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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

IN RE: ) Case No. 10CV1146-IEG (WMC)  
)  
APPLICATION OF CHEVRON ) San Diego, California  
CORPORATION. )  
) Friday,  
) August 27, 2010  
\_\_\_\_\_ ) 3:00 p.m.

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE WILLIAM MCCURINE, JR.  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 SAN DIEGO, CALIFORNIA FRIDAY, AUGUST 27, 2010 3:00 P.M.

2 --oOo--

3 (Call to order of the Court.)

4 THE CLERK: Calling Case Number two on the docket,  
5 Civil Number 10CV1146, In Regard the Application of Chevron  
6 Corporation.

7 Counsel, please be seated and enter your  
8 appearance for the record.

9 MS. NEUMAN: Andrea Neuman, Gibson Dunn, on behalf  
10 of Chevron Corporation.

11 MR. SABOVICH: Jim Sabovich, Gibson Dunn, on  
12 behalf of Chevron.

13 MS. SEVERSON: Good afternoon, your Honor. Maria  
14 Severson on behalf of Respondent's E-Tech International,  
15 William Powers, and interested parties, the Ecuadorian  
16 Plaintiffs.

17 MR. AGUIRRE: And Michael AGUIRRE with Ms.  
18 Severson.

19 THE COURT: Good afternoon everyone. Before we  
20 get started, let me give you some protocols.

21 Number one, you got 35 minutes a side. Allison  
22 will be the time keeper. You can spend your time however  
23 you want, but you have 35 minutes. If you interrupt  
24 opposing counsel, you lose a minute. Second time you lose  
25 three minutes. Third time you lose five minutes. After the

1 third time, you're out of time.

2 You clear?

3 MS. NEUMAN: Yes, your Honor.

4 THE COURT: Do not stand up while opposing counsel  
5 is speaking. Don't try to get my attention. It distracts  
6 me. So you will get your shot. You will get your shot.  
7 So, however infuriating the other side may be, how wildly  
8 stupid and inaccurate their statements may be, you let them  
9 pass until it's your turn to speak. Understood?

10 ALL: Yes, your Honor.

11 THE COURT: Great. All right. And when it's all  
12 over and the ruling comes back, you must come back and  
13 personally carry your exhibits out. You can't send a  
14 messenger. I want to see you carry them in your hands.

15 All right. So Applicant goes first. Are you the  
16 PowerPoint person?

17 MS. NEUMAN: I am, your Honor. Is that acceptable  
18 to the Court?

19 THE COURT: Yes, ma'am. And I do want you to know  
20 I have read the materials. Okay.

21 MS. NEUMAN: And if your Honor wants -- I  
22 understood your Honor to say we could address whatever we  
23 liked in our 35 minutes, but if there's something you would  
24 like us to focus on, obviously we're interested in the  
25 Court's guidance in that regard.

1           THE COURT: I would like you to specifically  
2 address this little issue of the service. You know, there  
3 was a statement that in another jurisdiction you were told  
4 -- when I say you, the Chevron people were told don't talk  
5 with -- or deal with our clients directly. Serve counsel.  
6 And then when you served counsel, they said that's the  
7 improper way to do it. I'd just like you to kind of  
8 rehearse that with me a little bit. I want to make sure  
9 that I got it right.

10           Otherwise, fire away. I don't care if you save  
11 that to the end.

12           MS. NEUMAN: Okay, your Honor. Thank you. I  
13 think I'll save it for a little while, but I will get to  
14 that in some detail.

15           As your Honor is aware, we are here on a 1782  
16 application, not for one but for two foreign proceedings.  
17 One is an international treaty arbitration taking place in  
18 the Hague, and the other is civil litigation taking place in  
19 Lago Agrio, Ecuador. There's no objections from the  
20 Republic of Ecuador, who is the opposing party in the treaty  
21 arbitration, but there have been objections from Plaintiffs  
22 and the Respondents in this matter.

23           As the Court is aware from having read the papers,  
24 the Court's not writing on a totally clean slate here.  
25 There have now been nine district courts that have granted

1 Chevron's related 1782 applications. One of these  
2 applications, which was affirmed recently by the Second  
3 Circuit was to get the out takes from the movie "Crude"  
4 which showed Plaintiffs and their consultants meeting with  
5 Mr. Cabrera prior to his appointment and planning what was  
6 afterwards falsely misrepresented as his independent expert  
7 report.

8           The rest of these applications relate directly to  
9 experts or consultants of the Plaintiffs who we have  
10 evidence were involved in the ghost writing of Mr. Cabrera's  
11 report, and I think not surprisingly, all of the District  
12 Courts have held that you're entitled to discovery of what  
13 was given to a testifier, especially when that testifier is  
14 supposed to be an independent court expert.

15           In the Middle District of Tennessee, the  
16 deposition of a Mark Quarles (phonetic), a supposed  
17 Plaintiff consultant expert was ordered to take place by  
18 September 1st. Plaintiffs took an emergency stay to the  
19 Sixth Circuit. The Sixth Circuit denied that today,  
20 finding, among other things, that Quarles and the Ecuadorian  
21 Plaintiffs have not demonstrated a strong or substantial  
22 likelihood of success on the merits of this appeal. Thus,  
23 while the Sixth Circuit hasn't reached the merits, it  
24 certainly has indicated that the discovery shall go forward.

25           For some background, your Honor, this is Richard

1 Cabrera, the independent neutral expert in the Lago Agrio  
2 litigation. He was appointed by the Ecuadorian Court on  
3 March 19th of 2007, and the words "independent" and  
4 "neutral" are in quotes because the Plaintiffs, the Court,  
5 and Mr. Cabrera constantly represented him as being an  
6 independent special master of the Court.

7           On June 13th, 2007, when Mr. Cabrera was sworn in,  
8 the expert states that he is not under any legal impediment  
9 whatsoever and swears to perform his duties with complete  
10 impartiality and independence vis-a-vis the parties.

11           After there were some issues with whether he was  
12 being independent, the Lago Agrio court issued a number of  
13 orders reminding Mr. Cabrera of his duties and of the  
14 independence of his work. In October of 2007, the Court  
15 stated:

16           "The expert is hereby reminded that he  
17 is an auxiliary of the Court. The  
18 transparency of the expert's work will  
19 be insured, and the parties shall have  
20 access to that work. Cabrera must  
21 perform his work in an impartial manner  
22 and independently with respect to the  
23 parties."

24           And the Court goes on to say that his work must be  
25 independent from the parties and he must be responsible for

1 the content of his work.

2           In another order issued by the Ecuadorian court in  
3 November of 2007, the Court was very specific in stating  
4 that all of the documents that serve as support or a source  
5 of information for the work performed by the expert must be  
6 presented together with the report. At that time, all those  
7 documents will be provided to the parties. For the  
8 foregoing reasons in his report, the expert is required --  
9 excuse me, your Honor -- to cite all the scientific sources  
10 and analytical and legal documents that he uses to perform  
11 his work.

12           Now, what's interesting about this order, your  
13 Honor, is at this time Mr. Cabrera was seeking documents  
14 from third parties in Ecuador, and Chevron went to the Court  
15 and said "We would like copies of what the third parties are  
16 giving Mr. Cabrera" from the third parties. And the Court  
17 said, "Fine, you can have those," and then went on to say,  
18 "but he's going to have to give you everything anyway when  
19 he files his report, but you can go get them from the third  
20 parties if you want to."

21           This order in particular, along with the last  
22 order I quoted to your Honor, completely refutes Plaintiff's  
23 claim that Chevron is trying to circumvent any foreign proof  
24 gathering restrictions. The Ecuadorian court has made clear  
25 that Mr. Cabrera should have, though he did not, acknowledge

1 any role that Plaintiffs had in his report and provide any  
2 documents that they provided to him.

3           Instead, what Mr. Cabrera did was falsely deny his  
4 relationship with the Plaintiffs. In July of 2007 he said  
5 to the Ecuadorian court:

6           "I do not have any relation or  
7 agreements with the Plaintiff, and it  
8 seems to me to be an insult against me  
9 that I should be linked with the  
10 attorneys of the Plaintiffs."

11           THE COURT: What you're doing now is just reading  
12 from excerpts that are in the various documents you've given  
13 me, right, because I remember these same statements. I'm  
14 not stopping you. I just wanted confirmation.

15           MS. NEUMAN: Yes, your Honor. And on the slides  
16 is a cite for the Court to where it is in the record.  
17 Everything here is in the record.

18           And then Mr. Cabrera went on to say on October  
19 11th, 2007, that he was acting with absolute impartiality,  
20 honesty, and transparency, and that the idea that the  
21 Plaintiffs would be helping me is unthinkable. He denied  
22 receiving any technical assistance from the Plaintiff and  
23 the Plaintiffs, likewise, denied providing it.

24           We now know all of those representations to have  
25 been false, your Honor. Following the Second Circuit's



1 order in July, which given the exigent circumstances here at  
2 issue less than 24 hours after oral argument, which I think  
3 is fairly unheard of for any circuit court, Mr. Berlinger  
4 (phonetic) had to produce the out takes from the movie  
5 "Crude," the footage that no one had seen but had been  
6 filmed, and I have three short clips from that film.

7           What's important about these clips, your Honor, is  
8 that this is taken on March 3rd, 2007, almost -- a little  
9 more than two weeks before Mr. Cabrera is appointed as the  
10 Ecuadorian court's independent expert.

11           THE COURT: Say that statement again. How much  
12 time?

13           MS. NEUMAN: A little more than two weeks before.  
14 And, as your Honor will see, despite the fact that Mr.  
15 Cabrera has not yet been appointed, Plaintiffs not only know  
16 that he is going to be appointed to this independent post  
17 but are also having a meeting to plan his report. The  
18 PowerPoint that's on the screen there, your Honor, the --  
19 it's planned in the examination of the global expert, and  
20 the people in this still are Yanza (phonetic), who is a  
21 representative of the Plaintiffs, Mr. Cabrera in the striped  
22 jacket, and Mr. Fajardo, who is Plaintiff's Ecuadorian  
23 counsel.

24           If we go to the next slide, on the next day I'm  
25 going to show clips from a March 4th meeting which was

1 attended by E-Tech chief scientist Ann Maest, Steve  
2 Donzinger (phonetic), who is Plaintiff's lead counsel in the  
3 U.S., and E-Tech Director Kamp.

4 Now, these clips, this one at least, your Honor,  
5 is in Spanish, so it has been subtitled. Can you play the  
6 clip, please.

7 (Video clip played.)

8 MS. NEUMAN: So that was simply showing that Mr.  
9 Cabrera was at this meeting and identified himself to the  
10 film crew. They then pan off of him, but he is over in that  
11 corner where you first saw him in the jacket. Play the next  
12 clip, please.

13 (Video clip played.)

14 MS. NEUMAN: Mr. Fajardo is describing what he  
15 anticipates Chevron will do.

16 (Video clip continues.)

17 MS. NEUMAN: And there are Maest and Kamp again,  
18 your Honor. What is really shocking about that clip is here  
19 they are in a secret meeting with this expert who has yet to  
20 be appointed as the global expert for the Ecuadorian court.  
21 Yet they're planning his report. They're planning how to  
22 keep Chevron from finding out that they're going to ghost  
23 write his report. They talk about the constant contact and  
24 coordination that the Plaintiffs' consultants and lawyers  
25 are going to have with this supposed independent expert.

1 And this is an expert, your Honor, that they represented to  
2 many courts in the U.S., in the media, in Ecuador,  
3 everywhere, that he was independent and impartial and that  
4 special weight should be given to his \$27 billion assessment  
5 that it turns out Plaintiffs ghost wrote.

