

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

REPUBLIC OF ECUADOR; DIEGO
GARCIA CARRION, DR., Attorney
General of the Republic of Ecuador,
Plaintiffs-Appellees,

v.

DOUGLAS M. MACKAY; CHEVRON
CORPORATION,
Defendants-Appellants.

No. 12-15572

D.C. No.
1:12-mc-00008-
LJO-GSA

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

THE REPUBLIC OF ECUADOR; DIEGO
GARCIA CARRION, DR., Attorney
General of the Republic of Ecuador,
Applicants-Appellees,

v.

MICHAEL A. KELSH, DR.; EXPONENT,
INC., DBA Delaware Exponent, Inc.,
Respondents-Appellants,

and

CHEVRON CORPORATION,
Intervenor-Appellant.

No. 12-15848

D.C. No.
3:11-mc-80171-
CRB

OPINION

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, Senior District Judge, Presiding

Argued and Submitted
December 4, 2013—San Francisco, California

Filed January 31, 2014

Before: Barry G. Silverman, Consuelo M. Callahan,
and N. Randy Smith, Circuit Judges.

Opinion by Judge Callahan

SUMMARY*

Discovery

The panel affirmed two district courts' decisions ordering the production of documents for use in a foreign proceeding under 28 U.S.C. § 1782.

The panel held that the 2010 amendments to Federal Rule of Civil Procedure 26 did not fundamentally change the scope of work product protection for expert materials. It therefore rejected the argument that the district courts erred because many of the documents at issue were presumptively immune from discovery under Rule 26(b)(3)'s protection for trial preparation materials. Arriving at the same result as two other circuits, the panel held that Rule 26(b)(3) does not provide presumptive protection for all testifying expert materials as trial preparation materials.

COUNSEL

Theodore J. Boutrous, Jr. (argued), Gibson Dunn & Crutcher, LLP, Los Angeles, California; Ethan Douglas Dettmer, Joshua S. Lipshutz, and Enrique Antonio Monagas, Gibson Dunn & Crutcher, LLP, San Francisco, California, for Intervenor-Appellant and Respondents-Appellants.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Gene C. Schaerr (argued) and Eric Bloom, Winston & Strawn, Washington, D.C.; Richard A. Lapping, Winston & Strawn, San Francisco, California, for Applicants-Appellees.

OPINION

CALLAHAN, Circuit Judge:

Chevron Corporation and two of its expert witnesses, Douglas M. Mackay and Michael A. Kelsh (collectively, “Chevron”), appeal from two district court decisions ordering the production of documents. The Republic of Ecuador (the “Republic”) and Diego Garcia Carrion (collectively, the “Applicants”) sought the discovery for use in a foreign proceeding under 28 U.S.C. § 1782. Contending that the 2010 amendments to Federal Rule of Civil Procedure 26 fundamentally changed the scope of work product protection for expert materials, Chevron argues that the district courts erred because many of the documents at issue were presumptively immune from discovery under Rule 26(b)(3)’s protection for trial preparation materials. We find no merit to Chevron’s arguments, and accordingly, we affirm the district courts.

I

A

The parties are involved in a long-running legal dispute that has stretched across multiple decades, tribunals, and continents. This appeal represents one of many skirmishes in the ongoing conflict, including two nearly identical appeals that were recently decided by the Tenth and Eleventh

Circuits. *Republic of Ecuador v. Hinchee*, ___ F.3d ___, No. 12-16216, 2013 WL 6655490 (11th Cir. Dec. 18, 2013); *Republic of Ecuador v. For Issuance of a Subpoena Under 28 U.S.C. Sec. 1782(a) (Bjorkman)*, 735 F.3d 1179 (10th Cir. 2013). We briefly review the underlying facts to provide context for the issue on appeal.

In 1964, a subsidiary of Texaco, Inc. (“Texaco”) began oil exploration and drilling in eastern Ecuador. *Chevron Corp. v. Berlinger*, 629 F.3d 297, 301 (2d Cir. 2011). Texaco subsequently began operating a consortium in the area that conducted drilling activities and operated a pipeline. *Id.* Ecuador’s state-owned oil company, Petroecuador, acquired an interest in the consortium, subsequently becoming the majority shareholder in 1976, and eventually acquired full ownership in 1990. *Id.* Texaco ceased operating the consortium in 1992. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 235 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).

In 1993, a group of Ecuadorians brought a class action suit in the Southern District of New York against Texaco seeking billions of dollars in damages for environmental pollution and contamination allegedly caused by the consortium’s activities (the “Aguinda” action). *Berlinger*, 629 F.3d at 301; *see generally Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002). At Texaco’s urging and over the plaintiffs’ opposition, the case was dismissed on forum non conveniens grounds in 2001 with Texaco consenting to jurisdiction in Ecuador. *See Berlinger*, 629 F.3d at 301–02 & n.2.

In the interim, Texaco entered into a settlement agreement with the Republic and Petroecuador in 1998, agreeing to perform remediation projects in exchange for a release from

liability. *Naranjo*, 667 F.3d at 235. In 2001, Chevron purchased Texaco. *Id.* at 235 n.2. Chevron has since asserted that the release covered any public claims related to the environmental harm because, at that time, the Republic owned the rights to any such claims. For their part, the *Aguinda* plaintiffs entered into an agreement where they waived any claims against the Republic and Petroecuador (which was allegedly responsible for a significant amount of the pollution). *Chevron v. Donziger*, 768 F. Supp. 2d 581, 597–99 & n.18 (S.D.N.Y. 2011), *rev'd sub nom. Naranjo*, 667 F.3d at 234.

In 2003, a second group of Ecuadorians, including many of the *Aguinda* plaintiffs, brought suit against Chevron in Lago Agrio, Ecuador (the “*Lago Agrio*” action). *Berlinger*, 629 F.3d at 302. Invoking a 1999 environmental law, the *Lago Agrio* plaintiffs asserted public claims that Chevron contends the Republic had previously released. *Id.* The *Lago Agrio* court ordered an independent expert to conduct a global damages assessment. *Donziger*, 768 F. Supp. 2d at 603; *Berlinger*, 629 F.3d at 302. The court eventually entered a judgment of over \$18 billion against Chevron. The judgment was recently cut in half but otherwise upheld by Ecuador’s highest court. *Hinchee*, 2013 WL 6655490, at *1.

