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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Application of: DANIEL CARLOS LUSITAND YAIGUAJE, ET AL. Applicants, For the Issuance of Subpoenas for the Taking of Depositions and the Production Of Documents in a Foreign Proceeding Pursuant to 28 U.S.C. § 1782	Case No. 11-mc-80087-CRB **[CORRECTED][1] NOTICE OF MOTION AND MOTION TO COMPEL RESPONDENTS MASON INVESTIGATIVE GROUP, ERIC DANFORD MASON, AND JOSEPH PHILIP PARISI TO PRODUCE SUBPOENAED DOCUMENTS LISTED ON RESPONDENTS' AUGUST 23, 2011 PRIVILEGE LOG AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SAME**

[1] Due to a filing error, the Table of Contents and Table of Authorities were not included in the original filing of this Motion on August 31, 2011. This Corrected version includes a Table of Contents and Tables of Authorities. A citation was also corrected in footnote 12 on page 10. No other substantive changes were made to this document.

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on September 23, 2011 or as soon thereafter as may be set by the Court, before the Honorable Charles R. Breyer in Court 6 of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102, Petitioner Daniel Lusitand Yaiguaje and other plaintiffs (collectively, the "Ecuadorian Plaintiffs" or "Petitioners") in the matter known as *Maria Aguinda et al. v. Chevron Corporation*, No. 2002-0002, pending in the Provincial Court of Justice of Sucumbíos in Lago Agrio, Ecuador (the "Lago Agrio litigation") will and hereby do move the Court to compel Defendant Mason Investigative Group, Eric Danford Mason, and Joseph Philip Parisi (collectively, "Mason Group" or "Respondents") to produce all documents listed on the Mason Group's privilege log, a revised version of which was received by the Ecuadorian Plaintiffs on August 25, 2011.

The instant motion is supported by: the Memorandum of Points and Authorities below; the Declaration of James E. Tyrrell, Jr., filed herewith, and the exhibits attached thereto; all of the pleadings, records, and papers on file in this action, and upon such further oral and documentary evidence as may be presented at the hearing of this motion. A proposed order is included.

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INTRODUCTION & SUMMARY OF ARGUMENT

Mason Group has failed to carry its burden to demonstrate that documents identified on the log are protected by attorney-client privilege or work production doctrine in several respects:

First, Mason Group asserts that its communications to and from third-parties such as Wayne Hansen's friend and "business partner," a travel agent, and a United States District Court, constitute "attorney work product." Those assertions are clearly frivolous, and stretch the work product doctrine well past its breaking point.

Second, Mason Group's descriptions of allegedly privileged documents remain inadequate; they do not allow for a reasonable assessment of the validity of the privilege assertion. For the most part, they are comprised of only boilerplate language. Further, many documents over which the "attorney-client privilege" is specifically claimed are not described with any language, generic or otherwise, suggestive of the provision of legal advice between attorney and client. Indeed, it seems doubtful that any of Mason Group's documents are entitled to that privilege. In any event, we should not be relegated to guessing. In sum, Mason Group was given multiple bites at the apple to articulate an adequate basis for its claimed privileges. It has failed to meet that burden.

Third, Mason Group claims work product over a litany of documents apparently downloaded from public sources, none of which are claimed to contain any indicia of potential work product, such as handwritten notes. These documents do not merit any protection.

Finally, the Ecuadorian Plaintiffs have more than a "substantial need" for at least some of the documents identified on the privilege log, even if they were protectable work product. This is particularly true of Mason Group's communications with Charles "Sandy" Harris—Wayne Hansen's friend, purported "business partner," and the owner of the environmental remediation company (CIASA), which Messrs. Borja and Hansen falsely claimed to be representatives of as a means of gaining access to the Ecuadorian judge whom they attempted to entrap on film. While

Chevron has embraced one of its judicial entrapment operatives, Mr. Borja, the company has disavowed any relationship with his accomplice, Mr. Hansen, obviously wishing to keep some distance between itself and the convicted drug-trafficker and inveterate scam artist who helped eliminate a judge perceived as hostile to Chevron's interests. These communications to and from Charles Harris will likely shed light on the true nature of the relationship between Hansen and Chevron, including Chevron's knowledge of, or involvement in, Mr. Hansen's apparent abrupt departure from the United States in or around November 2010.