6 One more clip, your Honor.

7 THE COURT: Just a second. Okay.

8 MS. NEUMAN: This is from a lunch the day  
9 following the meeting with Cabrera, where Mr. Kamp, Ms.  
10 Maest, Mr. Donzinger are discussing their evidence or lack  
11 thereof.

12 (Video clip plays.)

13 MS. NEUMAN: So you see there, your Honor, the  
14 lead U.S. counsel for these Plaintiffs who are before this  
15 Court saying that the expert report and everything they're  
16 about to do for the Court is smoke, mirrors, and bull shit,  
17 and I think we see that with what they subsequently did and  
18 the false representations that they made.

19 Now, turning to Plaintiffs' representations in  
20 this case regarding specifically Mr. Powers, who is the  
21 Southern California resident at issue here, they said that:

22 "Chevron cannot justify discovery into  
23 otherwise privileged documents based on  
24 a bald assertion of the crime fraud  
25 exception where, as here, the fraud

1 consists of the expert fully attributing  
2 and disclosing his use of a report  
3 prepared by Mr. Powers."

4 Now, in that sentence they're referring to a 2006  
5 article of Mr. Powers that Mr. Cabrera did reference in his  
6 report. What they left out of this argument, which is  
7 seemingly improper to the extent they're asserting a  
8 privilege, was the fact that Mr. Powers, in fact, wrote  
9 additional sections of the Cabrera report as evidence on the  
10 Stratus privilege log and that Mr. Cabrera did not attribute  
11 those to Mr. Powers. Mr. Powers is now claiming those  
12 documents are privileged and not a crime fraud, but the  
13 supreme Court in Hazel Atlas was quite clear that ghost  
14 writing an expert report and then falsely representing it to  
15 be that expert's independent work is fraudulent.

16 Plaintiffs went on to claim that:

17 "We seek this discovery from Powers  
18 despite the fact that he claims he has  
19 never met Cabrera, never communicated  
20 with him in any way directly or  
21 indirectly, and does not ever recall  
22 reading the Cabrera report."

23 Again, this is an interesting statement and  
24 interesting that it remains uncorrected in this records  
25 since subsequent productions of the Stratus privilege log

1 which we'll show show that Mr. Powers not only was working  
2 on portions of the Cabrera report, whether he knew that that  
3 was what he was working on or not, but also worked on  
4 Stratus' supposed peer review of the Cabrera report where  
5 they purported to review it as independent third parties and  
6 sign off on it scientifically, and anybody who worked on  
7 those comments obviously had to read Cabrera's report or at  
8 least that's what the comments represented had been done.

9           They then take issue that Chevron has failed to  
10 offer evidence that Mr. Cabrera considered documents  
11 prepared by Powers and that we were on a burdensome fishing  
12 expedition.

13           Let's see the next slide. And Mr. Powers himself  
14 says that he did not meet with Cabrera and does not recall  
15 viewing the global damage assessment report prepared by Mr.  
16 Cabrera.

17           After suggesting to this Court quite clearly that  
18 Mr. Powers did not work on the Cabrera report, Plaintiffs  
19 filed in a related 1782 action in Denver a privilege log.  
20 Now, the Denver court has not ruled on their privilege  
21 assertions yet. The Denver court has ruled all their  
22 privileges are waived except for narrow ones. We have taken  
23 the position that they are abusing that ability to assert  
24 narrow privileges that are going to be ruled on in the next  
25 few weeks. So I don't want to give the Court a

1 misimpression just because these things are currently on a  
2 privilege log.

3           But what the privilege log does show is while the  
4 Plaintiffs are withholding these documents until the Denver  
5 court rules, is that there's 30 different entries involving  
6 communications between Powers, Stratus, and another of  
7 Plaintiffs' consultants from January '08 through December  
8 '08, and January '08 through April '08 was the primary  
9 writing time for the Cabrera report by Stratus Consulting,  
10 and despite the 10 different district courts we've been in,  
11 your Honor, Plaintiffs have never once denied ghost writing  
12 the Cabrera report.

13           And then in the period following that is where  
14 Stratus commented on the Cabrera report.

15           To give your Honor just a few examples, there was  
16 a February 21, 2008 E-mail from Bill Powers to Ann Maest,  
17 the woman who was in the meeting with Cabrera, and Douglas  
18 Beltman (phonetic) regarding work in Ecuador. There was a  
19 March 21st, 2008 E-mail discussing damage calculations and  
20 strategy. The only person preparing damage calculations was  
21 the global damages expert, Richard Cabrera.

22           On the next slide we'll see a March 22nd, 2008 E-  
23 mail between Beltman and Bill Powers, again, regarding  
24 damage estimates from contamination. This is two days  
25 before the date on Mr. Cabrera's report, the only damage

1 expert in Lago Agrio. The parties did not submit their own  
2 independent damage assessments, just so the Court is aware.

3           On the next slide is an E-mail dated March 22nd,  
4 2008, again, has Mr. Powers' name on it. It's talking about  
5 cost of reinjection of formation water and capture use of  
6 associated gas, again, a subject of the Cabrera report.

7           THE COURT: Let me ask you a question. I just  
8 want to get this clear. Neither the Lago Agrio Plaintiffs  
9 nor Chevron had their own damages experts?

10           MS. NEUMAN: No, your Honor. The Court appointed  
11 Mr. Cabrera to be the independent global damages expert. So  
12 he was the only damage expert in the case. The Plaintiffs  
13 have conceded that, at least in the Denver 1782.

14           THE COURT: Okay.

15           MS. NEUMAN: Then on the next slide we have a  
16 March 24th -- and this is the day the Cabrera report was  
17 issued -- discussing damage calculations lost, LPG value,  
18 and reinjection, all topics of that report.

19           Finally, your Honor, we have an E-mail from May  
20 28th of 2008 between Beltman and Powers. Now, this is after  
21 the Cabrera report is issued. It's actually filed on April  
22 1st, which is a little ironic. And this notes that they are  
23 discussing commentary upon the Cabrera report.

24           So how this gentleman was able to file a  
25 declaration in this court saying he doesn't know anything

1 about the report and never read it is a little curious in  
2 light of it's shown on this privilege log that he is on an  
3 E-mail which Plaintiffs' lawyers describe the topic of as  
4 commentary upon the Cabrera report.

5           So, to go to the merits of our 1782, your Honor,  
6 as the Court's well aware, you are entitled to order  
7 discovery from people who reside or are found in your  
8 district. The only dispute the parties have about the  
9 statutory requirements of 1782 is the found in element, and  
10 if we could go to the next slide, Plaintiffs do not dispute  
11 that Mr. Powers is found in the district. Plaintiffs and  
12 respondents have argued extensively that E-Tech is not found  
13 in the district. It was a primary argument of their motion  
14 to quash in their reply brief.

15           After we filed the proceeding here and after  
16 Plaintiff submitted the declarations of Mr. Kamp in reply  
17 saying that E-Tech could not be found here and after we  
18 obtained the Crude footage, Chevron filed a 1782 in New  
19 Mexico as against E-Tech and Kamp and asked the -- E-Tech  
20 and Kamp if they would stipulate that they are found in New  
21 Mexico so we could dismiss them out of this action. They  
22 refused to do that.

23           After that court issued an order to show cause as  
24 to why the 1782 should not be granted as to both E-Tech and  
25 Kamp, Plaintiffs requested that that action be stayed in



1 favor of this action, despite the fact that they've told  
2 this Court it doesn't have jurisdiction over them.

3           We have asked this Court, rather, to proceed as to  
4 Mr. Powers and stay the matter as to E-Tech. Mr. Kamp is  
5 not a respondent here. So they can't sort of put him over  
6 here as they've sought to do. And when we appear in New  
7 Mexico on Tuesday, so long as the Court finds that E-Tech is  
8 found in New Mexico, we will dismiss the 1782 here as to E-  
9 Tech without prejudice to the New Mexico action, because we  
10 need to have E-Tech and Mr. Kamp in light of the Crude  
11 footage, and there are other applicants in New Mexico that  
12 aren't here, namely, the individual Chevron lawyers who have  
13 had false criminal charges brought against them in Ecuador.

14           THE COURT: Okay. You've got 10 minutes left. Is  
15 that adequate?

16           MS. NEUMAN: Yes. I think that will work, your  
17 Honor.

18           THE COURT: So is the New Mexico court going to  
19 issue a ruling on Tuesday or are you just going to make an  
20 argument on Tuesday?

21           MS. NEUMAN: I'm not sure, your Honor. Most of  
22 the courts, in light of the time frame that we're in with  
23 the September 16th deadline, have been ruling from the  
24 bench. We got a ruling from the bench in North Carolina  
25 this morning granting Mr. Kamp's 1782, the other person

1 shown in the video. So I think it's likely given the  
2 expedited nature of the briefing schedule we have a brief  
3 due on Sunday in that matter and setting the hearing the  
4 next day, that the court anticipates ruling quite quickly.

5 THE COURT: So right now you do not -- you want me  
6 to hold in abeyance any ruling as to E-Tech?

7 MS. NEUMAN: Yes, your Honor. Next we just show  
8 the -- remind your Court of the arguments the Plaintiffs  
9 have made that E-Tech is not properly before this Court.  
10 And this Court -- they can't stipulate to jurisdiction here.  
11 So we'd much rather be in a court where it's clear that the  
12 Court has jurisdiction and there's no argument as to that.

13 On the issue of the service, your Honor, in  
14 Chevron's -- can we go to the next slide -- in our original  
15 1782 petition, we attached the deposition notice and the  
16 documents request, and those were served personally on  
17 Powers at his San Diego business address.

18 THE COURT: Okay.

19 MS. NEUMAN: After that, counsel appeared for Mr.  
20 Powers, and your Honor granted our 1782 application and set  
21 the briefing schedule for their motion to quash. We, thus,  
22 believed the subpoenas to be served. We also re-served them  
23 when they indicated they needed to be re-served on counsel.  
24 They've objected to that. However, the law, I think as the  
25 Rules provide that service of a notice of request for

1 documents or a deposition on a party to a proceeding, which  
2 Respondents were after they formally appeared in these  
3 proceedings, may be affected upon service of counsel of  
4 record.

5           In the Denver proceedings, the Stratus 1782, we  
6 served documents on two respondents there after Plaintiffs'  
7 counsel indicated they were going to represent them but they  
8 had not yet appeared. So we didn't feel that the E-mail  
9 service through the EFC system was sufficient, and the  
10 Plaintiffs took the very aggressive position that that was  
11 an improper contact with their parties and we were harassing  
12 these respondents and that these were improper tactics on  
13 our part.

14           When they took that position after having not even  
15 formally appeared for these parties but, rather, just  
16 sending us an E-mail saying they planned to do so, we were  
17 very surprised to see the same party claim here that we  
18 should be personally serving their clients with subpoenas  
19 rather than serving counsel.

20           Finally, your Honor, the remedy if there is a  
21 problem with service, is just to re-serve. It's not to  
22 quash. So the motion to quash is not supported by any  
23 argument that service has not been properly perfected.

24           Going to the Intel factors, I believe --

25           THE COURT: Just let me back up. You originally

1 served the respondents through E-mail in this action?