While the *Lago Agrio* action was ongoing, the plaintiffs’ attorneys commissioned a documentary which was eventually released as *Crude: The Real Price of Oil*. *Naranjo*, 667 F.3d at 236. Based on some of the footage, Chevron engaged in a broad-based – and largely successful – effort to obtain the outtakes of the film and related materials through applications under 28 U.S.C. § 1782. *Id.* Chevron contends that the outtakes show widespread fraud by the plaintiffs’ attorneys and the Ecuadorian judiciary. *Id.* at 237. Chevron presented

this evidence to the *Lago Agrio* court, but the court continued to rely on the independent expert's data and returned the substantial judgment against Chevron. *Id.* One of Chevron's responses to the *Lago Agrio* action was a demand for arbitration against the Republic pursuant to the bilateral investment treaty between the United States and Ecuador ("BIT Arbitration"). *Berlinger*, 629 F.3d at 303.

B

On June 3, 2011, the Applicants filed a § 1782 application seeking discovery from Mackay in the Eastern District of California for use in the BIT Arbitration (the "*Mackay*" action). They filed a similar application in the Northern District of California on June 21, 2011, seeking discovery from Kelsh and his former employer, Exponent, Inc. (the "*Kelsh*" action). Chevron intervened in both actions.

Mackay and Kelsh both served as Chevron's experts in the *Lago Agrio* action. Mackay is an adjunct professor at the University of California-Davis who offered opinions regarding the state of the soil and groundwater in the affected areas, as well as the parties' respective sampling and analysis. Kelsh is an epidemiologist who submitted reports rebutting the independent expert's assessment regarding health problems allegedly caused by Texaco's operations. Chevron submitted reports from both experts to the tribunal in the BIT Arbitration. The Applicants contend that the discovery will show that Chevron and its experts engaged in selective sampling to achieve favorable results.

Both district courts granted the § 1782 applications. Chevron subsequently produced hundreds of thousands of pages of documents but also withheld thousands of

documents, asserting that they were privileged. The Applicants objected to Chevron’s privilege claims, and the parties eventually raised their disputes with the district courts.

In the *Mackay* action, the magistrate judge found that Chevron was required to produce all documents listed on its privilege log other than Mackay’s draft reports and certain “[c]ommunications directly between Dr. Mackay and counsel.” The district court denied Chevron’s motion for reconsideration.

In the *Kelsh* action, the magistrate judge found that Chevron did not have to produce draft reports, draft worksheets, communications among Kelsh and his assistants, or communications between Kelsh or his assistants and Chevron attorneys. *In re Republic of Ecuador (Kelsh)*, 280 F.R.D. 506, 512–14 (N.D. Cal. 2012). The magistrate judge, however, otherwise ordered Chevron to produce the documents it was withholding. *Id.* at 516. The district court subsequently affirmed the magistrate judge’s order. Chevron now appeals, and we have jurisdiction pursuant to 28 U.S.C. § 1291. *See In re Premises Located at 840 140th Ave. NE*, 634 F.3d 557, 565–66 (9th Cir. 2011).

II

We typically review a district court’s discovery rulings for abuse of discretion. *R & R Sails, Inc. v. Ins. Co. of Pa.*, 673 F.3d 1240, 1245 (9th Cir. 2012). However, where the question is not whether the district court properly exercised its discretion under a federal rule, but rather turns on the legal issue of whether the court properly interpreted the rule’s requirements, we review that question de novo. *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010).

III

Chevron argues that the plain language of Rule 26(b)(3) generally protects expert materials as trial preparation materials prepared “by or for” a party or a party’s representative. It urges us to confine our review to the text of the rule but contends that even if we look beyond it, the notes of the Advisory Committee on the Federal Rules of Civil Procedure support its interpretation. Chevron makes no arguments specific to the documents at issue or the experts involved in these proceedings; rather, the crux of Chevron’s argument is that Rule 26(b)(3) always provides presumptive protection for all testifying expert materials because they are necessarily prepared “by or for” a party or its representative.

We apply the “traditional tools of statutory construction” to interpret the federal rules. *See United States v. Petri*, 731 F.3d 833, 839 (9th Cir. 2013) (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988)), *cert. denied*, 134 S. Ct. 681 (2013). “The first step in construing the meaning of a statute is to determine whether the language at issue has a plain meaning.” *McDonald v. Sun Oil Co.*, 548 F.3d 774, 780 (9th Cir. 2008). “When interpreting a statute, words and phrases must not be read in isolation, but with an eye toward the ‘purpose and context of the statute.’” *Petri*, 731 F.3d at 839 (quoting *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006)). An interpretation that gives effect to every clause is generally preferable to one that does not. *Cf. Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013). Additionally, “[i]t is a ‘cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.’” *United States v. \$133,420.00 in U.S. Currency*, 672 F.3d 629, 643 (9th Cir. 2012) (quoting *Spencer*

Enters., Inc. v. United States, 345 F.3d 683, 691 (9th Cir. 2003)) (internal quotation marks omitted).

Where “the statute’s language is plain” we do not consider “the legislative history or any other extrinsic material.” *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1042 (9th Cir. 2013) (en banc) (quoting *Exxon Mobile Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005), and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). “Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.” *McDonald*, 548 F.3d at 780 (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004)). To determine whether there is an ambiguity, we must assess whether there is “an uncertainty of meaning or intention.” *Id.* at 781 (citation and alteration marks omitted).

The federal procedural and evidentiary rules are accompanied by a unique form of legislative history. The advisory committees draft and recommend rule changes to the Judicial Conference. 28 U.S.C. § 2073(a)(2). If adopted by the Supreme Court, the recommendations become law absent Congressional action. *See* §§ 2072(a), 2074(a). Along with their recommended rule changes, the advisory committees provide explanatory notes. *See* 28 U.S.C. § 2073(d). As the explanatory notes are contemporaneously drafted by the same entity charged with drafting the rules, they are a particularly reliable indicator of legislative intent. *See United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002) (“In the absence of clear legislative mandate, the Advisory Committee Notes provide a reliable source of insight into the meaning of a Rule, especially when, as here, the rule was enacted precisely as the Advisory Committee proposed.”). We have accordingly observed that “[a]lthough Advisory Committee notes ‘do not

foreclose judicial consideration’ of a rule’s validity and meaning, ‘the construction given by the Committee is of weight.’” *Petri*, 731 F.3d at 839 (quoting *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986)) (internal quotation marks omitted). We have frequently relied on the advisory committees’ notes for guidance. *E.g.*, *id.* (clarifying any ambiguity in Federal Rule of Criminal Procedure 32 with reference to the notes); *Summers v. Delta Air Lines, Inc.*, 508 F.3d 923, 926 (9th Cir. 2007) (indicating that the Advisory Committee’s note “guides our interpretation of [Federal Rule of Civil Procedure] 50”); *United States v. Saeteurn*, 504 F.3d 1175, 1180 (9th Cir. 2007) (“We look to Advisory Committee Notes when interpreting a federal rule for ‘guidance and insight.’”).