BACKGROUND

On July 5, 2011, the Court ordered Mason Group to submit a privilege log to the Ecuadorian Plaintiffs by July 15. (Dkt. 69.) Mason Group did in fact submit a log on July 15, but it does not appear to have been prepared in good faith. (*See* Dkt. 85 at 8-24.) Virtually all documents were described in meaningless fashion, such as: *Email re greetings*, *Email re documents, Email re phone call,* and *Email re contact*. (*See id*.) Among other problems, Mason Group did not identify the affiliations of *any* persons identified on the log as document "authors" or email "recipients," or their relationship to the party asserting privilege. (*See id*.) Compounding this apparent gamesmanship, Mason Group asserted privilege over a number of documents purportedly on behalf of *Chevron*, notwithstanding the fact that both Chevron and Mason Group suggested in their briefing that any claim of privilege belonged to Diego Borja.[2]

The Ecuadorian Plaintiffs requested a prompt meet-and-confer in light of Chevron's ongoing efforts to nullify the judgment against it in Ecuador based on the alleged judicial misconduct exposed via the entrapment scheme carried out by Diego Borja and Wayne Hansen. (Dkt. 85 at 26-28.) Four days later, Mason Group responded that it would not "'cure' - *or even*

[2] *See, e.g.,* Dkt. 72 at 24 (Chevron arguing *only* that Borja has not waived his privilege); Dkt. 74. at 14, n.3 (Mason Group asserting *only* that counsel for Mr. Borja instructed it to assert privilege). The Ecuadorian Plaintiffs relied on that assertion and did not address any claim of privilege by Chevron in their own briefing—because there was none. Indeed, the Ecuadorian Plaintiffs expressly noted in their reply brief that Chevron seemed only to be advocating (albeit improperly) Mr. Borja's privilege. (Dkt. 79 at 9, n.5.) Chevron should not be permitted to blindside the Ecuadorian Plaintiffs with this belated assertion of privilege. Chevron has waived the right to assert privilege over any of the Mason Group's documents.

discuss" the privilege log unless the Court granted the § 1782 application, notwithstanding the Court's July 15 Order. (*See* Dkt. 85 at 30-31 (emphasis added).)

The Court granted the Ecuadorian Plaintiffs' § 1782 Application on August 5. (Dkt. 87.) Following an August 8 conference during which the various deficiencies were discussed, on August 10, Mason Group submitted a revised privilege log. It is apparent from the revised log that Mason Group purported to address the Ecuadorian Plaintiffs' complaints about minimalist document descriptions by replacing those descriptions with boilerplate language sounding of privilege. On August 23, Mason Group sent the Ecuadorian Plaintiffs a disk containing their document production, as well as another revised privilege log, which appears to be much the same as the August 10 privilege log but for its identification of some additional documents that Mason Group had not previously logged. That August 23 privilege log is the subject of this motion. (*See* Declaration of James E. Tyrrell, Jr., dated August 31, 2011, at Ex. A.)[3]

As for the document production, the disk contained just two files: one pdf file containing what appeared to be several documents (*not* in native electronic format) lumped together, and a separate, single email.[4] (Tyrrell Decl. ¶ 2).[5] The production was comprised of: (1) the publicly available transcripts of the surreptitiously-videotaped conversations between Messrs. Borja and Hansen, the Ecuadorian judge, and other persons; (2) three emails communications between Diego Borja and others, all of which appear to have been previously produced in the Borja § 1782 proceedings; (3) the résumés of Diego Borja and his wife, which were also produced in the Borja § 1782 proceeding; (4) four grainy photographs, which, apparently, are merely stills from the publicly available videotapes of the entrapment operation; and (5) an undated Chevron report about the Lago Agrio Litigation. (Tyrrell Decl. ¶ 3.)

* * *

[3] Hereinafter, unless otherwise noted, all exhibits referenced in this Memorandum are appended to the Tyrrell Declaration.

[4] The Ecuadorian Plaintiffs continue to meet and confer with Mason Group on this limited issue and hope to resolve this matter without the intervention of this Court.

[5] The scant production stands in sharp contrast to what has been withheld; the privilege log contains over 160 entries consisting of approximately 700 pages. (*See* Ex. A.)

As this Court has observed: "Chevron's allegations of judicial bribery in Ecuador are monumental. . . .Hansen is at the very center of those allegations. . . . [and] Applicants have demonstrated that the Mason Investigative Group might be able to shed at least some light on Hansen's story." (Dkt. 87 at 19-20.) The Mason Group's scant production and "liberal," to put it mildly, assertion of privilege over what are obviously the truly informative documents—i.e., communications with Wayne Hansen's friend and "business partner" —suggest that Chevron and Borja will do everything in their power to assure that no light is ever shed on the Wayne Hansen story. In this global environmental and human rights litigation, in which the Ecuadorian Plaintiffs' litigation files have been rendered an open book while Chevron's side of the story has largely gone untested to date, that would be an inequitable result, indeed.

