It  
25 is not dispositive.

1           In other words, if there is some confidential  
2 relationship with the individual, it becomes a factor that  
3 indicates to you what the real analysis should be, which is:  
4 Your disclosure is not going to substantially increase their  
5 opportunity to get that work product. That's the question  
6 that's asked at the end of the day.

7           And if there's a confidential relationship, that's  
8 one way that shows that it's unlikely that there's going to be  
9 a substantial opportunity for them to get the information.

10           **THE COURT:** How about the asserted waiver by not  
11 including the Mason documents in response to the subpoena?

12           **MR. NIESPOLO:** In response to the Borja subpoena?

13           **THE COURT:** Yeah.

14           **MR. NIESPOLO:** Let me make sure that the Court really  
15 understands that. And I really think your Honor you should  
16 take a copy with you.

17           **THE COURT:** Yeah.

18           **MR. NIESPOLO:** Because what's happened here -- and I  
19 don't mean to subscribe any mal intent to the people at  
20 Winston. What they've done is they've given a definition of  
21 "you."

22           **THE COURT:** Originally gave the definition to the  
23 parties; not to me; but I understand.

24           **MR. NIESPOLO:** But here in the courtroom.

25           **THE COURT:** Right.

1           **MR. NIESPOLO:** So the definition of "you" includes  
2 accountants, investigators; dentists next week, you know, and  
3 all of that; but that doesn't determine what you have to  
4 produce. What you have to produce is determined by what  
5 documents are requested.

6           You won't have -- as Mr. Cassman said, it won't take  
7 you long to look at the attachment. "Produce documents that  
8 are" -- It's very precise. It's Chevron driven. With the one  
9 exception that he described, it does not call for the  
10 document -- you know, you could have gone looking at the  
11 privilege log. You could have gone to the Mason Group and  
12 said,

13                        "Do you have any documents that are  
14 responsive to this subpoena?"

15           Answer: No.

16           Now --

17           **THE COURT:** Because the originally it was not focused  
18 on Mason Group; it was focused on Chevron in other parts of the  
19 case?

20           **MR. NIESPOLO:** That's my surmise. I agree that  
21 that's the most likely reason. I don't know if they didn't  
22 look at their subpoena before they made that argument, both in  
23 the opening brief and in the reply; but you know, doing what I  
24 do, it's a first thing you do.

25           And so that's my response to the waivers issue.

1 I still don't think it works a waiver, in any event,  
2 I mean, because the whole waiver issue -- again, looking at  
3 this and taking a practical approach to this, you have  
4 discretion to decide whether or not, for instance, there's been  
5 prejudice that they've suffered -- and there is none, because  
6 they served a subpoena on Mason.

7 This isn't Borja coming in pursuant to some  
8 subsequent request from Borja specifically. Mason documents  
9 have been subpoenaed. The privileges are being put forward as  
10 a result of that particular subpoena. So there's no prejudice  
11 that they're suffering from this by you dealing with it.

12 And so even if that weren't true -- and it is true --  
13 I would suggest to the Court that, in your discretion, you  
14 would still not find waiver. There's no reason to find waiver  
15 in this circumstance.

16 **THE COURT:** One of the particular documents we talked  
17 about before was the billing invoices. You said there had been  
18 redacted ones produced. Can you tell me more about what was  
19 produced, and what the basis of the redaction was?

20 **MR. NIESPOLO:** This table (indicating) will correct  
21 me if I'm wrong, because I didn't do the document stuff.

22 **THE COURT:** I understand.

23 **MR. NIESPOLO:** But I'm confident -- fairly confident  
24 that, pursuant to the Borja subpoena, what was produced,  
25 because they had it in their possession, were the Mason bills

1 for the work that the Mason Group did, which, by the way, was  
2 not like some monstrous amount of investigative work.

3 And the content, as is always the case, is redacted:  
4 The description of what you're doing.

5 **THE COURT:** The description of what was performed?

6 **MR. NIESPOLO:** That's right. And in fact, they  
7 probably provided more information than they should have under  
8 the normal practice, if you will; but -- so that information  
9 was redacted from all of the Mason bills, and produced to, I  
10 believe, both sides: The ROE and the LAP, as they're wont to  
11 be called.

12 So the request came in, and we didn't provide it; but  
13 we said in our papers, "We're happy. We'll give you the same  
14 thing again, because that's all there is."