2 MS. NEUMAN: We originally served Mr. Powers  
3 personally at his business address.

4 THE COURT: Personally, and then you served when  
5 counsel appeared?

6 MS. NEUMAN: Then we served counsel.

7 THE COURT: Okay. Keep going.

8 MS. NEUMAN: Looking at the Intel factors, your  
9 Honor, this discovery is not unduly intrusive or burdensome,  
10 and they've made now showing that it is other than claiming  
11 we're on a fishing expedition. Mr. Powers is not a party to  
12 the foreign proceeding. Both the Tribunal and Ecuadorian  
13 courts have shown historic receptivity to evidence. And, in  
14 fact, we have filed with the Lago Agrio court all the  
15 evidence we've obtained in related 1782 proceedings, and it  
16 has been added to the record in Lago Agrio. Although, the  
17 receptivity requirement really relates to Ecuadorian courts  
18 as a whole, even if this one judge said "I don't care to see  
19 your evidence." That would not undermine our right to  
20 obtain it and offer it under 1782.

21 And I believe I've already addressed their  
22 argument that we're attempting to circumvent foreign proof  
23 gathering restrictions.

24 Plaintiffs claim in this proceeding that the  
25 Ecuadorian court denied our request for the documents that

1 Plaintiffs gave to Cabrera. That is not accurate. The  
2 Court has never ruled on that request, and Plaintiffs have  
3 since corrected that in other proceedings, although I don't  
4 know that they've corrected it here.

5 I would like to go at this point, your Honor, to  
6 the waiver issue. In the related proceedings -- and I'll  
7 just quote from the Southern District of Texas' ruling:

8 "All the courts have found that to the  
9 extent what Plaintiffs were really doing  
10 was ghost writing Cabrera's report when  
11 they provided the materials that their  
12 consultants worked on to Cabrera.

13 Whether the consultants knew that's what  
14 they were doing or not, they waived the  
15 privilege."

16 In the Southern District action, the Court said:

17 "Additionally, the fact that the  
18 materials were voluntarily given to  
19 Cabrera, an agent of the Court, destroys  
20 work product privilege even if it were  
21 to apply. Once the consultant's  
22 materials were provided to Cabrera, a  
23 third party, this attorney-client  
24 privilege was destroyed, and every court  
25 to consider the question has so ruled."

1           There is also here, your Honor, I think the  
2 important issue of the crime fraud exception. It is well  
3 established that communications otherwise protected by  
4 attorney-client privilege or the attorney work product  
5 privilege are not protected if they relate to client  
6 communications in furtherance of contemplated or ongoing  
7 criminal or fraudulent conduct.

8           In the Supreme Court case of Hazel Atlas, which  
9 we've cited to the Court, an attorney secretly ghost writes  
10 an article purporting to have been written by a  
11 disinterested person and relies on it in litigation to  
12 support a patent claim. The nominal disinterested author  
13 claims authorship and denies collusion. In this case,  
14 that's Mr. Cabrera.

15           No ghost writing is admitted until evidence of it  
16 is produced in other litigation, exactly what happened here,  
17 your Honor. They did not admit to providing him their  
18 consultant's work in Lago Agrio until after we had submitted  
19 four expert opinions in Denver proving that that's what  
20 they'd done.

21           In the Hazel Atlas case, the Court went on to  
22 find:

23           "No fraud is more odious than an attempt  
24 to subvert the administration of  
25 justice. The Court is unanimous in

1           condemning the transaction disclosed by  
2           this record. The resources of law are  
3           ample to undo the wrong and pursue the  
4           wrongdoer."

5           And in the District Court of New Jersey, where it  
6 was found that one of Cabrera's team members, another  
7 supposedly neutral expert, was secretly working for  
8 Plaintiffs directly, the District Court found in June of  
9 this year:

10           "In short, the provision of materials  
11           and information by consultants on the  
12           litigation team of the Lago Agrio  
13           Plaintiffs in what appears to be a  
14           secret and undisclosed aid of a  
15           supposedly neutral court-appointed  
16           expert in this Court's view constitutes  
17           a prima facie demonstration of a fraud  
18           on the tribunal."

19           I think that this Court should find the same crime  
20 fraud exception applies here to the extent that the  
21 privileges have not been completely waived by disclosure to  
22 Cabrera and his team via Plaintiffs' counsel or otherwise.  
23 It is obviously a crime and a fraud to ghost write an expert  
24 report and then represent it to the world, to the courts, to  
25 U.S. courts as coming from an independent expert. I think

1 Plaintiffs even at the time they filed their original motion  
2 in this case continued to refer to Cabrera as independent to  
3 this Court.

4           Finally, your Honor, I think Plaintiffs are  
5 collaterally estopped from making the arguments they're  
6 making here about whether the BIT is a foreign proceeding,  
7 whether they can claim privilege over documents given to  
8 Cabrera. They have lost these arguments again and again and  
9 again, yet they continue to make them.

10           The Ninth Circuit says they just need a full and  
11 fair opportunity to litigate, that they actually litigate,  
12 and that they lost. They have lost 10 times.

13           Finally, your Honor, I would emphasize that  
14 Chevron's need for the discovery here has increased in  
15 urgency since we first came to this Court in June. These  
16 are just some quotes -- and I won't read them -- from other  
17 courts finding that Chevron's need for the discovery is  
18 urgent.

19           Expedited discovery has been granted in three  
20 related proceedings over the last week and a half. And, as  
21 I mentioned, Plaintiffs' emergency stay to the Sixth Circuit  
22 was denied so that a deposition similar to the one we're  
23 seeking here can proceed on September 1st.

24           What's currently driving these short deadlines is  
25 an order from the Lago Agrio court that came out in August,



1 August 2nd, setting a 45-day deadline for the parties to  
2 brief, setting forth their positions with respect to  
3 economic and a political criteria for remediation of  
4 environmental damages. Obviously in the record in Lago is  
5 Cabrera's report on the economic value of the supposed harm  
6 done. All of this evidence that relates to the fraudulent  
7 nature of his report is relevant to that issue as is the  
8 underlying work done by these experts. If they're the ones  
9 that really came up with those numbers, the law is clear  
10 that we're entitled to ask them how they got them and  
11 whether they're valid. And that all needs to be done so  
12 that it can be submitted by September 16th in Ecuador.

13 Thank you, your Honor.

14 THE COURT: My goodness, you actually stayed  
15 within your time. This probably should be a day that you  
16 invest in the stock market.

17 Okay. I'm going to give you two minutes, five  
18 minutes, no running time, so that you can organize your  
19 thoughts, okay.

20 MS. SEVERSON: Yes, your Honor. I'm ready.

21 THE COURT: Then your five minutes is up. Do you  
22 have your own PowerPoint?

23 MS. SEVERSON: No, your Honor. I'm happy to  
24 just --

25 THE COURT: All right.

1 MS. SEVERSON: -- give mine orally. I do have it  
2 for guiding, unless counsel would like to allow me to plug  
3 into their projector.

4 MS. NEUMAN: That's fine with us.

5 MS. SEVERSON: Then, yes, then I'll show my  
6 PowerPoint.

7 THE COURT: Okay. I'm not requiring you to.  
8 Don't feel that you have to. That's entirely up to you.

9 MS. SEVERSON: No, no. It will aid my discussion.  
10 I will now take a couple of minutes just to set up.

11 THE COURT: Sure.

12 MS. SEVERSON: I appreciate the Court's  
13 indulgence.

14 THE COURT: Sure. Absolutely. That allows me to  
15 get something. Why don't we go off the record for a moment.

16 (Proceedings recessed briefly.)

17 MS. SEVERSON: Your Honor, this case is about  
18 Chevron's attempt to circumvent a foreign sovereign, and it  
19 goes to the most basic notion of international relation  
20 between sovereign entities. There needs to be respect for a  
21 foreign sovereign.

22 Here Chevron is asking the Court to allow them to  
23 gather evidence of wrongdoing of an Ecuadorian court-  
24 appointed expert witness that was appointed in Ecuador. As  
25 we'll discuss in our presentation, the primary factor is

1 receptivity of a foreign tribunal, and here the record  
2 before you, your Honor, is clear that neither Ecuador is  
3 receptive, and the arbiter of the arbitration tribunal is  
4 not yet (indiscernible) -- at that particular venue.

5           What this appears to be is an attempt by Chevron  
6 in the final hours of the case that has been pending in the  
7 Southern District of New York since 1993 and at Chevron's  
8 insistence in Ecuador since 2003. It appears that now this  
9 is the last-stitch attempt to circumvent the jurisdiction in  
10 Ecuador (indiscernible).

11           Now, for nearly a decade, Chevron sought to have  
12 the case heard in Ecuador, and the record is full of  
13 arguments where Chevron said that they would be provided a  
14 fair forum to litigate its claims there. The very forum,  
15 the jurisdiction that Chevron sought to get out of, it now  
16 runs back to try to avail itself of the discovery laws  
17 (indiscernible).

18           Now, the court in Ecuador appointed an independent  
19 expert, and the Lago Agrio Court as it's termed, provided  
20 that the parties may submit to the expert whatever  
21 documentation they believe may be useful in preparing their  
22 report.

23           Richard Cabrera was appointed, and he was  
24 accessible to both Chevron and to the Plaintiffs in the  
25 Ecuadorian case.

1           Now, I call your Honor -- and I'll give you a  
2 little brief history of how the expert got appointed,  
3 because your Honor inquired of that of Chevron's counsel  
4 during her presentation.

5           There was a series of agreements and  
6 understandings early in the Lago Agrio litigation, and the  
7 parties agreed under the Ecuadorian jurisprudence system  
8 they would be entitled to select and pay for their own  
9 experts to write reports on the contamination of the former  
10 Texaco Oilplex.

11           What you're dealing with here, your Honor, the  
12 subject of this litigation is Chevron, the company acquired  
13 Texaco, had oil well sites in the Amazon Rain Forest  
14 covering the size of about the state of Rhode Island.

15           Now the procedures in Ecuador were that the  
16 parties would each have their own experts, and there was a  
17 fact discovery phase of litigation. There were sites  
18 inspected, you know, 55 different sites inspected. There  
19 were studies carried out with a number of different types of  
20 experts, as you can imagine in a contamination case.

21           In October 2003, Plaintiffs petitioned the Lago  
22 Agrio court in Ecuador for the appointment of a global  
23 damages assessment expert. Chevron did not request the  
24 appointment of this type of expert. They allowed the time  
25 to go by and failed to do it. So they were without global

1 damages experts.

2           Now, Plaintiffs did not nominate any specific  
3 individual, but what they did say is out of all the experts  
4 that have been doing site inspections -- there were a number  
5 of experts who were already working on it -- they  
6 recommended it be someone amongst that pool.

7           The Court then appointed Mr. Cabrera and issued  
8 orders that the parties were to submit the documents that  
9 they believed would be useful.

10           Now, for a full recitation of the history of this  
11 procedural aspect of this case -- because remember, your  
12 Honor, Chevron's here coming to you, the United States  
13 District Court, (indiscernible) and asking them to impose  
14 discovery that's currently before the foreign tribunal.

15           So what we need to look at and we'll get into are  
16 the Intel factors, how the jurisprudence system works in  
17 Ecuador, so that this Court and this country can be  
18 respectful.

19           Now, as part of the Court order, the Plaintiffs  
20 submitted and disclosed the fact that they submitted  
21 findings, conclusions, valuations to Cabrera for his  
22 potential adoption, and Cabrera, the court-appointed expert,  
23 was free to adopt the Plaintiffs' views, not adopt the  
24 Plaintiffs' views, adopt Chevron's material, but it was an  
25 independent expert.