ARGUMENT

I. MASON GROUP'S PRIVILEGE LOG IMPROPERLY LOGS COMMUNICATIONS AND EXCHANGES WITH THIRD PARTIES THAT CANNOT BE PRIVILEGED

Mason Group has improperly withheld documents in the possession of third parties which are not protectable by the attorney work product doctrine. For example, Mason group claims attorney work product over communications with Wayne Hansen's friend and business partner, and Wayne Hansen's attorney, even though the parties have already conceded and this Court already found that communications with Wayne Hansen *himself* are subject to neither privilege nor work product protection. (*See* Dkt. 87 at 7 n.9 (citing Jul. 5, 2011 Hr'g Tr. at 69:8-13).) Other entries on the log have no description at all as to the third party author and recipient that would enable the reader even to guess why any privilege is being asserted. (*See, e.g.*, Ex. A, at 20 (Appendix to the Mason Group log) (providing no explanation of relationship to Mason Group of certain identified persons such as Ellen Thatcher, Pierre Merkl, and Mary McNamara to support privilege and immunity assertions).) And Mason Group even claims that a letter communication with the Clerk's Office of the United States District Court is somehow privileged. (*See* Ex. A, at MASON00376-00378.)

The voluntary exchange of information with third parties waives any claim of privilege or work-product protection. *See Griffith v. Davis*, 161 F.R.D. 687, 699-700 (C.D. Cal. 1995) ("Waiver is found where the disclosure substantially increases the opportunity for potential adversaries to obtain the information."); *Regents of the Univ. of Cal. v. Micro Therapeutics Inc.*, No. C 03-05669 JW, 2007 WL 1670120, *3 (N.D. Cal. Jun. 6, 2007) (noting waiver is "general rule" when attorney work product is disclosed to third parties"); *Great Am. Assur. Co. v. Liberty Surplus Ins. Corp.*, 669 F. Supp. 2d 1084, 1092 (N.D. Cal. 2009) (finding waiver due to intentional production to third party). When otherwise protectable information is disseminated to a third party, "*the attorney cannot reasonably expect to limit the future use of the otherwise protected material*." *Griffith*, 161 F.R.D. at 699-700 (citation and internal quotation marks omitted) (emphasis added).

The Mason Group clearly cannot meet its burden in showing that third-party disclosures can be considered work product. *See United States v. Mass. Inst. Of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997) ("Where privilege is claimed and the opponent alleges a specific disclosure, the burden of proof is on the claimant to show nondisclosure wherever that is material to the disposition of the claim.").

Charles "Sandy" Harris. There are four entries on the Mason Group's privilege log involving communications with Charles "Sandy" Harris. (*See* Ex. A at MASON00893-00895, MASON00896-00897, MASON00898-00899, and MASON00926-00927.) Mason Group cannot claim attorney work product immunity over the four emails on which Harris was either the sender or recipient, no less a communication that Mason Group once described, in an earlier iteration of its privilege log, as "*email re greetings*."[6] (Dkt. 85 at 24 (MASON00926-27)). Harris does not work for the Mason Group or Borja, nor can he be regarded as an agent of their counsel. He is

[6] When the Ecuadorian Plaintiffs challenged the Mason Group that an "email re greetings" could not possibly be considered attorney work product, rather than produce the document, Mason Group made their subject matter description of this communication *less* descriptive, apparently in an effort to conceal from this Court the document's non-privileged nature. (Compare descriptions for MASON00926-00927 (Dkt. 85, at 24 ("*Email re greetings*") to Ex. A at 19 ("*Email correspondence reflecting investigator's strategy related to investigation in anticipation of litigation*").)

the founder and owner of Construcción e Ingeniería Ambiental, SA de CV ("CIASA"), a company located and incorporated in Mexico. (*See* Ex. B.) The relevance of Harris and CIASA to the underlying litigation is clear: CIASA is the water treatment company that Borja and Hansen purported to represent in their meetings with the judge in Ecuador. (Ex. F.)

Wayne Hansen was clear about his willingness to turn on Chevron out of frustration at the fact that Chevron had not offered him the "deal" that the "oil co." gave to Borja. (Dkt. 4, Ex. 7.) Moreover, Hansen's former partner (Borja) apparently stabbed him in the back. *See* No. 10-mc-80225, Dkt. 68-4, Ex. 36, at 6 (Borja in recorded conversation discussing Hansen and noting "We knew that from the get go. . . . Collateral damage. . . . He's disreputable."). To suggest that Hansen's friend and "business partner"[7] could somehow be considered a trusted confidante of the Chevron-Borja camp, such that one would reasonably expect Harris to keep communications with the Mason Group a secret is beyond the pale.[8]

It cannot be there was any expectation on the part of Eric Mason that when he communicated with Harris, Harris would "limit the future use of the otherwise protected material." *Griffith*, 161 F.R.D. at 699-700. The Mason Group has not claimed privilege over its communications with Wayne Hansen (also addressed to Charles Harris). (*See* Ex. C.) By logical extension, communications with Hansen's friend and "business partner" during the course of the same investigation should not protected by work product, absent some particularized showing –

[7] Borja has already conceded that Hansen owned a financial interest in Harris' CIASA. (Ex. F.)