15 So this is not a --

16 **THE COURT:** You're sort of asserting the same  
17 privilege objection as was asserted by Borja?

18 **MR. NIESPOLO:** Yeah. I think they're -- what I heard  
19 and what I read in the briefs is this: You didn't provide the  
20 redacted bills, and you should have.

21 You know, your Honor, they may be right. They were  
22 already produced. It slipped by us. So I'm happy to give them  
23 a second copy of the same redacted bills. And we told them  
24 that. So this is a nonissue.

25 **THE COURT:** That's not anybody really wants to have

1 happen.

2           **MR. NIESPOLO:** No, but they haven't asked for  
3 unredacted bills. And they didn't ask for it in a motion.  
4 What they did was say,

5                    "They gave the redacted bills, and you  
6 didn't."

7            Okay. We'll give you the redacted bills.

8           **THE COURT:** All right. Anything else that --

9           **MR. NIESPOLO:** Yeah. There are some things I just  
10 want to clarify. And I'm not going to really do what I want to  
11 do. So -- because there were some statements that I think are  
12 important for you to appreciate in -- in the description that  
13 was given to you.

14            Look. I have spent, like, next to no time learning  
15 about the machinations. I know Judge Kaplan, District Court  
16 judge in Southern District, very well. I've been in front of  
17 him. I'm sure he's doing what he's doing, and would never --  
18 I'm not commenting or questioning any of that, but I'm also not  
19 sitting here, reading all of that stuff for my own  
20 entertainment or enjoyment or interest.

21            My representation here has nothing to do with that;  
22 with what's going on in front of Judge Kaplan, and how they're  
23 getting beat up, or how Mr. Tyrell feels bad because, having  
24 been on the defense side his whole life and probably beating up  
25 on people just like he's getting out-lawyered and beaten up



1 now -- he's feeling pretty bad. I mean, really, you know, I'm  
2 passionate. This is personal for him. I mean, 45 minutes in  
3 front of you talking about stuff that has nothing to do with  
4 whether or not Eric Mason's investigative group should be  
5 producing some small quantity of documents that he is hoping  
6 against hope, after being told 8 million times, "Don't lend any  
7 credence, proof, or evidence to his whacked-out conspiracy  
8 theory. It's not there."

9           You need to know this. Back in April -- I think it  
10 was April -- when we were first in court, I said to him -- we  
11 asked Breyer to take a recess. And I said,

12                   "Look. Forget about documents.  
13                   They're privileged, anyway. Let's not  
14                   fight about documents. I will set up,  
15                   immediately, in the near future -- right?  
16                   You know. Give us a couple of weeks, three  
17                   weeks, something, to get them ready. I  
18                   will give you Eric Mason for a deposition.  
19                   I will give you Joe Parisi for a  
20                   deposition."

21                   Immediate response:

22                           "I want those documents."  
23                   There's nothing in those documents. There's nothing  
24 about this stuff that you're doing.

25                   Now, fine. He doesn't have to take my word for it.

1           **THE COURT:** He doesn't have to. And --

2           **MR. NIESPOLO:** He doesn't know me. He's not from  
3 here. So I won't be too offend by the suggestion that he  
4 continues to make after Breyer slapped him of us being involved  
5 in some nefarious, collusive conspiracy with Chevron to tank  
6 the Ecuadorian --

7           This isn't my fight.

8           Okay?

9           And I -- you know, Chevron's got Chevron's battles  
10 all over the country with them, and outside the country. Okay.  
11 You know.

12           But the point I'm making to you is that we offered up  
13 the depositions.

14           **THE COURT:** And that offer is still open?

15           **MR. NIESPOLO:** Well, the application's been granted.  
16 There's a deposition that's going to be scheduled. The offer's  
17 still open. I mean, now we're fighting. I said,

18           "If you pursue with these documents,  
19 we're going to be fighting about this,  
20 because it's a privilege. It's the  
21 principle of the privilege, at a minimum.  
22 Take the depositions. You'll see what I'm  
23 telling you is true. You'll find out that  
24 there's probably some other 1782 that your  
25 time is better spent on. Ask Eric."

1 No.

2 **THE COURT:** All right.

3 **MR. NIESPOLO:** You know. So here we are. Okay?