A

1

We thus begin our analysis with the text of the rule. Rule 26 is titled, “Duty to Disclose; General Provisions Governing Discovery.” Fed. R. Civ. P. 26. It sets forth, at some length, the framework for civil disclosure and discovery. Rule 26(a) sets out the requirements for parties’ mandatory disclosures, including initial disclosures, expert disclosures, and other pretrial disclosures. Among other things, parties must reveal the identity of expert witnesses as part of their mandatory disclosures, and most experts are required to submit reports which must include “the facts or data considered by” the expert in forming his or her opinions.¹ Fed. R. Civ. P.

¹ This requirement applies to testifying experts retained or specially employed to provide expert testimony in the case or an employee whose duties regularly involve providing expert testimony. Fed. R. Civ. P.

26(a)(2)(A)–(B). Rule 26(b) then sets out the scope of discovery. We have previously recognized that the scope of permissible discovery under Rule 26 is “broad.” *See Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993). The rule, however, does provide some limitations on discovery, such as protection for “trial preparation” materials as well as certain expert materials.

Rule 26(b)(3) is titled “Trial Preparation: Materials” and extends protection to “documents and tangible things” prepared “by or for” a party or its representative (“including the . . . party’s attorney, consultant, surety, indemnitor, insurer, or agent”) “in anticipation of litigation or for trial.” Fed. R. Civ. P. 26(b)(3)(A). A party may still obtain discovery of trial preparation materials under Rule 26(b)(3) if they are otherwise discoverable and the party shows that it has a “substantial need” for the materials and “cannot, without undue hardship, obtain their substantial equivalent by other means.” Fed. R. Civ. P. 26(b)(3)(A). To the extent that a court orders discovery of trial preparation materials under the rule, “it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.” Fed. R. Civ. P. 26(b)(3)(B).

26(a)(2)(B). Parties must also disclose the subject matter and a summary of facts and opinions for testifying experts who fall outside the report requirement. Fed. R. Civ. P. 26(a)(2)(C). These experts typically include treating physicians or a party’s employees who do not regularly provide expert testimony. *See* N. Lee Cooper & Scott S. Brown, *Selection of Experts, Expert Disclosure and the Pretrial Exclusion of Expert Testimony*, in 3 Robert L. Haig, *Business and Commercial Litigation in Federal Courts* § 28:10 (3d ed. 2012).

Rule 26(b)(4) is titled “Trial Preparation: Experts” and provides that parties may depose testifying experts. Fed. R. Civ. P. 26(b)(4)(A). It further provides that Rule 26(b)(3) “protect[s] drafts of any report or disclosure required under [the rule], regardless of the form in which the draft is recorded.” Fed. R. Civ. P. 26(b)(4)(B). Trial preparation protection also extends to “communications between the party’s attorney and any [expert who must provide a report] regardless of the form of the communications except to the extent that the communications”: (i) relate to the expert’s compensation; (ii) identify “facts or data” provided by the attorney that the expert considered; or (iii) “identify assumptions that the party’s attorney provided and that the expert relied on in forming” his or her opinions. Fed. R. Civ. P. 26(b)(4)(C). Facts known to, or opinions held by, an expert retained “in anticipation of litigation or to prepare for trial and who is not expected” to testify at trial (sometimes known as a “consulting” expert) are ordinarily exempt from discovery absent a showing of “exceptional circumstances.” Fed. R. Civ. P. 26(b)(4)(D).

2

Chevron argues that the text of Rule 26(b)(3), which protects materials prepared “by or for” a party or its “representative,” applies to expert materials that do not fall within the attorney-expert communication or draft report protections under Rule 26(b)(4). It contends that there are no applicable exceptions beyond the limited requirements for disclosure (e.g., “facts or data”) and specific exempted categories of attorney-expert communications. Chevron further argues that the disputed documents do not fall within those exceptions and thus, the general provisions of Rule 26(b)(3) protects them from discovery.

The basic structure of the rule contradicts Chevron’s argument. Rule 26(b)(3) extends protection to “Materials.” Rule 26(b)(4) then separately provides some protection for “Experts.” This strongly suggests that experts were intended to be treated separately from the “materials” protected under Rule 26(b)(3). Indeed, the fact that the Committee used the term “expert” in Rule 26(b)(4) but not in the list of representatives in Rule 26(b)(3) suggests that the omission of “experts” in the text of Rule 26(b)(3) was intentional. *Hinchee*, 2013 WL 6655490, at *6.

However, there is also some textual support for the argument that Rule 26(b)(3) can apply to testifying experts. The phrase “by or for” and the term “representative” are somewhat broad on their face. Arguably, testifying experts prepare their analyses and supporting materials “for” the parties that retain them. Indeed, this expansive language led the First Circuit to conclude that a document prepared by a testifying expert was covered by the rule. *Sprague v. Director*, 688 F.2d 862, 868–70 (1st Cir. 1982) (concluding that a letter prepared by medical expert “for” counsel was protected by the work product doctrine). There are also cross-references within Rule 26(b)(3) and Rule 26(b)(4) which reflect a degree of interrelationship. *See* Fed. R. Civ. P. 26(b)(3)(A) (indicating that, “subject to Rule 26(b)(4),” materials otherwise protected under Rule 26(b)(3)(A) may be discovered in certain circumstances); Fed. R. Civ. P. 26(b)(4)(B)–(C) (indicating that draft reports and attorney-expert communications are generally protected by “Rules 26(b)(3)(A) and (B)”). The cross-references could be read to suggest that Rule 26(b)(3) protection would otherwise apply to experts if not for Rule 26(b)(4). *See In re Cendent Corp. Sec. Litig.*, 343 F.3d 658, 665 (3d Cir. 2003) (quoting *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 594 (3d Cir.