[8] Notwithstanding the fact that Mason Group claims "*attorney* work product" over every document on the log as to which any claim of work product is made, as this Court has recognized with respect to similar documents disclosed in connection with the Borja § 1782 proceedings, if any of these documents are protected work product at all, they are, at best, *ordinary* work product. (Dkt. 87, at 7.) As ordinary work product, these materials will be discoverable if a party has "substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." *Castaneda v. Burger King Corp.*, 259 F.R.D. 194, 196-97 (N.D. Cal. 2009); s*ee also* Fed. R. Civ. Proc. P. 26(b)(3). That the Ecuadorian Plaintiffs have a substantial need for Mason Group's communications with Charles Harris, a friend and purported "business partner" of Wayne Hansen, is an understatement. As noted above, Hansen and Borja claimed that they worked for CIASA, the Mexican remediation company owned by Charles Harris, as the pretext to gaining access to the Ecuadorian Judge to execute the secretly-videotaped entrapment scheme. Moreover, Charles Harris is copied on the critical, December 2010 email from Wayne Hansen to Eric Mason, in which Hansen states that he is in Peru and invites Mason to join him. (*See* Dkt. 4, Ex. 9.) Of all the documents on Mason Group's privilege log that may shed light on (1) the nature of Chevron's relationship with Hansen, and (2) the circumstances surrounding his apparent departure from the United States to Peru, the correspondence to and from Mr. Harris is most likely to do so. There is no viable substitute for the exchange between Mason Group and Charles Harris embodied in these emails.

which should now be considered waived was not provided at the time Mason Group's privilege log was served. Communications with Harris should be compelled.

Mary McNamara. Communications with Mary McNamara should also be ordered produced. Upon information and belief, McNamara was the attorney designated by Chevron to represent Wayne Hansen – a legal representation that may well have never culminated. (Tyrrell Decl., ¶ 5.) The Mason Group claims privilege over two entries in which McNamara is the author or recipient of a communication, though the privilege log's appendix fails to disclose in any way her relationship to Borja and Mason Group. (*See* Ex. A. at MASON00887-00889.) Instead, the Mason Group log merely discloses that McNamara is an attorney at Swanson & McNamara LLP,[9] and does not describe, in any way, her relationship (if any) to the Mason Group or Borja, rendering the log deficient in the first instance. To the extent that the parties have already conceded that communications with Hansen cannot be considered work product, communications in the possession, custody, or control of Hansen should also be ordered produced. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 8.11 (2006); *see also Evvtex Co. v. Hartley Cooper Assocs*. Ltd., 102 F.3d 1327, 1332 (2d Cir. 1996) (holding agent has duty to provide principal with information relevant to affairs entrusted to him).

United States District Court. Mason Group audaciously has withheld, and claims attorney work product over, three letters to United States district courts. (*See* MASON00374-75, MASON00376, and MASON00377-78). Tellingly, Mason Group did not include the word "draft" in its revised privilege log description for these documents and during the meet-and-confer session, when specifically asked whether the documents were drafts, counsel for Mason Group demurred. (Tyrrell Decl., ¶ 6.).

Mason Group cannot support an argument that letters sent to a United States District Court are privileged or subject to any immunity. There cannot be any reasonable expectation that any documents sent to a Federal courthouse will not be made public. *See, e.g.*, *Seattle Times Co.*

[9] Swanson & McNamara LLP – now Swanson, McNamara & Haller LLP – bills itself as a "firm specializing in criminal defense." (*See* Ex. D.)

v. U.S. District Court, 845 F.2d 1513, 1516 (9th Cir. 1988) (noting public access to judicial proceedings is crucial to public confidence in judiciary). It is outrageous for Mason Group to claim that an unsolicited letter sent to United States District Court would be subject to work product protection.[10]