4 So this whole notion of -- and I am -- and I said  
5 this to Breyer. And Arguedas said it to Breyer. And I'm going  
6 to say it again. It makes me angry to listen to someone like  
7 him come in here and impugn our integrity and my law firm's  
8 integrity, not suggesting, expressly saying,

9 "You're part of some Chevron conspiracy  
10 to do bad stuff. And you know what? We're  
11 getting spanked. And it may be that the  
12 judges down in Ecuador were corrupt, so  
13 I've got a bad judgment, and I'm getting  
14 killed all over the country. So come on,  
15 Judge, balance this out a little bit over  
16 here. You know. Let us -- let us try to  
17 beat up on Chevron."

18 That ain't -- that's just not what this is about.

19 So he said -- this is a factual statement -- that  
20 information -- documents that they have show that Chevron's  
21 lawyers instructed Arguedas, Cassman & Headley, and therefore,  
22 Mason -- his language --

23 "Start shadowing Hansen. He may be  
24 dangerous to us."

25 There is no e-mail; there is no document, as he

1 suggested to you, that says that. It doesn't say that.

2           There's documents about people trying to find Hansen,  
3 but it doesn't say that, which is important. That's the kind  
4 of stuff that Breyer listened to, and made the findings that he  
5 did.

6           He said that the Mason Group is, quote,

7                   "Up to their eyeballs in this."

8                   -- the "this" being the Chevron conspiracy.

9           There was no evidence before you, there is no  
10 evidence before Breyer, who has seen a lot of stuff, that --  
11 and Breyer found -- that suggests that there's any truth to  
12 that, but he keeps saying that.

13           And that's just wrong. I can't stand here and just  
14 let that be the record. I mean, it's wrong. That's my client.  
15 And it's a lie.

16           Okay. I already told you about the fact that we've  
17 revised the log.

18           And just so that you know this, so the second log was  
19 a revision after our meet and confer. And then, right before  
20 the production, of course, the people working with me went  
21 through the documents one by one very carefully again. And  
22 they found a few other documents that had slipped through, and  
23 that they then also asserted a privilege as to. So there were  
24 another few documents that that happened to.

25           You have that log. That's the one that's an exhibit,

1 but we revised the logs because we met and conferred. And  
2 people didn't like descriptions like what we gave them. They  
3 wanted more.

4 So okay. We'll give you more.

5 And I am happy to address that today, after today, at  
6 any time. If you have concerns about any of the entries at  
7 all, your Honor, we will make ourselves available on a moment's  
8 notice.

9 **THE COURT:** If my order were to be on particular  
10 entries to have you meet and confer further about that, you  
11 would be amenable to that?

12 **MR. NIESPOLO:** Absolutely. I don't want to sit here  
13 and try and guess.

14 **THE COURT:** Right.

15 **MR. NIESPOLO:** Okay. We talked about sharing.

16 Substantial need. I don't know that you need  
17 anything further than what Breyer said. And if --

18 Oh, oh. Before I get to substantial need, this is  
19 Mr. Tyrell:

20 "Your Honor, we can't get anything out  
21 of Mexico."

22 Well, that's disingenuous. They have an  
23 investigator, not to the surprise of Judge Breyer, who put that  
24 in his order. And I imagine that they do. His name's  
25 Grant Fein. He has been down in Mexico during the relevant

1 time period, meeting and interviewing Sandy Harris, and asking  
2 him all of the questions that he could possibly want to ask  
3 him. And I believe it was over a period of more than one day.

4 And Sandy made himself available to Grant Fein, who,  
5 you have a -- you have another report from Grant Fein that is,  
6 I think, Exhibit A to Mr. Tyrrell's declaration, with his reply  
7 brief. So he's identified.

8 You may know Grant Fein, because he's an investigator  
9 who often does criminal work in addition to civil work here in  
10 the Bay Area.

11 **THE COURT:** Mm-hm.

12 **MR. NIESPOLO:** So the notion that we can't get  
13 anything out of Mexico about Sandy Harris is just not accurate.  
14 And they've had access to him. They've fully interviewed him  
15 about anything that Grant -- and Grant Fein went to see him at  
16 a time that's relevant to -- I'm sure that Grant Fein had the  
17 opportunity to say,

18 "Did you talk with the Mason Group?

19 Did you talk with anybody on behalf of  
20 Borja? What did you tell him?"

21 -- or certainly had the opportunity to do that.