1           The Lago Agrio court is already aware of these  
2 allegations by Chevron that alleged fraud, and we know that  
3 this tribunal, this foreign tribunal (indiscernible). We  
4 know that Chevron agrees that the proper tribunal, because  
5 it fought for years to get there, and by the fact that  
6 Chevron bombarded the Court with over 30 motions challenging  
7 everything from Cabrera's qualifications, conflicts, work  
8 plan, methodology, and now as a final argument, some  
9 supposed fraudulent collusion with Plaintiffs' counsel and  
10 Cabrera.

11           Chevron wants this Court to do what a foreign  
12 sovereign will not. Chevron requested discovery,  
13 specifically requesting -- and I refer the Court to docket  
14 27-1 at page 26 -- specifically requesting the Ecuadorian  
15 Plaintiffs turn over all materials they gave Cabrera and  
16 explain fully to this Court and Chevron the full extent of  
17 their communications and contacts.

18           Your Honor, this exact request on its very large  
19 scale has been before the Court in Ecuador, and because it  
20 hasn't ruled or chosen not to rule, that is not a basis to  
21 invoke a 1782 application to this Court seeking to get in  
22 the United States what the court they submitted to  
23 jurisdiction before won't do.

24           What this is is a collateral attack. In an  
25 unprecedented scheme, Chevron has filed 11 different 1782

1 actions in the United States in an attempt to uncover some  
2 illicit contact between Cabrera and Plaintiffs.

3           There's a ruling that is expected in the  
4 Ecuadorian court in February 2011, and Chevron will be using  
5 the 1782 process (indiscernible) the 1782 process to do an  
6 end run around a judgment (indiscernible). Chevron didn't  
7 get the discovery it wanted in the jurisdiction -- now,  
8 interestingly, Mr. Cabrera issued a report. It was an  
9 independent report. Chevron had an opportunity to  
10 participate as did the Plaintiffs.

11           The -- Mr. Cabrera did a report. The Ecuadorian  
12 process within their system of jurisprudence has different  
13 discovery rules, rules of procedures. And what they allowed  
14 the parties to do is submit questions to the Court, submit  
15 written interrogatories to the Court, and that's been done.  
16 There are -- they vetted -- Chevron had an opportunity and  
17 did, in fact, vet the Cabrera report by asking very pointed  
18 questions. And if you take a look at Exhibit 2811 in this  
19 action, it's question after question, and that's just a  
20 small piece of it. That demonstrates the process under the  
21 Ecuador jurisprudence that the -- Chevron fought to get.

22           Because the court hasn't ruled in the Ecuador  
23 court, they come to the United States seeking to do what  
24 Ecuador won't. The applications they filed seek the same  
25 types of discovery, if not the same exact discovery, in

1 different states. And, in fact, when Ecuador didn't act,  
2 Chevron came to the United States. When this Court didn't  
3 act quick enough and expedite the proceedings that Chevron  
4 wanted, instead of dismissing the action against E-Tech  
5 because it realized it didn't have jurisdiction over it, E-  
6 Tech here, it then filed in New Mexico, but never  
7 dismissing, never notified this Court that there was another  
8 action pending because I was notified by my client, E-Tech,  
9 that that matter was pending in New Mexico.

10           So apparently California hasn't been quick enough.  
11 Now they're going over there. (Indiscernible) they take  
12 issue that we're saying, you know what, we've been briefing  
13 this for months, we have the orders here, we've had to spend  
14 money, time to defend this (indiscernible) to the  
15 jurisdiction, and apparently now that's not good enough  
16 either.

17           1782 gives this Court discretion, may order  
18 discovery for use -- and I think "for use" the key word --  
19 in a proceeding in a foreign or international tribunal. By  
20 the very words of the statute, your Honor, it's assumed that  
21 it's actually going to be used in those jurisdictions, and  
22 the Intel factors govern the Court's discretion.

23           One, are the documents or testimony sought within  
24 the foreign tribunal's reach.

25           Two, when were the proceedings underway. We've



1 already discussed that and (indiscernible) declaration  
2 really (indiscernible) to revisit that.

3           Three, the receptivity, and that's simply is the  
4 foreign tribunal going to be receptive to this Court's -- to  
5 this Court's decision. And we submit that they are not.  
6 One, the Lago Agrio court -- the Lago Agrio court is not  
7 receptive because they have had motions and request after  
8 request and it's gone unanswered.

9           Conversely, what the court did recently issue in  
10 Lago Agrio is an opportunity for the parties to the  
11 additional submissions on the -- I'm sorry -- to the court  
12 for another 45 days. So instead of submitting actual  
13 science, instead of taking issue with the substance of the  
14 Cabrera report, there's been an attempt to invoke the 1782  
15 process here and ask this Court to do what the Ecuadorian  
16 court won't.

17           The arbitral tribunal, the Bilateral International  
18 Treaty proceedings, also cannot be receptive to  
19 (indiscernible). Pending before the Second Circuit is the  
20 Republic of Ecuador's application to stay the entire private  
21 international arbitration. One -- the way it works, your  
22 Honor, is the Southern District of New York determined that  
23 it would go to this arbitration. However, the arbitral  
24 tribunal itself must make a threshold determination whether  
25 it has jurisdiction. There's an initial jurisdictional

1 hearing scheduled November 2010. Chevron is here  
2 prematurely because the issue that it seeks to address, to  
3 the extent it's even an issue that's proper for the  
4 tribunal, should be made by that tribunal. That is where  
5 Chevron wanted to be, and that's where Chevron finds itself.  
6 It needs to abide by that judicial process.

7           Now, as far as documents being within Lago Agrio's  
8 reach, Lago Agrio has jurisdiction over Richard Cabrera, and  
9 we know that Chevron admits that the Lago Agrio court has  
10 jurisdiction because it has repeatedly asked that court for  
11 an order that Plaintiff turn over the materials and get  
12 whoever to turn over materials.

13           But this Court needs to ask itself a fundamental  
14 question. Is it going to intrude in the jurisprudence of  
15 Ecuador. Under 1782 (indiscernible). Under 1782 another  
16 threshold issue, if the Court finds that the initial factors  
17 are met, there has to be an issue of privilege, are the  
18 documents and testimony protected by privilege. 1782  
19 states:

20           "A person may not be compelled to give  
21 his testimony or statement or to produce  
22 a document or other thing in violation  
23 of any legally applicable privilege."

24           Now, E-Tech and Powers were consulting experts.  
25 If we're going to look -- if we're going to step outside the

1 jurisprudence system of Ecuador that has its own rules, its  
2 own procedural evidence on discovery, and we're going to  
3 look at -- the Court finds no (indiscernible) of that, take  
4 a look at what the United States (indiscernible). We have  
5 to look at Federal Rule of Civil Procedure 26(b), and  
6 consulting experts, absent exceptional circumstances, exist  
7 to privilege, not just discovery.

8           Now, Chevron's request is barred by Federal Rule  
9 of Civil Procedure 26(b), and here's why. Your Honor,  
10 there's a public policy interest allowing the litigants to  
11 prepare their case. Lawyers need to be able to consult with  
12 experts. They need to be able to have discussions around  
13 the lunch table like you saw talking about their case, and  
14 they need to be able to brainstorm about it. They have to  
15 have discussions without the fear that some adverse party is  
16 going to have that benefit of their work product as they  
17 develop.

18           Now, again, here the Ecuadorian court issued an  
19 order -- just recently the Ecuadorian court issued its own  
20 order permitting the parties to submit a supplemental  
21 submission on damages. If this Court puts aside the  
22 privilege of what the experts on damages, as far as  
23 preparing that report, then it allows what any litigant  
24 would want, and that is to get inside the communication  
25 between lawyer and expert, especially in preparing a

1 submission on damages just on the eve of when the ruling  
2 made final, after 17 years of litigation.

3           There's no showing of exceptional circumstances  
4 here. What Chevron has done is put a privilege log with  
5 some snippets, information here and there, and there's  
6 nothing in the privilege log that shows -- the law on the  
7 privilege log demonstrates there's a legitimate claim of  
8 privilege to the extent that Chevron's using it. Chevron  
9 cites to these other court rulings in various jurisdictions.  
10 And, naturally, those are not required to be followed by  
11 your Honor. Your Honor has independent discretion whether  
12 to give this decision. But there's no -- there's nothing to  
13 show that these little snippets -- we object to -- your  
14 Honor, for the record, I just want to put an objection to  
15 the clips. There was a motion to supplement the record. As  
16 your Honor knows, there was a massive record lodged with  
17 this Court on its application, such that your Honor asked  
18 that we take them home (indiscernible).

19           When the Respondents brought a motion to quash and  
20 it was fully briefed, at the same time Chevron asked for an  
21 expedited proceeding, Chevron then mounted another request  
22 to supplement its record with evidence. Your Honor, to the  
23 extent that the Court is going to look at those clips and  
24 determine whether they should be part of this record, I  
25 would ask the Court to really see -- look at them carefully

1 and see if they have any evidence. Anything can be taken  
2 out of context. What was shown up here is the experts  
3 talking about how a case might go, and what I also want your  
4 Honor to -- encourage the Court is there is -- based on  
5 those little clips, you can't tell if Cabrera is even in the  
6 room. Once he's off screen, what is to say where is  
7 Cabrera, what his influence on the meeting is, and whether  
8 or not he understood they were saying (indiscernible)  
9 Spanish clip.

10           So my point is this, your Honor. There is a lack  
11 of foundation, and they are snippets taken out of context  
12 that show nothing more than lawyers talking and experts  
13 talking about a case (indiscernible). That is something  
14 that occurs in every case.

15           I'd like to go to the -- the con fraud issue and  
16 the ghostwriters exception. Actually, ghostwriters  
17 exception. Chevron claims that there was some waiver  
18 because of the ghostwriters exception. However, they have  
19 not demonstrated that E-Tech or powers had a ghostwriter.  
20 Chevron wants more documents and testimony, but the  
21 subpoenas are incredibly broad. They go well beyond the  
22 Cabrera fraud.

23           If your Honor looks at the subpoenas, they ask for  
24 everything regarding communication between Plaintiffs'  
25 counsel and Plaintiffs' experts. There is no -- it's so far

1 beyond. What this really is is a fishing expedition and an  
2 end run around the Ecuadorian jurisprudence. It's Chevron's  
3 burden to produce a waiver of work product protection, and  
4 they have not met that burden.

5           Now, there's no crime fraud exception, your Honor.  
6 That's a red herring. In order to invoke the crime fraud  
7 exception, Chevron has to show this Court that Powers and E-  
8 Tech and Plaintiffs' counsel were complicit in a criminal  
9 fraudulent action under Ecuadorian law. And there is not  
10 one reference to any criminal statute that has been violated  
11 under the Ecuadorian jurisprudence.

12           The fact that Chevron doesn't like the system it  
13 requested that it be ruled by does not make how that system  
14 works unlawful. And there's no basis for the exception.  
15 There's no assertion by Chevron that an ex parte contact  
16 with Cabrera could be criminally prosecuted or that it  
17 constitutes fraud under Ecuadorian law. The filings in the  
18 Lago Agrio court demonstrate that the Ecuadorian court not  
19 only knew the parties would be transmitting information, it  
20 encouraged the transmission of such things by both parties.

21           The Ecuadorian court has this matter under  
22 submission. It has heard motion after motion. It's been  
23 presented with evidence of the so-called fraud. Remember,  
24 1782 is used to assist a foreign jurisdiction. They have to  
25 not have access to it and be receptive to it. And here they

1 know about it. They have access to it, and by the decision  
2 not to take action means that they're not receptive to it,  
3 and this cannot be (indiscernible). There's no indication  
4 that there's anything wrongful under Ecuadorian law and  
5 procedure.