Travel agents. Mason Group has claimed privilege over communications with its travel agents. (*See, e.g.*, *See, e.g.*, Ex. A. at MASON00900-00902 ("*Email correspondence between counsel and travel agent reflecting investigative strategy in anticipation of litigation*"), MASON00904-906 ("*Documents related to travel reflecting investigative strategy in anticipation of litigation*"); *See, e.g.*, Dkt. 85 at MASON00474-00476, MASON00892-00893 (emails described as "*Email re travel)*, MASON00478 ("*Email re travel safety*"), MASON00799 ("*Email re travel research*"). Communications with travel agents cannot be subject to claims of attorney work product for the purpose of provisioning air plane tickets and hotel reservations.[11] As an initial matter, communications with a travel agent for the purpose of booking travel stretches work product immunity well beyond its intended purpose, if they can be claimed work product at all. In related litigation in the Southern District of New York, that Court last week ordered the production of documents related to "*travel logistics*," finding that such communications are "non-substantive" and "must be produced because they are neither attorney-client communications nor attorney work product." (Exhibit E, at 2 (emphasis added).) It is doubtful that a communication with a travel agent is prepared "because of" litigation. *In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management)*, 357 F.3d 900, 906 (9th Cir. 2004). Protecting such communications is not in alignment with the principle behind the work product doctrine: to

[10] This is particularly true as Chevron has argued elsewhere, and other courts have found, that documents provided to a court appointed expert in Ecuador are not protected by work product. *See Chevron Corp. v. E-Tech Int'l.*, No. 10cv1146-IEG(WMc), 2010 WL 3584520, *6 (S.D. Cal. Sept. 10, 2010) (finding that communications with a court appointed expert lost any confidential privilege status). There is, in short, no reasonable expectation of privacy in documents submitted to a United States Federal Court and Mason Group should be compelled to produce these communications.

[11] Surely Mason Group could not claim as immune from discovery a communication with Delta Airlines selecting a seat assignment or a stub for a flight ticket. For the same reasons Mason Group cannot shield invoices, itineraries, and other documents created by or sent to its travel agents.

"shelter[ ] the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *O'Connor v. Boeing N. Am., Inc.*, 216 F.R.D. 640, 643 (C.D. Cal. 2003) (citation omitted)).

Joe Serrano and Pierre Merkel. Mason Group's privilege log identifies two "investigators" on its log, Joe Serrano and Pierre Merkl, but fails to disclose their relationship to Borja and Mason Group in order to allow the Ecuadorian Plaintiffs the opportunity to assess work-product claims over these same communications. (*See* Ex. A, at MASON00770-73, MASON00778-79; MASON00814-22, MASON00825-26, MASON00831-32.) Neither the Mason Group nor Borja produced or logged any retainer or engagement agreement wither either Serrano or Merkl, or their investigative services. Mason Group has put forth no evidence indicating that it has any legally protectable relationship with other investigative firms. Work Product privilege only protects communications prepared by the attorney or his agents. *United States v. Nobles*, 422 U.S. 225, 238–39 (1975).

II. THE MASON GROUP'S PRIVILEGE LOG FOR THE MOST PART DOES NOT SUFFICIENTLY ARTICULATE A BASIS FOR THE PRIVILEGES CLAIMED

Documents must be described on a privilege log "in a manner that, without revealing information itself privileged or protected, *will enable other parties to assess the claim* [of privilege]." Fed. R. Civ. P. 26(b)(5) (emphasis added). A party's "[f]ailure to provide sufficient information may constitute a waiver of the privilege." *Ramirez v. County of L.A.*, 231 F.R.D. 407, 410 (C.D. Cal. 2005). Moreover, "[d]oubts must be resolved against the party asserting the privilege." *United States v. 22.80 Acres of Land*, 107 F.R.D. 20, 22 (N.D. Cal. 1985); *U.S. Inspection Servs., Inc. v. NL Engineered Solutions LLC*, 268 F.R.D. 614, 626 (N.D. Cal. 2010) (same). The Mason Group's privilege log falls well short of what is required by Rule 26 of the Federal Rules of Civil Procedure and the interpretive authority.

A. Mason Group's Boilerplate Document Descriptions Do Not Permit the Validity of Its Assertion of "Attorney Work Product" to be Evaluated in Any Meaningful Way

1. Mason Group's Document Descriptions are Devoid of Substance

In response to the Ecuadorian Plaintiffs' complaint that the three-word document (*e.g.,* "*Email re greetings*") descriptions provided on the Mason Group's original, July 15 privilege log were inadequate, Mason Group simply added words without adding any substance—and in most cases, removing what little substance was already there.[12] Mason group's descriptions are "too cryptic to the point of obfuscation."[13] Conclusory descriptions comprised of hollow, strung-together buzz-phrases invoking notions of work product protection do not suffice.[14] The substitution of conclusory, boilerplate language in lieu of substance is alone fatal to the claims of work product protection asserted here.

2. Mason Group's Privilege Log Does Not Sufficiently Convey That the Documents Were Prepared in Anticipation of Litigation

To qualify for work product protection, a document must be "prepared in anticipation of litigation or for trial." *In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management)*, 357 F.3d 900, 906 (9th Cir. 2004); Fed. R. Civ. P. 26(b)(3). A party asserting protection under the work product doctrine must make the requite showing as to each document identified on its privilege log. *See Bible v. Rio Properties, Inc.*, 246 F.R.D. 614, 620 (C.D. Cal. 2007) (internal citations omitted); *Garcia v. City of Centro*, 214 F.R.D. 587, 591 (S.D. Cal. 2003).