1984)). Nonetheless, although the language of Rule 26(b)(3) and the cross-references do imply that there can be some overlap between the protections for “Materials” and “Experts,” they do not necessarily indicate that *all* expert materials are *always* protected by Rule 26(b)(3).

Indeed, the explicit protections for draft reports and attorney-expert communications under Rule 26(b)(4) would be redundant under Chevron’s interpretation of the rule. Chevron suggests that these provisions are not redundant because they: (a) extend protection to “facts or data” that would otherwise have to be disclosed within draft reports; and (b) set forth the exceptions to the explicit protection for attorney-expert communications. This is implausible. If that had been the Committee’s intent, it would have been much simpler and clearer for it to declare that all expert materials are protected as trial preparation materials and then set forth exceptions to that general rule.

Thus, if we were to make our decision based on the text alone, we would conclude that Rule 26(b)(3)’s protection does not extend to *all* testifying experts. Nonetheless, giving Chevron the benefit of the doubt, we will assume for the purposes of argument that the text’s meaning is ambiguous, and accordingly, we look beyond the text itself.

B

We proceed to review the historical context of the rule, substantially aided by the Advisory Committee’s notes. The work product doctrine is a “qualified immunity from discovery” that attempts to balance “the necessity of protecting an attorney’s preparation under the adversary system, and the policy of full and open discovery underlying

the” rules. Patrick E. Higginbotham, *Duty to Disclose; General Provisions Governing Discovery* in 6 James Wm. Moore, *Moore’s Federal Practice* § 26.70[1] at 26-434 to 26-435 (3d ed. 2013) [hereinafter “*Moore’s*”]. The doctrine evolved out of the Supreme Court’s seminal decision in *Hickman v. Taylor*, 329 U.S. 495 (1947).

In *Hickman*, the petitioner made discovery requests seeking memoranda prepared by the defendants’ attorney memorializing witness interviews prepared after the underlying accident but before the litigation commenced. *Id.* at 498–99. The Supreme Court ruled that the information was not discoverable because it fell “outside the arena of discovery and [discovery would] contravene[] the public policy underlying the orderly prosecution and defense of legal claims.” *Id.* at 509–10. That policy reflected the necessity “that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.” *Id.* at 510–11. Thus, “the [w]ork product of the lawyer” is shown “in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways.” *Id.* at 511 (internal quotation marks omitted). The Court indicated that if this material was not protected from discovery, “much of what is now put down in writing would remain unwritten” and that “[a]n attorney’s thoughts . . . would not be his own.” *Id.* The result of a contrary rule would be “[i]nefficiency, unfairness[,] . . . sharp practices,” and a “demoralizing” effect on the profession. *Id.*

In *Hickman*’s wake, the 1970 and 1993 amendments to Rule 26 addressed the work product doctrine and the scope of expert discovery. Prior to the 1970 amendment, courts were divided on whether expert materials were protected by the

work product doctrine. Richard L. Marcus, *Depositions and Discovery* in 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2029 (3d ed. 2013). The 1970 amendment added provisions allowing for discovery of information held by testifying experts and partially codifying the work product doctrine. Fed. R. Civ. P. 26(b) advisory committee’s notes (1970 amendment); *United States v. Deloitte LLP*, 610 F.3d 129, 136 (D.C. Cir. 2010).² The primary reason for permitting discovery of testifying experts (as opposed to consulting experts) was to allow “the adverse party to prepare for effective cross-examination and rebuttal.” Wright et al., *supra*, § 2032 (citing Fed. R. Civ. P. 26 advisory committee’s notes (1970 amendment)). The Committee explained that if this discovery were foreclosed, “then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.” Fed. R. Civ. P. 26(b)(4) advisory committee’s notes (1970 amendment). The Committee also indicated that the creation of the rule was intended to “reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine.” *Id.*; accord *United States v. Meyer*, 398 F.2d 66, 73–74 (9th Cir. 1968).

In 1993, the Committee added the provisions requiring most testifying experts to prepare reports including various disclosures. Fed. R. Civ. P. 26(a)(2) advisory committee’s notes (1993 amendments). The Committee explained:

The report is to disclose the data and other information considered by the expert and any

² Although Rule 26(b)(3) is focused on documents and tangible things, *Hickman* protects intangible things independent of the rule. *Deloitte*, 610 F.3d at 136 (citing 329 U.S. at 512–13).

exhibits or charts that summarize or support the expert’s opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Id.

The requirement to disclose “data or other information” considered by the expert in forming the opinions coupled with the implication in Rule 26(b)(3) that the work product protection was “[s]ubject to” provisions requiring expert depositions led many courts to conclude that “any material given by an attorney to an expert [wa]s discoverable,” including opinion work product.³ See *Moore’s, supra*, § 26.80[1][a] at 26-477 to 26-478. The Sixth Circuit’s decision in *Regional Airport Authority of Louisville v. LFG, LLC*, 460 F.3d 697 (6th Cir. 2006), is illustrative. There, the Sixth Circuit adopted the then-majority view “in holding that Rule 26 creates a bright-line rule mandating disclosure of all documents, including attorney opinion work product, given to testifying experts.” *Id.* at 717. The court read the disclosure obligation as “requir[ing] disclosure of more than

³ “Opinion work product” represents the core types of work product protected under *Hickman*, namely an attorney’s mental impressions, conclusions, opinions, or legal theories developed in anticipation of litigation. See *Deloitte*, 610 F.3d at 136. It “is virtually undiscoverable.” *Id.* at 135 (quoting *Director v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997)).

facts” because the drafters had included the phrase “or other information.” *Id.* at 716. Since there was no “qualifier as to the extent of the information,” the court concluded that “none was intended” and the rule “requir[ed] disclosure of *all* information provided to testifying experts.” *Id.* (internal quotation marks omitted); *accord Elm Grove Coal Co. v. Director*, 480 F.3d 278, 301 (4th Cir. 2007); *In re Pioneer Hi-Bred Int’l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001).

Against that backdrop, the Advisory Committee explained the impetus of the 2010 amendments as follows:

Many courts read [the 1993 version of] the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts – one for purposes of consultation and another to testify at trial – because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Fed. R. Civ. P. 26 advisory committee's notes (2010 amendments).