6 And, your Honor, we'd respectfully submit it's not  
7 for the United States to decide what Chevron constitutes  
8 crime or fraud in Ecuador. There is no evidence  
9 (indiscernible).

10 Your Honor, in closing, for a United States court to  
11 opine on issues of foreign law without clear guidance is  
12 really antithetical to Section 1782. On the most basic  
13 notion of international diplomacy and respect for their  
14 jurisprudence, we'd ask this Court to decline the 1782  
15 action, grant the motion to quash, and because E-Tech and  
16 Richard Kamp the director of E-Tech, have had to appear in  
17 this action and fight it for months and is now willing to  
18 just accept your Honor's ruling, that you allow them to do  
19 that.

20 THE COURT: Okay. Now, is Kamp actually before  
21 me?

22 MS. SEVERSON: Kamp is the director of E-Tech. He  
23 prepared a declaration on behalf of E-Tech. To the extent  
24 that E-Tech would have to present discovery, it would be  
25 through its director. So we fail to see the semantics of

1 that nuance that they're trying to run from this Court, your  
2 Honor, over to New Mexico, but we submit that that is an  
3 improper (indiscernible) --

4 THE COURT: Okay. Okay. Take a deep breath.

5 MS. SEVERSON: Your Honor, if I --

6 THE COURT: Yes.

7 MS. SEVERSON: Do I still have some time?

8 THE COURT: Yes.

9 MS. SEVERSON: I would ask my colleague to speak  
10 on the --

11 THE COURT: Certainly.

12 MR. AGUIRRE: Thank you very much. I'm thinking  
13 about findings of fact, conclusions of law in every single  
14 court trial and the process in which judges decide what to  
15 adopt and what not to and how that reflects and I think  
16 instructs us that the fact that there are outside sources of  
17 information that are used is one thing, but whether they  
18 truly represent the findings of the Court is another, and I  
19 think we have built into our system, into our Civil Code in  
20 the state side, findings of fact and conclusions of law that  
21 are actually prepared by the attorneys.

22 So the idea that in a highly complicated case in a  
23 poverty-stricken country that there would be some influence  
24 in the sense of outside experts who are truly experts in the  
25 field having and making contributions to the final product,



1 that's why, your Honor, I would hope that you would have an  
2 opportunity to actually look at the report itself because  
3 the question is -- the first question is does this report  
4 reflect honestly the decision that was made by the expert.

5           And I'd like to invite your attention, your Honor  
6 -- I don't know if you have it there, but, you know, since  
7 -- first of all, I have to congratulate counsel from Gibson,  
8 Dunn. I was relating to counsel the first time I actually  
9 had a very memorial experience with Gibson, Dunn was in an  
10 expert case in which I had cross examined an expert and that  
11 expert had actually fled the courtroom and was refusing to  
12 come back to the court because we caught him doing things  
13 that were not proper, and Gibson, Dunn appeared on behalf of  
14 that expert before the Superior Court in Orange County. And  
15 we handled that matter by keeping our eye focused on the  
16 proceedings. We did not go off on a tangent. There was a  
17 special instruction given to the jury. The case moved  
18 ahead. The case was resolved, but the -- it was resolved on  
19 the merits.

20           If we look at the summary of report that was  
21 prepared by the Ecuadorian court-appointed expert, one of  
22 the things that he says on page three is he goes through and  
23 he lays out the results. This Texaco operated. There was  
24 contamination from their oil. There was a certain amount of  
25 responsibility that he attributes to them. And then he says

1 under the heading "Sufficient and reliable information":

2 "As part of the suit, thousands of  
3 environmental analyses were performed by  
4 me, by the experts proposed by the  
5 Plaintiff, and by those proposed by the  
6 Defendant."

7 That's in his report. Then later in his report --  
8 and I think if you look through the report, you can see that  
9 it is a -- obviously a highly technical report, but he then  
10 goes on at Section 3.2.6 to say:

11 "Information on contaminants that was  
12 taken into account. In order to reach  
13 specific conclusions about environmental  
14 contamination in the concession area, I  
15 based my research primarily on the  
16 information that I compiled together  
17 with my technical team in accordance  
18 with the Court's instructions as well as  
19 on the information compiled by the  
20 experts proposed by the Plaintiffs and  
21 by the Defendant during the judicial  
22 inspection."

23 That's Exhibit E. In other words --

24 THE COURT: Exhibit E to?

25 MR. AGUIRRE: Well, this is Exhibit J, Section

1 3.2.6, "Information on Contaminants" --

2 THE COURT: Slow down. Exhibit J?

3 MR. AGUIRRE: Exhibit J, page 154, 3.2.6,  
4 "Information on Contaminants that was Taken into Account,"  
5 Exhibit J to their application.

6 And then again -- so, your Honor, if we think  
7 about this, many many years ago an American producer of oil  
8 went into Ecuador, did not follow environmental practices  
9 and procedures that were careful, contaminated the area,  
10 lawsuit was brought in New York to use our system of justice  
11 to hold them accountable for their conduct, and they  
12 objected. And they insisted that the case go down to  
13 Ecuador, knowing full ware -- fully aware of the pluses and  
14 minuses of operating within that system. A highly technical  
15 presentation was made. Each side had all the resources, the  
16 vast resources of Chevron, the resources of the Plaintiffs,  
17 and they engaged that process, and that process produced a  
18 report.

19 Now, if counsel had a single problem with the  
20 report, a single substantive problem with the report that  
21 they could have objected to, these highly experienced  
22 lawyers would have done that. But they didn't point your  
23 Honor to a single sentence, a single finding. They didn't  
24 suggest that the person who made the decision didn't  
25 honestly and sincerely believe that what they said was true

1 because they can't do that. And so that matter now rests in  
2 front of a judge in Ecuador.

3           Imagine if the situation were reversed and imagine  
4 if that matter was before you and instead of respecting the  
5 integrity of this Court, they went to a foreign jurisdiction  
6 and before you even had an opportunity to rule or even to  
7 consider it, they used their massive power to file in  
8 jurisdictions throughout the United States and to get orders  
9 attacking, like so many bees attacking, and trying to rip  
10 apart the case before it's even decided, even to the point,  
11 your Honor, of putting a picture of lowly Mr. Cabrera into  
12 their presentation, obviously suggesting in the way that  
13 they chose that picture that he was not of the  
14 sophistication that we would normally see in the United  
15 States, and that's all true. But the point is that's what  
16 they decided that they wanted to present themselves to.

17           So I don't want to take any more of the time away  
18 from my counsel or from the Court, but I would just ask your  
19 Honor to consider the single question is the report itself.  
20 And I've looked through the report. It looks like the kind  
21 of report that you would see in any case, a certain amount  
22 of balancing of pluses and minuses, certain determinations,  
23 certain findings. The -- you know, I wish we could show the  
24 whole documentary, but maybe that is what summarizes their  
25 case.

1           For them, they want you to focus on the out takes,  
2 and for us we want you to let the Court in Nicaragua focus  
3 on the documentary itself in its entirety -- I mean Ecuador,  
4 pardon me, in Ecuador, in its entirety. And that's what  
5 we're asking, your Honor. Yes, they've been able to get it  
6 in other courts. They've been able to get other orders.  
7 They're digging through, but they haven't done it in  
8 California. They haven't done it in the Ninth Circuit. And  
9 your Honor has a free hand, and I hope and I trust that your  
10 Honor will make the kind of decision that will embrace the  
11 principles that will influence the determination that this  
12 is really not an appropriate case to allow the circumvention  
13 and the disrespect to a foreign country, because whatever  
14 price, whatever advantage they get out of this case today,  
15 if it's -- and the way that they're going, if it continues  
16 on, then Americans who have cases in that jurisdiction,  
17 innocent Americans, who go to that jurisdiction for relief  
18 and for justice are going to pay the price. That's what  
19 international relations are all about.

20           Thank you, your Honor.

21           MS. NEUMAN: Thank you, your Honor.

22           THE COURT: Would you like two minutes to breathe?

23           MS. NEUMAN: I think I'm fine.

24           THE COURT: Okay.

25           MS. NEUMAN: I'll take a couple of seconds to

1 (indiscernible) Plaintiffs' counsel.

2 I think, your Honor, that Plaintiffs' argument  
3 really proves beyond all doubt why this discovery is  
4 absolutely necessary. Plaintiffs' counsel -- both  
5 Plaintiffs' counsel got up here and represented to this  
6 Court that Mr. Cabrera was independent, despite the fact  
7 there is not a shred of evidence in this record that that's  
8 the case. Plaintiffs' second counsel got up and read to  
9 this Court from Mr. Cabrera's report claiming that Cabrera  
10 had written it. Yet in this court record, unrebutted, is  
11 the expert opinion of Professor Terrell (phonetic), who is a  
12 forensic linguist and has opined that that report that he  
13 read from and attributed to Mr. Cabrera was written in  
14 English and badly translated into Spanish from Mr. Cabrera's  
15 signature.

16 Plaintiffs' counsel then went on to say -- and I  
17 quote from her argument -- that we "haven't proven that Mr.  
18 Powers was the ghost writer." That's because we haven't  
19 deposed him yet. What the Court in Ecuador needs to  
20 consider is the evidence that we're able to gather here that  
21 proves that Mr. Powers is one of the ghost writers, and the  
22 evidence that's gathered here that prove that the statements  
23 that were just made moments ago about Mr. Cabrera being free  
24 to adopt the findings of either party are untrue.

25 Plaintiffs' ghost wrote a 4,000 page report. Did

1 this gentleman really have a different 4,000 page report in  
2 his back pocket that he was going to submit if he didn't  
3 submit this one? I don't think so. They were writing this  
4 report, according to the privilege log, up until the day he  
5 signed it. Again, that's not an act of free will. And what  
6 the Crude clips show is this was all part of a plan that  
7 started two weeks, if not longer, before he was ever  
8 appointed.

9           So it's quite clear that it is untrue to say that  
10 Mr. Cabrera was independent, and it's quite clear that the  
11 reason they're fighting the deposition of Mr. Powers is that  
12 the deposition will prove that. And every one of our  
13 document requests, your Honor, refers to the Cabrera report  
14 and has nothing to do with their new damage submission. We  
15 have certainly carried whatever burden we have on the  
16 privilege issue.

17           On the receptivity issue, I would simply note that  
18 counsel failed to inform the Court that they asked the  
19 Ecuadorian court months ago to issue a ruling that it was  
20 not receptive to Chevron's 1782 discovery, and the Court has  
21 never done so in Ecuador.

22           Finally, your Honor, in the privilege logs it  
23 shows on one of the slides I provided your Honor that Mr.  
24 Powers was actually providing proposed annex language, and  
25 that's a quote from the log. So it's clear that this

1 gentleman was working on the report, and he was, in fact,  
2 working on an annex that concludes that Chevron should pay  
3 nearly \$400,000,000 to upgrade Peto Ecuador's  
4 infrastructure.

5           And, finally, your Honor, on the argument that we  
6 should go to Ecuador to get discovery from a Southern  
7 California resident or else just be stuck with what Mr.  
8 Cabrera or Plaintiffs are willing to confess to in Ecuador,  
9 I would quote from the Court's ruling in the Southern  
10 District of Texas in May of this year where that Court said:

11           "It is apparent that the Ecuadorian  
12           Plaintiffs provided some or all of 3TM's  
13           report to Cabrera, and yet it appears  
14           Cabrera denies this occurred. Under the  
15           circumstances, it seems unlikely the  
16           Ecuadorian court would have much success  
17           in ordering Cabrera to divulge the work  
18           product provided by Plaintiffs and their  
19           consultants."