In addition to the lack of any real substantive description, Mason Group's log does not inform us what litigation it contends the documents were created "in anticipation of." We are cognizant that in its August 5 Order, the Court took the prudent position that it could not then,

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[12] By way of example, Mason Group replaced "*Email re Vehicle Registration Report*" with "*Email correspondence between counsel and investigator related to results of investigation in anticipation of litigation*." (*Compare* Dkt. 85 with Ex. A, at MASON00462-63.) A document originally described as "*Email re travel safety*" was changed to "*Email correspondence between counsel and investigator reflecting counsel's instructions and investigative strategy in anticipation of litigation*" (Compare Dkt. 85 to Ex. A, MASON00478).

[13] *Natural Resources Defense Council v. Gutierrez*, No. C 01-0421 JL, 2008 WL 2468494, at *3 (N.D. Cal. Jun. 17, 2008) (ordering party to provide more detail explaining the nature of the document, including document's subject matter).

[14] *See Dominguez v. Schwarzenegger*, No. CO0-2306 CW(JL), 2010 WL 3341038, at *4 (N.D. Cal. Aug. 25, 2010) (finding that party's non-descriptive document summaries gave no indication whether the underlying materials were privileged); *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 THE, 2008 WL 4234239, at *5 (N.D. Cal. Aug. 29, 2008) (holding that privilege log was "too *vague and conclusory* to permit an adequate assessment of the claim of privilege.") (emphasis added); *see also E.E.O.C.,*, 2002 WL 31947153, at *3 (N.D. Cal. 2002).

"[b]ased on the Court's current understanding," accept the Ecuadorian Plaintiffs' theory that Borja's counsel was merely acting as a conduit between Chevron and Mason Group, in sole service of Chevron's interests vis à vis the Lago Agrio Litigation.[15] (Dkt. 8 at 21.) But owing to Mason Group's ambiguous privilege log, our understanding on this issue remains frozen. We remain relegated to *guessing* how the threat of litigation arose and from where, and most importantly, we have no way of assessing if and when the threat of this generically-described litigation may have ended at some point.[16] This total lack of clarity is compounded by the fact that Mason Group neither produced nor logged any retention agreement that might shed light on the scope of what it was retained to do. The burden is unquestionably on Borja (through Mason Group) to prove his entitlement to work product protection with specificity. *See, e.g.*, *Kaufman & Broad Monterey Bay v. Travelers Prop. Cas. Co.*, No. C10-02856, 2011 U.S. Dist. LEXIS 59724, at *16, 16 n.3 (N.D. Cal. June 2, 2011) (rejecting assertion of work product protection because "party claiming work-product protection bears the burden of demonstrating that the doctrine applies" and defendant failed to show "by specific evidentiary proof of objective facts, that a reasonable anticipation of litigation existed when the document was produced, and that the document was prepared and used solely to prepare for that litigation, and not to arrive at a (or buttress a tentative) claim decision.") (internal quotation marks omitted). But by failing to describe the "anticipated" litigation (litigation that apparently has been "anticipated" for two

[15] The Court noted specifically that the Ecuadorian Plaintiffs had failed to articulate why Chevron could not simply have hired the Mason Group directly, if that were the case. We respectfully submit that the reason Chevron would not hire the Mason Group directly is that it wished to keep the appearance of a disconnect between itself and anything involving Wayne Hansen (apparently, a person of considerable disrepute). This is plainly evidenced by Chevron's many public disavowals of any connection to Hansen, as well as the fact that, much to Mr. Hansen's chagrin, Chevron immediately cut a "deal" with Mr. Borja in the immediate aftermath of the entrapment operation but apparently was not as eager to bring Mr. Hansen into its camp. (*See* Dkt. 4, Ex. 7.)

[16] *See Clavo v. Zarrabian*, 2003 U.S. Dist. LEXIS 27014, at *7-8 (C.D. Cal. July 9, 2003) (rejecting defendants' work product claims because that "burden *cannot be discharged by mere conclusory or ipse dixit assertions*") (internal citations and quotation marks omitted) (emphasis added); *McCaugherty v. Siffermann*, 132 F.R.D. 234, 245-46 (N.D. Cal. 1990) (rejecting defendants' assertion of work product doctrine because they failed to sufficiently identify a litigation for which documents were prepared.); *TeKnowledge Corp. v. Akamai Techs., Inc.*, No. C 02-5741, 2004 U.S. Dist. LEXIS 19109, at *7-8 (N.D. Cal. Aug. 10, 2004) (concluding that plaintiff failed to meet burden of establishing that activities performed were "in anticipation of litigation" because it "did not disclose to defendant the litigation involved.") (emphasis added).

years now) in any meaningful way—i.e., a way that would allow us to assess the credibility of that assertion—he has impermissibly hoisted the burden on the Ecuadorian Plaintiffs to *disprove* his claim.