Accordingly, the amended rule “provide[s] work-product protection against discovery regarding draft expert disclosures or reports and – with three specific exceptions – communications between expert witnesses and counsel.” Fed. R. Civ. P. 26 advisory committee's notes (2010 amendments). With respect to the disclosure obligations, the notes indicate that the requirements should “be interpreted broadly” to encompass “any material considered by the expert, from whatever source, that contains factual ingredients” but to exclude the “theories or mental impressions of counsel.” Fed. R. Civ. P. 26(a)(2)(B) advisory committee's notes (2010 amendments). Notably, “[t]he disclosure obligation extends to any facts or data ‘considered’ by the expert in forming the opinions to be expressed, not only those relied upon by the expert.” *Id.*; see also *Allstate Ins. Co. v. Electrolux Home Prods., Inc.*, 840 F. Supp. 2d 1072, 1080 (N.D. Ill. 2012) (indicating that discoverable “factual” information includes material that the expert “considered” – i.e., was provided or otherwise exposed to in the course of developing his or her opinions – rather than just the narrower spectrum of material that the expert “relied upon”). The prior version of the rule had required the disclosure of “data or other information,” but the Committee revised this to “facts or data” to “alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports.” Fed. R. Civ. P. 26(a)(2)(B) advisory committee's notes (2010 amendments).

Rule 26(b)(4)'s protections for draft reports and attorney-expert communications “do not impede discovery about the

opinions to be offered by the expert or the development, foundation, or basis of those opinions.” Fed. R. Civ. P. 26(b)(4) advisory committee’s notes (2010 amendments). Indeed, the scope of permissible “disclosure and discovery otherwise allowed” remains “broad.” Fed. R. Civ. P. 26(b)(4) advisory committee’s notes (2010 amendments). For example, the rule allows for discovery of: (a) the testing of material involved in litigation and notes concerning any such testing; (b) alternative analyses, testing methods, or approaches; and (c) “communications the expert had with anyone other than the party’s counsel about the opinions expressed.” Fed. R. Civ. P. 26(b)(4) advisory committee’s notes (2010 amendments). However, discussions with counsel about the “potential relevance of facts or data” and more general discussions “about hypotheticals, or exploring possibilities based on hypothetical facts” are protected. *Id.* Thus, materials containing “factual ingredients” are discoverable, while opinion work product is not discoverable. *See* Fed. R. Civ. P. 26(a)(2)(B) advisory committee’s notes (2010 Amendments).

C

The historical evolution of the rule, its current structure, and the Committee’s explanatory notes make clear that the driving purpose of the 2010 amendments was to protect opinion work product – i.e., attorney mental impressions, conclusions, opinions, or legal theories – from discovery. *See* 1 Steven S. Gensler, *Federal Rules of Civil Procedure: Rules and Commentary* Rule 26 cmt. & n.82 (2013) (indicating that the Committee was attempting to “alter the outcome reached in” cases such as *Regional Airport Authority*, 460 F.3d at 714). The protections for draft reports and attorney-expert communications were targeted at the areas most vulnerable to

the disclosure of opinion work product. The Committee thus sought to acknowledge the reality that attorneys often feel that it is extremely useful – if not necessary – to confer and strategize with their experts. But there is no indication that the Committee was attempting to do so at the expense of an adversary’s ability to understand and respond to a testifying expert’s analysis.⁴

To the contrary, the Committee sought to balance the competing policy considerations, including the need to provide an adversary with sufficient information to engage in meaningful cross-examination and prepare a rebuttal, on the one hand, and the need to protect the attorney’s zone of privacy to efficiently prepare a case for trial without incurring the undue expense of engaging multiple experts, on the other. There is no indication that the Committee intended to expand Rule 26(b)(3)’s protection for trial preparation materials to encompass all materials furnished to or provided by testifying experts, which would unfairly hamper an adverse party’s ability to prepare for cross-examination and rebuttal. We accordingly reject Chevron’s argument.

⁴ Indeed, we note that any ordinary work product protection (i.e., for trial preparation materials prepared by non-attorneys that do not reflect an attorney’s mental impressions, conclusions, opinions, or legal theories) would typically be waived where the materials are disclosed to a testifying expert. See *United States v. Nobles*, 422 U.S. 225, 239 (1975) (concluding that although the work product protection would otherwise apply to an investigator’s report, the defendant “by electing to present the investigator as a witness, waived the privilege with respect to matters covered in his testimony”); *Meyer*, 398 F.2d at 74 (emphasizing that the discovery of appraisers’ work in a condemnation action was permissible because the appraisers were expert witnesses who were expected to testify at trial).

IV

We conclude that Rule 26(b)(3) does not provide presumptive protection for all testifying expert materials as trial preparation materials. The 2010 amendments did not fundamentally restructure Rule 26 to do so. Our conclusion is fatal to Chevron's argument. Accordingly, we independently arrive at the same result reached by our sister circuits. *See Hinchee*, 2013 WL 6655490, at *1; *Bjorkman*, 735 F.3d at 1180. As Chevron has forsworn any challenge to the district courts' specific assessments of the various categories of documents in dispute, we also do not reach those aspects of the district courts' decisions.

AFFIRMED.

Nos. 12-15572, 12-15848

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

IN RE: APPLICATION OF REPUBLIC OF ECUADOR and
DR. DIEGO GARCÍA CARRIÓN, the Attorney General of the
Republic of Ecuador, for an Order Pursuant to 28 U.S.C. § 1782
to Conduct Discovery for Use in a Foreign Proceeding.

On Appeal From The United States District Court
for the Eastern District of California
Case No. 12-mc-00008 LJO (Honorable Lawrence J. O'Neill)

and

The United States District Court
for the Northern District of California
Case No. 11-mc-80171 CRB (Honorable Charles R. Breyer)

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CORPORATE DISCLOSURE STATEMENT

Chevron Corporation is a publicly traded company (NYSE: CVX) that has no parent company. No publicly traded company owns 10% or more of its stock. Texaco Petroleum Company is a fifth-tier subsidiary of Chevron Corporation, and no other publicly held company owns 10% or more of its stock.

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INTRODUCTION

This case presents an issue of first impression in this Circuit regarding the correct interpretation of the 2010 amendments to Federal Rule of Civil Procedure 26, and the scope of testifying expert witness discovery under those amendments.