20           The same is true now, your Honor, as it was back  
21 in May. We need discovery from the U.S. participants in the  
22 fraud which we then can offer both in Ecuador and in the  
23 treaty arbitration where Chevron's memorial on the merits is  
24 due on September 6th.

25           And as to the one order of the Ecuadorian court



1 that counsel showed claiming to authorize submissions to  
2 Cabrera, that order which she did not show the date of was  
3 actually dated April 28, nearly a month after Cabrera's  
4 report had already been filed with the Court. And the only  
5 two court orders in Lago Agrio that they've directed this  
6 Court to are January and April '08, and they originally  
7 argue to this Court that those were the orders that  
8 authorized them to have contact with Cabrera. Yet we know  
9 from the Crude footage that that contact started in March of  
10 '07, and we know that Cabrera and Plaintiffs vehemently  
11 denied that contact and that the Court issued multiple  
12 orders reminding them to be strictly independent and  
13 reminding Cabrera's work to be transparent. They would not  
14 have denied these acts were they not wrongful in Ecuador.

15           And we talk about findings of fact and conclusions  
16 of law. The reason the process works is because people  
17 participate in a transparent trial, and then they  
18 transparently offer up their findings of fact and  
19 conclusions of law.

20           The problem here is that Plaintiffs gave massive  
21 materials to Cabrera, that they won't show what they were,  
22 so no one can assess whether he was, in fact, independent as  
23 they continue to claim to this day, and we're entitled to  
24 know what they gave him and when so we can prove that he was  
25 not, and it's no disrespect to the Ecuadorian judicial

1 system -- well, I think it's a great disrespect to the  
2 Ecuadorian judicial system to collude with an expert and  
3 ghost write a report and submit it to a court there if the  
4 court was unaware that that was going on, and I think any  
5 court who's interested in due process would welcome this  
6 Court's assistance in determining whether its own expert had  
7 defrauded it. So we would request that this 1782 be  
8 granted, your Honor.

9 THE COURT: Okay. We'll take just two minutes so  
10 you can turn off your PowerPoint. I don't have a  
11 PowerPoint.

12 MS. NEUMAN: Okay.

13 THE COURT: Okay. And I'll see if I have any  
14 further questions when I go over my notes.

15 (Proceedings recessed briefly.)

16 THE COURT: I want both sides to give me their  
17 PowerPoint presentations. So you got a hard copy. Do you  
18 have a hard copy?

19 MS. SEVERSON: I don't, your Honor. May I  
20 (indiscernible)?

21 THE COURT: Yes.

22 Okay. So I'm ready to rule because we got to --  
23 we have to move, and this is -- I've been giving birth to  
24 this baby a long time, and I'm ready for it to pop out.

25 All right. The primary thrust of Chevron's

1 application under 28 U.S.C. Section 782 is the Ecuadorian  
2 Plaintiffs have wrongfully used the work product of E-Tech  
3 and William Powers, the respondents herein, to perpetuate a  
4 fraud on the Ecuadorian tribunal in the Lago Agrio  
5 litigation. Specifically, Chevron alleges the Ecuadorian  
6 Plaintiff used the findings, conclusions, and opinions of  
7 Respondents and passed them off as the work of the neutral  
8 expert, Richard Staline Cabrera-Vega, in violation of  
9 Cabrera's ethical obligations to the Ecuadorian tribunal.

10           A district court may order a person residing or  
11 found in the district to give testimony or produce documents  
12 for use in a proceeding in a foreign or international  
13 tribunal upon the implication of any interested person, and  
14 that's from the Intel case. I won't cite it because you  
15 both are very familiar with Intel.

16           "Section 1782(a) authorizes but does not  
17           require a federal district court to  
18           provide judicial assistance to foreign  
19           or international tribunals or to  
20           interested persons in proceedings  
21           abroad."

22           That's a quote from Intel at page 247.

23           A request for discovery pursuant to Section 1782  
24 presents two primary inquiries to a district court. One,  
25 whether it is authorized to grant the request and, two,

1 whether it should exercise its discretion to do so.

2           The Supreme Court has set forth several factors  
3 that bear consideration by a district court in ruling on a  
4 request for discovery under Section 1782. First, the Court  
5 may consider whether the person from whom discovery is  
6 sought is a participant in the foreign proceeding. Second,  
7 the district court may take into account the nature of the  
8 foreign tribunal, the character of the proceedings under way  
9 abroad, and the receptivity of the foreign government or the  
10 court or agency abroad to U.S. federal court judicial  
11 assistance.

12           Third, the district court can consider whether the  
13 1782 request conceals an attempt to circumvent foreign proof  
14 gathering restrictions or other policies of a foreign  
15 country or the United States.

16           Fourth, a district court may consider whether the  
17 discovery sought is unduly intrusive or burdensome. These  
18 four factors are permissive, not mandatory, and were given  
19 by the Supreme Court to assist the Trial Court in applying  
20 Section 1782.

21           In applying the Intel factors, first, William  
22 Brown is a direct participant in the Ecuadorian action.  
23 Therefore, the assistance of this Court is more necessary  
24 than if he were a participant in the Lago Agrio action. He  
25 is a participant in this action. Second, it is germane that

1 the forum proceeding is a trial before a valid Ecuadorian  
2 tribunal. The trial has been both lengthy and complicated,  
3 involving thousands of pages of documents and complicated  
4 expert testimony.

5           Third, the more convincing evidence before this  
6 Court is that the proposed discovery is not being done to  
7 circumvent foreign proof gathering restrictions or other  
8 policies of a foreign country or the United States.  
9 Rather, the discovery under Federal Rule of Civil Procedure  
10 26 appears relevant and likely to lead to the discovery of  
11 admissible evidence.

12           Chevron's proposed discovery goes directly to the  
13 heart of whether Cabrera, retained by the Ecuadorian court  
14 as a neutral expert, has indeed functioned in that capacity  
15 and whether Cabrera has performed his responsibilities to  
16 the Ecuadorian tribunal with integrity and neutrality.  
17 Indeed, the United States District Court for the District of  
18 New Jersey has found the conduct of the Lago Agrio  
19 Plaintiffs sufficiently reprehensible to warrant application  
20 of the crime fraud exception to the attorney-client  
21 privilege.

22           "In short" -- and I'm quoting:  
23           "the provision of materials and  
24           information by consultants on the  
25           litigation team of the Lago Agrio

1 Plaintiffs on what appears to be a  
2 secret and an undisclosed aid of a  
3 supposedly neutral court-appointed  
4 expert in this Court's view constitutes  
5 a prima facie demonstration of a fraud  
6 on the tribunal."

7 And I'm closing the quote. Chevron maintains its  
8 forensic linguist, Professor Teresa Terrell, believes  
9 Cabrera's report is, in fact, a Spanish translation of a  
10 previously written English document. If true, that  
11 assertion could establish the absence of Cabrera's  
12 neutrality and would constitute a violation of his  
13 obligations to the Ecuadorian tribunal.

14 Therefore, Chevron has offered sufficient evidence  
15 of possible collusion between the Lago Agrio Plaintiffs in  
16 drafting Cabrera's expert report and Cabrera in proposing  
17 his own report is a neutral report to the Ecuadorian court  
18 to make the proposed discovery relevant and likely to lead  
19 to the discovery of admissible evidence. Therefore, the  
20 proposed discovery will assist the Ecuadorian tribunal with  
21 its proof gathering in the Lago Agrio litigation.

22 Furthermore, the proposed discovery would clearly  
23 be permitted under the Federal Rules of Civil Procedure.  
24 And, lastly, I do not find in this connection that there's  
25 anything in the proposed discovery that would cause this

1 Court to conclude that such discovery is unduly intrusive or  
2 burdensome.

3           Now, William Powers is not a party to the Lago  
4 Agrio action. That is correct. However, Section 1782 does  
5 not require that the proposed deponent or the parties from  
6 whom discovery is sought under the statute be parties to the  
7 foreign action. And, therefore, this particular argument of  
8 Mr. Powers is of no avail. Respondents need not be parties  
9 to the Lago Agrio action in order for Chevron to invoke  
10 Section 1782. It is enough that Powers is a party to the  
11 current miscellaneous federal action.

12           With regard to the service upon William Brown and  
13 the travel to a deposition site, Rule 45(b)(1) requires  
14 subpoenas for depositions and subpoenas duces tecum to be  
15 personally served. The subpoenas were personally served  
16 initially on the Powers. Subsequently, at the time Powers  
17 filed his motion to quash Chevron's application, Rule  
18 5(b)(1) states:

19           "If a party is represented by an  
20 attorney, serve under this rule must be  
21 made on the attorney unless the Court  
22 orders service on the party."

23           So when they -- when Chevron served Powers first  
24 personally, that was adequate under 45 and under -- and once  
25 Powers was represented by counsel, then it was appropriate

1 for Chevron to serve Powers through his counsel. Therefore,  
2 under Federal Rule of Civil Procedure 5(b)(1), Chevron's  
3 service on Powers was appropriate in the first instance and  
4 also in the second instance.

5           The subpoena served on Powers complied with Rule  
6 45(b). Respondents argue they do not -- or at least Powers  
7 argues that he does not reside in or is found within the  
8 Southern District within the meaning of Section 1782. The  
9 cases he cites does not deal with Section 1782 but with  
10 other statutes. The only circuit court case dealing with  
11 the relevant statute was cited by Chevron, and that's the In  
12 Re Eddleman case, concluding that to be found in a  
13 jurisdiction within the meaning of Section 1782 requires  
14 nothing more than physical presence. As that Court pointed  
15 out, Section 1782 is only a discovery device and does not  
16 subject a person to liability.

17           William Powers is clearly found in and resides in  
18 San Diego. I see no contrary evidence to what Chevron has  
19 produced in this regard. Therefore, Section 1782 has been  
20 satisfied. And because Powers is a party to this action,  
21 the 100 mile limit imposed by Federal Rule 45 does not  
22 apply.

23           The documents from E-Tech and Powers I feel are  
24 not privileged. Federal Rule of Civil Procedure 26(a)(2)(B)  
25 requires the expert's report to be "prepared and signed by



1 the expert witness." The rule further provides the report  
2 must contain "a complete statement of all opinions the  
3 witness will express and the basis and reasons for them and  
4 the data or other information considered by the witness  
5 informing them."

6 Rule 26(a) (2) (B) requires the affirmative  
7 disclosure of all "data or other information considered by  
8 this expert witness" in forming his opinions. Thus, under  
9 the Federal Rules, the Lago Agrio Plaintiffs or Mr. Cabrera  
10 would have had to disclose all documents Cabrera even  
11 considered in reaching his opinions and conclusion,  
12 including the materials and reports prepared by E-Tech and  
13 Mr. Powers.

14 Furthermore, the Federal Rules of Civil -- I'm  
15 sorry -- Federal Rules of Evidence 702 and 703 permit an  
16 expert to rely upon facts and data. The rules do not permit  
17 an expert to rely upon excerpts from opinions developed by  
18 another expert for purposes of litigation.

19 And there I'm citing In Re Imperial Credit  
20 Industries Securities Litigation, 252 F.Supp.2nd, 1005,  
21 specifically pages 1011 through 1012. That's a Central  
22 District of California case.