B. Mason Group's Privilege Log Does Not Sufficiently Convey That the Documents Were Prepared in Anticipation of Litigation

"Not all communications between attorney and client are privileged." *Clarke v. Am. Commerce Nat' l Bank*, 974 F.2d 127, 129 (9th Cir. 1992). The party claiming privilege must demonstrate the satisfaction of a number of discrete elements. *Admiral Ins. v. United States Dist. Ct. for Dist. of Ariz.*, 881 F.2d 1486, 1492 (9th Cir.1989); *see also United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011) ("The party asserting the attorney-client privilege has the burden of establishing the relationship and privileged nature of the communication." Mason Group's privilege log is particularly deficient in terms of establishing any valid claim of attorney-client privilege, in at least two ways.

First, Mason Group asserts attorney-client privilege over every communication with an attorney. Mason Group's over-application of the privilege is belied by the basic tenet that "[t]he attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). The California Rules of Evidence provide that a "confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence . . . ." Cal. Evid.Code § 952. Mason Group cannot, therefore, assert the attorney-client privilege over communications that do not involve the conveyance of legal advice. *See United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir.1996) ("That a person is a lawyer does not, *ipso facto*, make all communications with that person privileged. The privilege applies only when legal advice is sought from a professional legal advisor in his capacity as such.") (citation omitted); *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351, 2008 WL 4415324, *4 (N.D. Cal. Sept. 25, 2008) (denying attorney-client protection of

"documents [that] do not indicate that the communication was made for the purpose of seeking legal advice").

Second, communications sent between two non-lawyers do not qualify for the attorney-client privilege. To properly assert the attorney-client privilege the privilege log "must identify the attorney *and client* involved in the communication." *Aristocrat Technologies Australia Pty Ltd. v. Int'l. Game Technology*, No. C 06–03717 RMW (PSG), 2011 WL 1158781, at *3 (N.D. Cal. Mar. 29, 2011) (emphasis added); *Coleman,* TEH, 2008 WL 4415324, at *4 (opining that a party cannot assert attorney-client privilege over communications that do not involve an attorney). And Mason Group certainly cannot argue that, like perhaps an accountant or other technical consultant, its role was to help facilitate the provision of legal advice between lawyer and client—it was, by its own admission, nothing more than a gatherer of information. *Cf United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011) (noting that information provided by third parties such as accountants, specifically retained to aid with the provision of legal advice in their professional capacity, may be subject to attorney-client privilege).

C. Notwithstanding the Fact That Its Original Descriptions Were Papered Over With Boilerplate Language in Its Revised Log, Mason Group's Original Log Reveals The True, Unprotected Nature of Certain of the Documents

The United States District Court for the Southern District of New York recently held in a related docket, *Chevron Corp v. Maria Aguinda Salazar,* that documents "characterized as 'non-substantive'" in nature, such as "communications about arranging telephone calls, *travel logistics*, and 'out-of office' e-mails" are not protectable work product. No. 11 Civ. 3718 (LAK) (JCF) (S.D.N.Y.) (Dkt. 227, at 2) (emphasis added). Notwithstanding Mason Group's attempt to dress-up the descriptions in its revised privilege log, documents that Mason Group once saw fit to describe as "*email re travel*," "*email re travel safety*," "*email re travel reservations*," and, perhaps most of all, "*Email re greetings*," are not entitled to protection. (*See* Dkt. 85 at 8-24, MASON00474-75, MASON00478, MASON00904-906, and MASON00926-927.) Indeed, that the descriptions "*Email re greetings*" and "*Email correspondence reflecting investigator's strategy related to investigation in anticipation of litigation*" have been used to describe *the very*

same document is indicative of bad faith somewhere along the line. (*Compare* Dkt. 85 *with* Ex. A, at MASON00926-927.)