The plain text of Rule 26(b)(3)(A) protects from disclosure all documents “prepared in anticipation of litigation or for trial *by* or *for* another party or its representative (including the other party’s attorney, consultant . . . or agent).” The district courts in these actions, initiated under 28 U.S.C. § 1782 and consolidated on appeal, ordered Chevron’s expert witnesses, Drs. Mackay and Kelsh (collectively with Chevron, “Respondents”), to produce documents that no party denies were prepared by or for Chevron and its attorneys in connection with pending litigation. Because there is no dispute that the documents at issue in these appeals fall squarely within Rule 26(b)(3)(A)’s protections, and because there is no exception to Rule 26(b)(3)(A) applicable here, the district courts’ orders should be reversed.

At the urging of Petitioner-Appellee the Republic of Ecuador (“ROE”), the district courts below adopted a broad exception to Rule 26(b)(3)(A) requiring disclosure of *all* expert witness-related materials, unless expressly *protected* by another, more specific provision of the Rules. But the ROE’s proposed exception turns the structure of the Rules upside down.

In support of its position, the ROE pointed to an *older*, superseded version of Rule 26 that required testifying expert witnesses to disclose any “data *or other information*” considered in forming their opinion. Fed. R. Civ. P. 26(a)(2)(B) (1993) (emphasis added). District courts had interpreted that language as a “bright-line rule” compelling disclosure of *all* expert witness-related materials, even those materials that constituted trial preparation materials. The 2010 amendments to the Federal Rules, however, eliminated that language, replacing it with a narrower requirement that experts identify only the “facts or data” they considered. *See* Fed. R. Civ. P. 26(a)(2)(B)(ii). But Respondents have already produced all the documents in Drs. Mackay and Kelsh’s custody and control identifying the “facts or data” they considered. The documents at issue in these appeals are expert-related documents and communications that do *not* identify “facts or data.” Thus, the ROE cannot rely on either the “facts or data” exception or the old “bright-line rule” to compel disclosure of the documents in dispute.

The ROE also pointed to two new provisions of Rule 26 that describe specific protections for certain types of expert witness-related materials, claiming that those “must be” the *exclusive* protections for expert witness-related materials. *See* Fed. R. Civ. P. 26(b)(4)(B) and (C). But nothing in those new provisions describes their protections as exclusive. To the contrary, the Rule expressly describes those protections as falling within the larger umbrella of protections for

trial preparation materials provided by Rule 26(b)(3)(A). Moreover, both new provisions serve a clear purpose: Rule 26(b)(4)(B) explains that an expert witness's draft reports are protected *even if* they contain "facts or data" the expert considered, and would therefore otherwise be unprotected. And Rule 26(b)(4)(C) explains that three categories of attorney-expert communications, which would otherwise be protected trial preparation materials, are *unprotected*. There is no basis for the ROE's counterintuitive argument that the *addition* of these new provisions to the Rule had the effect of *eliminating* other protections, especially where nothing in the text suggests such a result.

In short, with limited exceptions not applicable here, the plain language of amended Rule 26 protects expert-related work product. That plain language serves to effectuate the stated purpose of the Rule's amendments, which is to eliminate the cost and inefficiencies of broad expert discovery under the former rules. Indeed, this was the motivating principle behind the 2010 amendments. The ROE's interpretation of the revised Rule 26 would recreate this unnecessary burden, along with the associated waste of time and expense that the Rules Committee tried to alleviate. This Court should, therefore, reverse.

STATEMENT OF JURISDICTION

In both cases on appeal, the district courts granted the ROE's motions to compel production of documents pursuant to subpoenas issued under 28 U.S.C.

§ 1782. Each district court had subject matter jurisdiction under 28 U.S.C. § 1331. This Court has appellate jurisdiction over these related appeals pursuant to 28 U.S.C. § 1291 because, in a § 1782 action, an order compelling the production of documents is final and appealable. *See In re Premises Located At 840 140th Ave. NE, Bellevue, Wash.*, 634 F.3d 557, 566 (9th Cir. 2011).

In the *Mackay* matter, the magistrate judge granted the ROE's motion to compel in relevant part on February 14, 2012, and the district judge issued an order denying reconsideration on February 21, 2012. ER 6; ER 3. Respondents Chevron and Dr. Mackay timely filed their Notice of Appeal on March 15, 2012. ER 30 Fed. R. App. P. 4(a)(1)(A); 28 U.S.C. § 2107.

In the *Kelsh* matter, the magistrate judge granted the ROE's motion to compel in relevant part on March 9, 2012, and the district judge issued an order denying reconsideration on April 12, 2012. ER 12; ER 11. Respondents Chevron and Dr. Kelsh timely filed their Notice of Appeal on April 13, 2012. ER 109; Fed. R. App. P. 4(a)(1)(A); 28 U.S.C. § 2107.

Venue is proper in this Court under 28 U.S.C. § 1294(1).

STATEMENT OF THE ISSUE

Does the plain text of Rule 26(b)(3)(A) protect documents prepared in anticipation of litigation, in connection with the work of an expert witness for a party to the litigation, even if those documents do not fall within the narrower categories protected by Rules 26(b)(4)(B) and (C)?¹

STATEMENT OF THE CASES

In 2011, the Republic of Ecuador and Dr. Diego Garcia Carrión, the Attorney General of the Republic of Ecuador, filed a series of applications under 28 U.S.C. § 1782 seeking the issuance of subpoenas to experts Chevron hired to write expert reports that it submitted in litigation pending in Lago Agrio, Ecuador. The § 1782 applications purportedly seek evidence for use in a foreign proceeding, *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, PCA Case No. 2009-23, a Bilateral Investment Treaty arbitration (the “Treaty Arbitration”), under the rules of the United Nations Commission on International Trade Law. Chevron commenced the Treaty Arbitration against the ROE in September 2009, and is seeking relief from the \$18.2 billion judgment that was later entered in the Lago Agrio litigation. That judgment was procured in part

¹ The Federal Rules of Civil Procedure relevant to this issue appear as an addendum to this brief, for the Court’s convenience.

by the ROE's denials of due process, fair treatment, and international-law rights in Ecuador.