23 "When counsel" -- and I'm quoting --

24 "When counsel forwards documents  
25 prepared by a non-testifying consultant

1 to a testifying consultant, they become  
2 discoverable. Any protection the  
3 documents may have had no longer  
4 applies. In general, the work product  
5 privilege has been held not to apply to  
6 opinions and documents generated or  
7 consulted by an expert retained to  
8 testify at trial. Rule 26 -- Federal  
9 Rule of Civil Procedure Rule 26(b)(4)  
10 has been broadly interpreted to  
11 authorize disclosure of both expert  
12 opinions and all documents the expert  
13 generated or examined in the process of  
14 forming those opinions."

15 I turn your attention in that regard to U.S. v.  
16 City of Torrance, 163 FRD 590 and specifically 593. Chevron  
17 has produced sufficient evidence to establish there was a  
18 deliberate rather than an inadvertent disclosure of  
19 Respondent's work product to achieve a tactical advantage.  
20 That deliberate disclosure occurred when Cabrera adopted as  
21 whole cloth Respondent's work product as his own without  
22 notifying the Ecuadorian tribunal of the specificity,  
23 breadth, or depth of this adoption. The work product  
24 privilege was waived when Powers' work product was adopted  
25 in whole cloth by Mr. Cabrera as his own work and translated

1 into Spanish.

2           I feel that the crime fraud exception is  
3 implicated by the ghost writing that was done. The two  
4 orders from the Ecuadorian tribunal were very clear that Mr.  
5 Cabrera was to give to the Court his independent  
6 intellectual work, and while he may adopt certain findings  
7 and conclusions of other experts, that adoption may occur  
8 only after he has independently assessed the integrity and  
9 validity of those findings and conclusions and notified the  
10 Court of such adoption, the reason for his adoption, and the  
11 process by which he came to the conclusion that such  
12 adoption was consistent with his own duties to the Court.

13           It appears that Mr. Cabrera has failed to do that,  
14 implicating the crime fraud exception, and Chevron has a  
15 right to explore whether there has indeed been a violation  
16 of the -- whether indeed the crime fraud exception is  
17 implicated as directly as the evidence suggests it has been.

18           I want to quote from the Hazel Atlas case which I  
19 found personally persuasive.

20           "No fraud is more odious than an attempt  
21 to subvert the administration of  
22 justice."

23           This Court at times designates independent neutral  
24 experts. When the Court does so, it is because Warren  
25 experts have become perhaps so biased that they have ceased

1 to become experts and have become advocates. And,  
2 therefore, the Court wants in complex scientific matters as  
3 much as possible an opinion not of an advocate but of a  
4 scientist or other expert. That is why a court has a  
5 neutral expert. And so it would be indeed a terrible result  
6 and would undermine the integrity of the judicial system if  
7 the evidence does, in fact, establish before the Ecuadorian  
8 tribunal that Mr. Cabrera -- Cabrera's report was ghost  
9 written and was, in fact, the document of an advocate, not  
10 an independent unbiased expert who brought his intellect and  
11 training to inform the Court honestly and fairly on issues  
12 the Court must rule upon.

13 I am satisfied that the material being sought  
14 satisfies the requirement of Section 1782(a) because it  
15 seeks information "for use in a foreign or international  
16 tribunal." By providing the information to the Ecuadorian  
17 court, neither Chevron nor this Court is saying that the  
18 Ecuadorian court must review the documents, give any  
19 particular weight to the documents, but, rather, that the  
20 Ecuadorian court will have at its disposal everything it  
21 needs to make an informed ruling on very complex issues.

22 I am also satisfied that Section 1782(a) does not  
23 impose a foreign discoverability requirement. Although the  
24 section expressly shields from discovery matters protected  
25 by legally applicable privileges, nothing in the statute

1 limits a District Court's production order authority to  
2 material discoverable in the foreign jurisdiction if located  
3 there. And I do not accept any contention that Chevron must  
4 show that the United States law would allow discovery in  
5 domestic litigation analogous to the foreign proceeding.

6           Section 1782 is a provision for assistance to  
7 tribunals abroad. It does not direct this Court to engage  
8 in comparative analysis to determine whether analogous  
9 proceedings exist in Ecuador or elsewhere.

10           Lastly, Chevron has requested that this Court take  
11 judicial notice. Chevron's request for judicial notice of  
12 filings regarding late related actions is granted pursuant  
13 to Federal Rule of Evidence 201. Plaintiffs -- or  
14 Respondents have not filed any opposition to Chevron's  
15 request that the Court take judicial notice of these  
16 documents. Chevron's request for judicial notice of court  
17 filings on orders in the Lago Agrio litigation and the  
18 provision of Ecuadorian law is granted pursuant to Federal  
19 Rule of Evidence 201. Again, no opposition has been filed  
20 to these documents, and I've already said that I have  
21 granted Chevron's motion for leave to supplement the record  
22 in opposing Plaintiffs' motion to quash.

23           So that is the ruling of the Court. I want to  
24 thank the parties for giving me what I consider to be very  
25 excellent briefing, long but, nonetheless, excellent. I

1 mean that. The writing was unusually good. I say then to  
2 the loser, you fought bravely.

3 Anything else?

4 MS. NEUMAN: No, your Honor.

5 MS. SEVERSON: No, your Honor.

6 THE COURT: Thank you.

7 I should have fled while I had the chance.

8 MS. NEUMAN: I apologize, your Honor. I'm a  
9 little slow this afternoon. Is the deposition ordered to  
10 take place by a certain date?

11 THE COURT: Oh, yeah, yeah. Let's get the  
12 deposition -- you give me some proposed date because I know  
13 you've got to get ready for September 16. So Powers is  
14 here.

15 MS. NEUMAN: He is here, your Honor.

16 THE COURT: So why can't it be done by September  
17 3, Friday?

18 MS. NEUMAN: That works for us, your Honor.

19 THE COURT: All right.

20 MS. NEUMAN: As long as we can have the documents  
21 at least a couple of days ahead of time.

22 MS. SEVERSON: Your Honor, there's the issue as  
23 far as E-Tech. I understand --

24 THE COURT: I'm -- E-Tech is held in abeyance.  
25 I'm not -- I specifically kept talking about Powers and not

1 E-Tech. I would be happy to rule on E-Tech, but I'm going  
2 to hold off on ruling on E-Tech and let New Mexico do that.

3 I want the documents turned over. Today is the  
4 27th. I want the documents turned over by Tuesday, the  
5 31st, and I want the depo to happen by Friday, September 3.  
6 Okay.

7 Now, I expect the deposition to be in San Diego.

8 MS. NEUMAN: Yes, your Honor.

9 THE COURT: You can't fly to Hawaii to take his  
10 deposition or Nebraska to take his deposition. It has to  
11 happen in San Diego.

12 MS. SEVERSON: Your Honor, given that it's after  
13 5:00 p.m. on a Friday and that by definition the records  
14 that are sought would be voluminous and the -- there may be  
15 objections that are part of the actual deposition or  
16 production, Mr. Powers and the Plaintiffs, the Ecuadorian  
17 Plaintiffs did lodge objections -- not lodged, but served  
18 objections to the actual scope of the subpoena, this Court  
19 has not yet ruled on any issue that would come up as far as  
20 each particularized request within the subpoena, and so the  
21 31st just seems, notwithstanding Chevron's desire to have it  
22 expedited, that just seems unduly burdensome just by virtue  
23 of that date.

24 MS. NEUMAN: We only -- I'm sorry.

25 MS. SEVERSON: We would ask for production, you

1 know, at a later date and deposition a week later.

2 THE COURT: Well, they've got to file by the 16th,  
3 am I right? Listen, I will let you -- I will hold off  
4 production one day, to September 1. And the deposition has  
5 to happen, okay, and I'll give you this. You can have the  
6 production by Thursday, September 2, but the deposition has  
7 to happen on or before September 8, has to happen in San  
8 Diego.

9 Where is your office?

10 MS. NEUMAN: Just in Irvine, your Honor.

11 THE COURT: But you're in San Diego?

12 MS. SEVERSON: Yes, your Honor.

13 THE COURT: So you have to come down to San Diego.  
14 He doesn't have to go up to Irvine. I know it's a 100 mile  
15 thing, but both counsel are here. Come down here. Make a  
16 room available. If you need to get an independent room, do  
17 it. Whatever -- I'm expecting -- I remember the scope of  
18 the subpoena in my mind seemed to be related to all the  
19 documents and research that he used or conveyed or  
20 communicated with the Lago Agrio Plaintiffs or with Cabrera.  
21 So is there any dispute about the scope? Let's deal with  
22 that.

23 MS. SEVERSON: Yes, your Honor, there is a dispute  
24 about the scope, and we have asserted specific objections  
25 point by point to each particularized request (indiscernible



1 5:12:58), and --

2 THE COURT: Well, let's go -- let's pull it out  
3 now. Let's kind of get some of this resolved right now.  
4 Give me -- again, remind me where in all this stuff --

5 MS. NEUMAN: It's page 12, Exhibit A to the Neuman  
6 declaration, and since we're focusing on Mr. Powers, your  
7 Honor, there's, in fact, only five requests, and I think  
8 your Honor's overruled their privilege objections in your  
9 earlier ruling.

10 THE COURT: Yeah, I don't expect to see a  
11 privilege. So it's not the declaration of Sabovich. It's  
12 the declaration of who?

13 MR. SABOVICH: Declaration of Andrea Neuman, your  
14 Honor.

15 THE COURT: Here we go.

16 MS. SEVERSON: Your Honor?

17 THE COURT: Yes.

18 MS. SEVERSON: With regards to the privilege, is  
19 it your Honor's rule that only communications between the  
20 Plaintiffs' own counsel and the witness are not privileged?

21 THE COURT: Well, let's go through this. Ms. --

22 MS. SEVERSON: Because that subpoena's  
23 extremely broad.

24 MS. NEUMAN: Page eight, your Honor.

25 THE COURT: Okay.

1 MS. NEUMAN: It's page --

2 THE COURT: So I'm looking at Exhibit A as in  
3 apple?

4 MS. NEUMAN: -- page 12 --

5 MS. SEVERSON: Your Honor, if I may have a moment  
6 to turn my computer on so I can access the objection and  
7 (indiscernible).

8 MS. NEUMAN: Do you see those, your Honor, one  
9 through six?

10 THE COURT: Yes.

11 MS. NEUMAN: We would withdraw number one or make  
12 it inoperative because of setting aside E-Tech. So I would  
13 set that one aside as well.

14 MS. SEVERSON: Your Honor, if I may just have a  
15 moment so I can follow counsel's argument.

16 THE COURT: Yes, ma'am, you may have your moment.  
17 (Pause.)

18 MS. SEVERSON: Thanks for your patience, your  
19 Honor.

20 THE COURT: Certainly. It's important enough to  
21 wait.

22 MR. AGUIRRE: Just trying to help counsel, your  
23 Honor. Counsel was kind enough to provide me with a  
24 document that is on page seven, and it's in -- I believe  
25 that a number of the items have to do with E-Tech. So the

1 idea was that -- I would assume that each item as to E-Tech  
2 would be (indiscernible) right now. I'm making an inquiry  
3 to the Court. So, for example, all -- number one, all  
4 documents related to any work by E-Tech would -- I'm looking  
5 at -- I'm just trying to help counsel, my co-counsel, just  
6 getting her objections. And then number eight, all  
7 documents to retention and destruction of records by E-Tech.

8 MS. NEUMAN: We're only talking about the subpoena  
9 served on Powers.

10 MS. SEVERSON: I understand. I'm looking, though,  
11 at the attachment to Bill Powers. It indicates on page  
12 seven to Exhibit A --

13 THE COURT: Uh-huh.

14 MS. SEVERSON: -- all documents related to work by  
15 E-Tech. So that is (indiscernible) shall for purposes of --

16 THE COURT: I'll tell you what. Let's coordinate  
17 this. Turn to Exhibit A as in apple to the declaration of  
18 Andrea E. Neuman. Turn to page eight of Exhibit A as in  
19 apple. Are we all there.