D. Mason Group's Assertion of Privilege Over Email Attachments Is Inadequate

To properly assert privilege over an attachment to an email, the attachment must qualify on its own for attorney-client privilege and "*must be listed as a separate document on the privilege log*." *AT&T Corp. v. Microsoft Corp.*, No. 02-0164 MHP (JL), 2003 WL 21212614, at *4 (N.D. Cal. Apr. 18, 2003) (quoting *O'Connor v. Boeing North American, Inc.*, 185 F.R.D. 272, 280 (C.D. Cal. 1999)). Mason Group's log, at best, merely states *within the email description* that some document is attached, and worse yet, provides no information regarding the subject matter of the attachment. Consequently, Mason Group has failed to articulate a basis for any privilege assertion over the attachments.[17]

III. MASON GROUP'S PRIVILEGE LOG ASSERTS CLAIMS OF PRIVILEGE OVER DOCUMENTS THAT INHERENTLY DO NOT QUALIFY FOR ANY PRIVILIGE OR PROTECTION AND SHOULD BE ORDERED PRODUCED

Billing invoices. Billing invoices are generally not privileged and surely cannot be summarily protected by either the attorney-client privilege or work product doctrine. *United States v. $1,379,879.09 Seized from Bank of Am.*, 374 Fed. App'x. 709, 711 (9th Cir. 2010) (explaining that "garden-variety" billing records are not protected and may be "redacted only to the extent absolutely necessary to protect information covered by the attorney-client privilege or the work-product doctrine"). Surprisingly, though Mason Group says it is asserting Borja's privileges and work product, Mason Group specifically withheld (without any redaction) documents that Diego Borja produced in the related 28 U.S.C. § 1782 proceeding pending against

[17] (*See, e.g.*, MASON00795-98 ("*Email correspondence attaching memorandum prepared by counsel in anticipation of litigation*"); MASON00496-676 ("*Cover Letter attaching Report of Investigation prepared by investigator for counsel in anticipation of litigation*"); MASON00746-62 ("*Email correspondence attaching memorandum prepared by counsel in anticipation of litigation*"); and MASON00803-04 ("*Email correspondence between counsel and investigator attaching photographic evidence related to investigation in anticipation of litigation*").

him.[18] (*Compare* Ex. A, MASON00910-25 (describing withheld document as "Invoices for Services Rendered," *with* Dkt. 4, Ex. 14 (collection of Mason Group invoices produced by Borja in § 1782 with redactions).) These documents should be ordered produced.

Reports and other public documents. To claim work product protection, the document in question must have been prepared by or for a party. Fed. R. Civ. P. 26(b)(3). Fundamentally, the work product protection does not shield "discovery materials in an attorney's possession that were prepared neither by the attorney nor his agents." *United States. v. Fort*, 472 F.3d 1106, 1130 (9th Cir. 2007) (holding that reports in the FBI's possession but created state and local police forces do not warrant work product protection). Nevertheless, Mason Group continues to claim "Attorney Work Product" immunity over two hundred pages of documents that neither it nor its agents prepared. (Ex. A, at MASON00195-373; MASON00379-403.) Mason Group's continued instance on seeking immunity from producing these two hundred pages of document is clear abuse of the work product doctrine.[19] Further, Mason Group cannot assert privilege over documents it downloaded from the Internet or other online databases, which do not involve "any creative or analytical input from counsel" so as to merit work product protection. *In re Enforcement of Subpoena*, No. 3:11–mc–80066–CRB (EDL), 2011 WL 2559546, at *2 (N.D. Cal. Jun. 28, 2011) (transcripts prepared by counsel of non-privileged meetings was not entitled to work product protection). Database reports generated by a third party as a result of a simple name search are no different.[20]

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[18] Mason Group should also produce MASON00890-91. While counsel's revised, August 23, 2011 privilege log describes this document as "[e]mail correspondence between counsel and investigator reflecting counsel's instructions related to investigation in anticipation of litigation," Ex. A), an earlier privilege log revealed that this document is an "[e]mail re billing." (Dkt. 85 at 23.)

[19] (*See, e.g.* Ex. A, at MASON00379 (described as "1941 Extradition Treaty between the United States and Ecuador"; MASON00348 (described as "US District Court Order"); MASON00358 (described as "US District Court Document"); (MASON00360) (described as "US District Court Motion").)

[20] Mason Group's privilege log contains online reports printed from databases such as AutoTrack XP, (Ex. A., at MASON00231-264); documents obtained from the Superior Court of California online information system, (*id.* at MASON00266, MASON00267, MASON00268, MASON00269, MASON00271, MASON00295, MASON00298, MASON00299, MASON00303, MASON00304, MASON00305); LexisNexis reports (MASON00274, MASON00315, MASON00316); Court Online reports, (MASON00288, MASON00290, MASON00291, MASON00292, MASON00293, MASON00294); and PACER, (MASON0306-08, MASON00309-11, MASON00312-14).)

CONCLUSION

For the foregoing reasons, the Ecuadorian Plaintiffs request that the Court issue an order compelling Respondent Mason group to immediately produce all documents identified on its privilege log.

Respectfully Submitted,

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