I. The ROE's Application To Obtain Discovery From Dr. Mackay

The ROE filed a § 1782 application seeking discovery from Dr. Mackay on June 3, 2011 in the Eastern District of California (No. 12-mc-0008). That application was granted on September 13, 2011, and Chevron and Dr. Mackay produced over 62,000 pages of documents to the ROE. *See* ER 50.

Chevron and Dr. Mackay asserted work product protection over certain documents and logged those documents accordingly. Some of the documents were withheld as draft reports under Federal Rule of Civil Procedure 26(b)(4)(B), as that rule was revised in 2010. Other documents were withheld as attorney-expert communications under revised Rule 26(b)(4)(C). Finally, some documents were withheld as trial preparation material under revised Rule 26(b)(3)(A).

The ROE moved to compel the production of documents Chevron and Dr. Mackay maintained were protected work product or trial preparation materials. On February 14, 2012, Magistrate Judge Austin of the Eastern District of California granted the ROE's motion to compel in part:

Respondents are required to produce every document listed on their privilege log(s) unless it falls under one of the following two categories: (1) Draft reports prepared by Dr. Mackay; and (2) Communications directly between Dr. Mackay and counsel . . .

ER 8-9. In other words, Judge Austin held that Chevron and Dr. Mackay could properly withhold documents under Rules 26(b)(4)(B) and (C), but that documents falling outside those two narrow protections could not otherwise be protected by Rule 26(b)(3)(A). Judge Austin also ordered Chevron and Dr. Mackay to submit for *in camera* review any documents they believed should be withheld under the two protected categories. ER 9-10.

Chevron filed a motion for reconsideration asking District Judge Lawrence O’Neill to resolve the same issue of law that is now presented in this appeal: “Can documents prepared in anticipation of litigation, *by* an expert witness *for* a party to the litigation, be protected under the revised Rule 26(b)(3)(A), even if they do not fall within the specific protections of Rules 26(b)(4)(B) or (C)?” ER 37 (emphasis in original).

Without awaiting the ROE’s responsive briefing on this legal question, Judge O’Neill denied Chevron’s motion for reconsideration. ER 3. In so doing, he stated that Chevron “fail[ed] to identify particular documents or categories of documents which they claim are protected from discovery” and that Chevron had “fail[ed] to utilize in camera review without explanation.” ER 5. Judge O’Neill’s order thus seems to have misperceived the nature of the dispute between the parties. Under Chevron’s interpretation of Rule 26, *all* of the Rule 26(b)(3)(A) documents on its log were protected, whereas under the ROE’s and Magistrate

Judge Austin’s interpretation, *none* of them were protected. Accordingly, the *in camera* review process established by Magistrate Judge Austin had no bearing on the parties’ dispute—it addressed only documents falling within the two categories of documents that both parties (and Judge Austin) agreed were protected by Rule 26(b)(4), and not the withholding of documents outside those two categories, whose protection turned exclusively on the proper interpretation of Rule 26(b)(3)(A).

After Judge O’Neill rejected Chevron’s effort to clarify this apparent misunderstanding, ER 1, Chevron and Dr. Mackay appealed and, as required by the district court’s Order, produced roughly 3,000 additional pages under an agreed protective order. *See* ER 32. Under the terms of the protective order, the ROE is permitted to use the documents, materials, information, and deposition testimony produced “for the sole purpose of conducting the Bilateral Investment Treaty arbitration.” ER 33. In addition, upon entry of an order or opinion by this Court deeming some or all of the produced materials privileged, the ROE will be “forbidden from using, filing, sharing, or otherwise relying upon or disclosing those [materials]” and also will be “required to promptly return and/or destroy the privileged [materials] and certify thereto.” ER 34.

II. The ROE’s Application To Obtain Discovery From Dr. Kelsh

The ROE filed a § 1782 application seeking discovery from Dr. Kelsh on

September 23, 2011 in the Northern District of California (Case No. 11-mc-80171). That application was also granted. ER 257. Chevron and Dr. Kelsh produced over 197,000 pages to the ROE and withheld other documents under the protections provided by Rules 26(b)(3)(A), (b)(4)(B), and (b)(4)(C).

The ROE again filed a motion to compel production of all the documents on Chevron and Dr. Kelsh's privilege log. After considering the parties' arguments, Magistrate Judge Cousins held that, under the 2010 amendments to Rule 26, "expert materials and communications that fall outside the scope of Rule 26(b)(4)(B)-(C) are not work product and are, therefore, discoverable." ER 19. Chevron and Dr. Kelsh filed a motion for relief from the district judge raising the same legal issue described above, but District Judge Charles Breyer denied that motion and affirmed Judge Cousins' Order. ER 11. Chevron and Dr. Kelsh immediately appealed and moved to consolidate the Kelsh appeal with the Mackay appeal; and this Court consolidated the appeals. *See* ER 107; ER 28.

STATEMENT OF FACTS

I. The Lago Agrio Litigation

From 1964 to 1992, Texaco Petroleum Company ("TexPet") held an interest in an oil consortium in the Oriente region of Ecuador. By 1976, Ecuador's state-owned oil company, Petroecuador, became the majority owner of the consortium

and has been the sole owner and operator since 1992. ER 289.² In 1995, TexPet, the ROE, and Petroecuador entered into a settlement and release agreement under which TexPet agreed to remediate a portion of the former consortium sites proportionate to its minority ownership interest, leaving the remaining remediation to be performed by Petroecuador. *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 341-42 (S.D.N.Y. 2005). In 1998, after TexPet completed the remediation conducted under the supervision of the ROE and outside auditors, Petroecuador and the ROE “releas[ed], absolv[ed], and discharg[ed]” TexPet from any environmental liability arising from the consortium’s activities. *Id.* at 342.

Years after TexPet ceased operations and completed its remediation in Ecuador, one of Chevron’s subsidiaries merged with Texaco, TexPet’s ultimate parent company. Chevron thereby became an indirect shareholder of TexPet. *See* ER 286.

In contrast to TexPet’s prompt cleanup, for years Petroecuador failed to conduct any remediation of the former consortium sites, and compiled an abysmal environmental record, including 1,415 spill events between 2000 and 2008 alone. This record led Ecuador’s President Correa to publicly declare that Petroecuador “has dreadful environmental management practices,” ER 61; ER 387, and the

² Before its termination, the consortium’s activities generated US\$23 billion, 97.3% of which was retained by the ROE. ER 355.