20 MS. SEVERSON: I'm there.

21 THE COURT: Item number one, all documents  
22 responsive to any of the requests for production propounded  
23 to E-Tech that have not yet been produced by E-Tech has been  
24 withdrawn with -- have been held in abeyance at this time.

25 MS. NEUMAN: That's correct, your Honor.

1 THE COURT: Number two, all documents relating to  
2 any communication between you and Cabrera or any other  
3 person that contributed to the Cabrera reports,  
4 discoverable. Okay.

5 Item number three, all documents relating to any  
6 communication between you and Plaintiffs' lawyers relating  
7 to the Cabrera's reports or to any work provided to Cabrera.  
8 Now, to the extent it says all documents relating to any  
9 communications between you and Plaintiffs' lawyers relating  
10 to the Cabrera reports, that is to be produced.

11 Now, to the rest of that or to any work provided  
12 to Cabrera, if he considered it -- I don't care whether he  
13 adopted it. I don't care whether he incorporated it. If  
14 Powers considered it, it's discoverable.

15 Are you with me?

16 MS. NEUMAN: Yes, your Honor.

17 THE COURT: Okay.

18 MR. AGUIRRE: Actually, I'm not, your Honor.

19 THE COURT: Okay.

20 MR. AGUIRRE: I'm a little bit confused. In other  
21 words, what you're saying -- I mean, obviously if any  
22 documents from Powers were sent to Cabrera, the Powers -- if  
23 Powers knew or had knowledge that were sent to Cabrera,  
24 that's clearly discoverable? That's the first part of what  
25 you said?

1 THE COURT: No.

2 MR. AGUIRRE: Okay. The second part of it is not  
3 the part that I understood.

4 THE COURT: Okay. There may be work provided to  
5 Cabrera -- actually, I guess you should look at it in  
6 connection with the first part.

7 Okay. The first part is about communications  
8 between Powers and Plaintiffs' lawyers regarding the Cabrera  
9 report. It is possible that Powers gave other work to  
10 Cabrera that did not come from Plaintiffs' counsel. It may  
11 have come from some other source. It may have come from  
12 another expert that Plaintiffs' counsel hired. It may come  
13 -- it may have come from Wikipedia. But if he considered  
14 it, if Powers considered it, it goes to Cabrera, because  
15 under the rule -- under our Rules of Evidence, if an expert  
16 considers something, whether or not they adopt it, it's  
17 discoverable.

18 MR. AGUIRRE: Right. But I think, your Honor,  
19 just to clarify that, the idea -- what I think -- what your  
20 Honor is getting at is to the extent that Mr. Powers had  
21 communications either directly or indirectly with Cabrera,  
22 that's clearly covered.

23 THE COURT: Yes.

24 MR. AGUIRRE: Okay. If -- if Mr. -- let's say,  
25 for example, however, let's say that after the Cabrera

1 report was issued, if there was communication between Mr.  
2 Powers and counsel about the content of the report after it  
3 was issued, is that discoverable?

4 THE COURT: Sure.

5 MR. AGUIRRE: Even though that's -- even though  
6 they're consulting about it?

7 THE COURT: Well, you -- what I'm trying to say is  
8 that once you -- once you give the documents up that Powers  
9 generates and gives to Cabrera that Cabrera has ceded, how  
10 do you close the door now and say that the privilege is now  
11 back in effect?

12 MR. AGUIRRE: Well, what if there are no such  
13 documents?

14 THE COURT: Then you don't have a worry.

15 MR. AGUIRRE: Okay. But, no, but then -- but the  
16 point is there could have been communications between  
17 counsel and Powers after the Cabrera reports issued about  
18 that -- they just may be talking about what do you think  
19 about the report or whatever.

20 THE COURT: Yeah. It's discoverable. You know,  
21 you're giving a nice innocent. I don't know. It could say,  
22 "Oh, my goodness. They found out what we've done. We've  
23 got to cover it up." That's discoverable.

24 MR. AGUIRRE: Okay. What if it's -- what if it's  
25 just technical in nature that --

1 THE COURT: You don't get to -- you don't get --  
2 no. Given where we've gone, I think that's discoverable.

3 MR. AGUIRRE: Okay.

4 THE COURT: Item number four --

5 MS. SEVERSON: Your Honor, for the record, we  
6 object.

7 THE COURT: I know.

8 MS. SEVERSON: (Indiscernible.)

9 THE COURT: Okay. All documents relating to any  
10 communication between you, Powers, and any Plaintiff  
11 affiliated person related to the Cabrera report,  
12 discoverable.

13 Item number five, all documents that were  
14 reviewed, considered, or relied upon by you in performing  
15 any work relating to the Cabrera reports, discoverable.

16 Now, clue me in. Who's --

17 MS. NEUMAN: This one, your Honor, Laura Bellinger  
18 prepared a database that Cabrera adopted but did not  
19 attribute to her. We know from the Denver action where she  
20 produced that database and an expert confirmed -- a forensic  
21 expert whose opinion your Honor has, confirmed that that was  
22 the database that Cabrera pretended was his. So we're  
23 obviously looking for the work done on that Cabrera adopted  
24 database. So it falls in the Cabrera camp, but it's defined  
25 via the person who produced it in the 1782 action in Denver,

1 which is one Laura Bellinger.

2 MS. SEVERSON: Your Honor --

3 THE COURT: So you're trying to find out if Powers  
4 also relied on that or communicated it to Cabrera in some  
5 way?

6 MS. NEUMAN: Or worked on it before --

7 THE COURT: Okay.

8 MS. NEUMAN: -- it was sent to Cabrera.

9 THE COURT: That's discoverable. But it has to  
10 relate to the Cabrera report.

11 MS. NEUMAN: Yes. This -- this -- so it would be  
12 the database was adopted in the Cabrera report, and --

13 THE COURT: Okay.

14 MS. NEUMAN: -- we had submitted an unrebutted  
15 expert opinion to that effect.

16 THE COURT: And so have you defined the phrase  
17 "Laura Bellinger's work in the Selva Viva Database?"

18 MS. NEUMAN: We have defined the Selva Viva  
19 Database, your Honor.

20 THE COURT: Okay. Where is that?

21 MS. NEUMAN: I am looking for that, your Honor.

22 THE COURT: Oh, I see it. It's item 26 on page  
23 five.

24 MS. NEUMAN: Yes.

25 THE COURT: Okay.



1 MS. NEUMAN: And that's the database that shows up  
2 in the Cabrera report according to the opinion of Mr.  
3 Younger who did the computer forensic analysis to show that  
4 the two databases were the same.

5 THE COURT: Okay. Well, that makes sense that  
6 that's discoverable.

7 Okay. Madam, you have additional comment?

8 MS. SEVERSON: Yes, your Honor. Thank you. I  
9 would just like to put on the record just some objections  
10 and --

11 THE COURT: Sure. Go ahead.

12 MS. SEVERSON: The request to Mr. Powers was a  
13 series of instructions. The instructions and the definition  
14 purport to enlarge, expand, or alter the meaning of the  
15 topics that they're stated for. They're vague, ambiguous,  
16 over-broad, uncertain. The Plaintiffs object to -- these  
17 objections were served on the opposing party, on Chevron,  
18 and to the extent that the Respondents have asserted these  
19 objections, we incorporate them as a part of this record as  
20 the basis for the objection.

21 THE COURT: Okay. Just to help me, now, let's go  
22 through -- you say part of the instructions are vague,  
23 ambiguous, over-broad. So be specific. Where in the  
24 instructions do you find that to impact the specific request  
25 two through six on page eight -- two through seven on page

1 eight -- no, two through six?

2 MS. SEVERSON: For instance, your Honor, the Selva  
3 Viva Database which is listed on page five of Exhibit A to  
4 the moving declaration, there's an assumption built into  
5 this request that it is known and understood to be exactly  
6 how Chevron presents it, and that is the same scope of what  
7 Mr. Powers assumes it to be, and I don't think that has been  
8 established.

9 THE COURT: Well, you will establish that at the  
10 deposition. When you go to the deposition and you ask him  
11 what's the Selva Viva Database and he says "I've never heard  
12 of it" or he says it's the database having to do with the  
13 rate of filtration on an incline, you'll say, "Oh, you mean  
14 the Selva Database" or something. So you will find that out  
15 when you to go the deposition, and you will find that out  
16 when you talk with your client.

17 But right now what you're telling me is, in  
18 effect, this might not be understood by your client, but  
19 you're not telling me it isn't understood by your client.

20 MS. SEVERSON: Well, your Honor, there is no  
21 requirement of my clients in this country (indiscernible)  
22 objection stage. So --

23 THE COURT: No.

24 MS. SEVERSON: -- we would --

25 THE COURT: I agree with you. He doesn't have to

1 produce anything at this point, but I'm just -- you're  
2 giving me a hypothetical objection, and I'm trying to pin  
3 this down so, as much as I like you nice people and like to  
4 have nice lawyers and good lawyers in front of me, I don't  
5 need to see you over and over again on this matter if we can  
6 narrow down the issue. So is there anything other than the  
7 Selva Viva Database that you feel is vague, ambiguous, or  
8 over-broad as it impacts the items that I've said Powers  
9 must disclose?

10 MS. SEVERSON: Yes, your Honor.

11 THE COURT: Okay. What?

12 MS. SEVERSON: With regards to FDA -- actually --  
13 one moment, your Honor. Your Honor, we would object to the  
14 subpoena in scope and in time. As my partner has already  
15 talked about, the fact that there may be discussions, to the  
16 extent they're not relied upon, transmitted to Mr. Cabrera,  
17 they would be beyond any relevance to both the Ecuador  
18 matter, this Court, and would not be likely to lead to the  
19 discovery of admissible evidence. They also -- and would  
20 also be in a privilege that has not been found to have been  
21 waived, and it could be either attorney-client or work  
22 product privilege at that time.

23 The fact that this subpoena references -- request  
24 references persons, it seeks information pertaining to  
25 persons beyond the scope of the inquiry that is before this

1 Court and the purported reasons why Chevron needs the  
2 information and would be over-broad, irrelevant, and not  
3 reasonably calculated to lead to the discovery of admissible  
4 evidence.

5 Thank you.

6 THE COURT: Okay. Anything else? Any response?  
7 I'm not requiring a response. I'm just asking you is there  
8 a response. Don't feel that you have to give one, and don't  
9 feel that you are to refrain from giving one.

10 MS. NEUMAN: No, your Honor. We feel the requests  
11 are focused, and we obviously submit on your Honor's order  
12 that they produce all the requested materials.

13 THE COURT: Okay. So let's not have any delay.  
14 You've got the dates that I've given you, right?

15 MS. NEUMAN: Yes, your Honor.

16 THE COURT: Okay.

17 MS. SEVERSON: Thank you, your Honor.

18 THE COURT: Thank you.

19 MS. NEUMAN: Thank you, your Honor.

20 (Proceedings concluded.)  
21  
22  
23  
24  
25

1 I certify that the foregoing is a correct  
2 transcript, done to the best of my ability, from the  
3 electronic sound recording of the proceedings in the above-  
4 entitled matter.

5

6

Transcriber

Date

7

8 FEDERALLY CERTIFIED TRANSCRIPT AUTHENTICATED BY:

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11 L.L. Francisco, President  
12 Echo Reporting, Inc.

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