22 **THE COURT:** All right. Anything else? We've got a  
23 criminal calendar that's in the back of the courtroom, so --

24 **MR. NIESPOLO:** I'm so sorry.

25 **THE COURT:** -- you want to push us towards the end.

1           **MR. NIESPOLO:** I am close to wrapping up here.

2           The whole not -- the whole 45(a) issue.

3           **THE COURT:** Mm-hm.

4           **MR. NIESPOLO:** So the *Meyer* case clearly dealt with a  
5 situation where class-action lawyers in Florida in the -- in  
6 federal court in Florida subpoenaed the files of an attorney in  
7 Orange County who had a similar class action, but filed in  
8 state court. And he wanted reports from experts, et cetera.

9           **THE COURT:** Right.

10          **MR. NIESPOLO:** And so the lawyer in Orange County  
11 said,

12                        "We object on the basis of work  
13 product."

14           I don't know if the Court's familiar with it. If you  
15 are, I'll stop.

16          **THE COURT:** I am. I am.

17          **MR. NIESPOLO:** Okay. I mean, it's a clear  
18 application of Rule 45 to a nonparty's assertion of work  
19 product under circumstances where the documents were created in  
20 anticipation of litigation not with those parties.

21          **THE COURT:** And that's a Central District case.  
22 That's the best case that your side has.

23          **MR. NIESPOLO:** Absolutely.

24          **THE COURT:** As I understand it, there's not a  
25 Northern District case that you're aware of that's on point.

1           **MR. NIESPOLO:** Absolutely. That's directly on point.  
2 It deals with this situation. It's this year. It's post the  
3 amendment of to Rule 45. *CPUC* is pre the amendment to 45.  
4 You've heard about the notes; the advisory notes. I don't need  
5 to go through that. So that's all I have.

6           **THE COURT:** All right. Thank you, Mr. Niespolo.

7           **MR. NIESPOLO:** Thank you, your Honor.

8           **MR. TYRRELL:** Your Honor, very brief rebuttal.

9           **THE COURT:** I've given you 45 minutes, so I'll give  
10 you two minutes, if you want to hit the highest points for  
11 Republic, if you want to similarly take two minutes; but we do  
12 have other business to attend to. And I'll say so far, I've,  
13 you know, given you a lot of time. I appreciate the education  
14 that Chevron has given me on the facts and the law on the case.  
15 And it's been worthwhile for me. I know that it's all things  
16 that you already know. And a number of issues are disputed,  
17 and lots of passion in the case. I am benefitting from hearing  
18 about the facts and the law. So that's why I've given you as  
19 much time as I have, Mr. Tyrell.

20           **MR. TYRRELL:** Thank you so much, your Honor. You  
21 have been most generous.

22                   Counsel on the other side would have this Court  
23 believe that there was no basis to refer by Judge Breyer this  
24 matter to you; that it was all decided in his prior opinion.  
25 Here's what Judge Breyer said.



1           "The Court is not inclined to give the  
2           parties an advisory opinion as to which  
3           documents or category of documents are  
4           likely to be privileged, and which are not.  
5           The Mason Investigative Group has created a  
6           privilege log that is the appropriate  
7           starting point for discussions of privilege  
8           as to particular documents."

9           This was not previously decided. Judge Breyer, I  
10          don't think, is in the course of making make-work.

11          Turn to the case that Counsel says controls this. It  
12          does not. It is a case called *Meyer v. Colavita, U.S.A.* In  
13          that case, which is an unusual exception to the general rules  
14          we have articulated, the Court said that,

15                 "They assert that a Rule 45 inherently  
16                 imports for subpoenaed nonparties the  
17                 work-product protections."

18          That's what they say it does. However, the courts --  
19          the case, itself, makes two important points that are  
20          distinguishing. The courts only recognize such an extension of  
21          the work-product protection to subpoenaed nonparties where the  
22          nonparty will likely become involved in a future litigation  
23          with the requesting party, thereby rendering disclosure unjust.

24          The court went on to say that there was an additional  
25          factor in that case which tilted it in that direction, not

1 present here. It said that the party trying to get the  
2 information was really trying to coöpt the fruits of the work  
3 done by the other side.

4           That's the antithesis here. We don't want to take  
5 their work product and use it for ourselves. We want to know  
6 what happened, so that, on the issue of unclean hands, which  
7 has to be put in before the court in Ecuador, we want to be  
8 able to show what they did.

9           So the case, if you look at it hard, is  
10 distinguishable.

11           You've been great. And let me just close only with a  
12 personal response to Mr. Niespolo.

13           Mr. Niespolo says, "The documents don't matter. I  
14 told him he could take the depositions."

15           But what good lawyer takes a deposition without  
16 documents?

17           And I suggest to you Mr. Niespolo is his own best  
18 refutation. If they didn't matter, he, Chevron, and the  
19 Borjas' counsel wouldn't be here arguing as they did.

20           Finally, Mr. Niespolo says that Mr. Tyrrell has gone  
21 around the country, and he's been spanked by a whole lot of  
22 courts, and he's asking, in essence, for some forgiveness from  
23 your Honor.

24           I personally don't consider two reversals and wins in  
25 the Third Circuit Court of Appeals, a complete reversal of

1 Judge Kaplan last week by the Second Circuit --

2 **THE COURT:** We're not a scoreboard here. And  
3 that's -- I've probably let too many personal references  
4 between the two of you go on. I'll stop you there. I'm not  
5 going to decide this issue based on either of the individual  
6 attorneys. And I'm going to stick to the facts. So let's stay  
7 there.

8 **MR. TYRRELL:** Your Honor, one offer, if you wish it.  
9 Judge DuBois, in the Eastern District of Pennsylvania, asked us  
10 to prepare a list of the 1782s around the country, and which  
11 case had gone which way with respect to the issue of  
12 crime-fraud exception -- not a finding of fraud, but  
13 crime-fraud exception; to produce documents.

14 We have that list available, and can make it  
15 available to your Honor if that would be of use to you.

16 **THE COURT:** If you think it's important -- I don't  
17 sense that that's -- if you haven't submitted it already, that  
18 that's going to tilt the balance on this issue, but if you want  
19 to submit it --

20 **MR. TYRRELL:** It was purely a response saying that  
21 around the country we have been held guilty of fraud, which is  
22 not true.

23 **THE COURT:** Thank you.

24 **MR. EWING:** Your Honor, very briefly -- and again,  
25 thank you time this morning. And apologies for the amount of

1 time this takes, but two quick points.

2           The first: That the primary case that they've been  
3 able to find, *Meyers*, has been expressly discussed by  
4 Judge Illston here in this court. And we just remind you that  
5 we have addressed that in our argument below.

6           **THE COURT:** Okay. I've seen that, so --

7           **MR. EWING:** Thank you, your Honor.

8           And, to the more fundamental point of the *Meyer*  
9 decision and to their argument, there will always be other  
10 litigation that you may or may not anticipate. Rule 26 is  
11 clear. And the *CPUC*, Judge Illston, and other cases are clear:  
12 It just does not extend that far.

13           Thank you again for your time, your Honor.

14           **THE COURT:** All right. Thank you to everyone for  
15 your time.

16           Mr. Cassman, I know there's probably more you'd like  
17 to say, and I bet you'll have a chance to say it at a future  
18 date.

19           I am going to take the motions under submission. I  
20 will be offering an opinion shortly on them.

21           And if there are have been several things that  
22 parties suggested they would like to submit, including  
23 Mr. Tyrell, you're welcome to submit those in the next few  
24 days. Give me time to consider it, if you think it's  
25 appropriate to do so.

1           That's not to suggest another round of briefing.

2           Mr. Niespolo, I see you have something passing out.

3           **MR. NIESPOLO:** This is the subpoena.

4           (Whereupon a document was tendered to the Court)

5           **THE COURT:** We'll take that under advisement.

6           **MR. EWING:** Your Honor, that is Exhibit 3. You  
7 already have a copy of it.

8           **THE COURT:** Now I'll have two copies. Thanks so much  
9 for everyone's attention. Next matter in about five minutes.

10           (At 11:19 a.m. the proceedings were adjourned)

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**CERTIFICATE OF REPORTER**

I, LYDIA ZINN, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C.11-80087 CRB, In re: Daniel Carlos Yaiguaje; and C. 11-80110 CRB, In re: Dr. Diego Garcia Carrion, *et al.*, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

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/s/ Lydia Zinn, CSR 9223, RPR

Thursday, September 29, 2011