Ecuadorian plaintiffs' counsel in the Lago Agrio litigation to admit that "Petro[ecuador] has inflicted more damage and many more disasters than Texaco itself," "but since it's a state-owned company, since it's the same people involved in the laws and all, no one says a thing." ER 75; ER 402.

In 2003, a group of American and Ecuadorian lawyers initiated the Lago Agrio litigation against Chevron, but not Petroecuador or the ROE, claiming that TexPet's operations harmed the environment. Numerous federal district courts have now determined that the Lago Agrio litigation has been tainted by the Lago Agrio plaintiffs' lawyers serious acts of fraud and malfeasance.³ The District

³ *E.g.*, *In re Chevron Corp.*, Nos. 1:10-mc-00021-22, slip op. at 3 (D.N.M. Sept. 2, 2010) (The Ecuadorian plaintiffs and their attorneys and representatives engaged in "corruption of the judicial process, fraud, attorney collusion with the Special Master, inappropriate ex parte communications with the court, and fabrication of reports and evidence"); *Chevron Corp. v. Champ*, Nos. 1:10-mc-27, 1:10-mc-28, 2010 WL 3418394, at *6 (W.D.N.C. Aug. 30, 2010) ("While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court. If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill."); *In re Applic. of Chevron Corp.*, No. 10-cv-1146-IEG(WMC), 2010 WL 3584520, at *6 (S.D. Cal. Sept. 10, 2010) ("There is ample evidence in the record that the Ecuadorian Plaintiffs secretly provided information to Mr. Cabrera, who was supposedly a neutral court-appointed expert, and colluded with Mr. Cabrera to make it look like the opinions were his own. Thus, any privilege which existed was waived; Respondents' claim of privilege neither bars production of the subpoenaed documents nor gives [plaintiffs' technical consultant] Powers a basis for refusing to testify."); *In re Applic. of Chevron Corp.*, 633 F.3d 153, 166 (3d Cir.

Court for the Southern District of New York, for example, concluded: “There is substantial evidence that [counsel for the Ecuadorian Plaintiffs] have improperly . . . pressured, intimidated, and influenced Ecuadorian courts” *In re Applic. of Chevron Corp.*, 749 F. Supp. 2d 141, 162 (S.D.N.Y. Nov. 10, 2010) (corrected opinion). Indeed, the Lago Agrio proceedings and the \$18.2 billion judgment issued from the Ecuador court in February 2011 are so tainted by fraud and corruption that the District Court for the Southern District of New York issued a preliminary injunction prohibiting the Lago Agrio plaintiffs, their agents, and co-conspirators from seeking to enforce the judgment before a trial on the merits of its enforceability could be held. *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 660 (S.D.N.Y. 2011), *injunction vacated on other grounds*, *Chevron Corp. v. Camacho Naranjo*, 667 F.3d 232 (2d Cir. 2012). Although the U.S. Court of Appeals for the Second Circuit later vacated the preliminary injunction on procedural grounds, the Southern District of New York’s fraud findings remain

Feb. 3, 2011) (“Though we recognize that the Lago Agrio Court may view what seems to us to be a conflict of interest differently than we do, we believe that this showing of [plaintiffs’ technical consultant] Villao’s dual employment is sufficient to make a prima facie showing of a fraud that satisfies the first element of the showing necessary to apply the crime-fraud exception to the attorney-client privilege.”); *In re Applic. of Chevron Corp.*, No. cv-10-2675 (SRC), Hrg. Tr. at 43:13–44:16 (D.N.J. June 11, 2010) (“As far as the Court is concerned, the concept of an employee of a party covertly functioning as a consultant to a court appointed expert in the same proceeding can only be viewed as a fraud upon that tribunal”).

undisturbed. *See Chevron Corp. v. Camacho Naranjo*, 667 F.3d 232, 246 n.17 (2d Cir. 2012) (vacating the preliminary injunction but expressing “no view on the merits of the parties’ various charges and counter-charges regarding the Ecuadorian legal system and their adversaries’ conduct of this litigation, which may be addressed as relevant in other litigation before the district court or elsewhere”); *Chevron Corp. v. Donziger*, No. 11-cv-00691-LAK, Dkt. 468 at 7 (S.D.N.Y. May 14, 2012) (denying motion to dismiss Chevron’s RICO claims against plaintiffs and certain of their lawyers and observing that Second Circuit opinion “did not pass . . . on this Court’s findings with respect to . . . evidence of fraud”).

II. Chevron’s Treaty Arbitration

In September 2009, Chevron and TexPet commenced the Treaty Arbitration against Ecuador under the U.S.-Ecuador Bilateral Investment Treaty (“BIT”). *See generally* ER 79-100; ER 420-42. The BIT establishes a procedure for American investors to bring claims before an impartial adjudicator when they believe that their Treaty rights have been violated. The individual or company may submit “the dispute for settlement by binding arbitration . . . in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL),” among other options. ER 448-49.

Chevron and TexPet invoked the BIT arbitration procedure to seek relief from the ROE's denials of due process, fair treatment, and international-law rights in the Lago Agrio litigation. Chevron and TexPet alleged in their notice of arbitration that "[i]n breach of the 1995 and 1998 agreements and the Treaty, Ecuador today is colluding with a group of Ecuadorian plaintiffs and U.S. contingency-fee lawyers" in the Lago Agrio litigation and that "Ecuador improperly seeks to shift to Chevron the responsibility for impact caused by Petroecuador's own oil operations since 1992." ER 83; ER 425. The ROE's unlawful actions "involve[] Ecuador's various organs of State," and "Ecuador's judicial branch has conducted the Lago Agrio litigation in total disregard of Ecuadorian law, international standards of fairness, and Chevron's basic due process and natural justice rights, and in apparent coordination with the executive branch and the Lago Agrio plaintiffs." *Id.* Contrary to the ROE's assertions in its applications for discovery, Chevron does not seek to retry the merits of the Lago Agrio litigation in the Treaty Arbitration, but rather to address the ROE's conduct, including conduct of the Ecuadorian judiciary, regarding Chevron's due process rights and Chevron's and TexPet's rights under the settlement and release agreements.

Chevron filed a request for interim relief before the Tribunal, and in February 2011—the same month that the \$18.2 billion judgment was entered

against Chevron in the Lago Agrio litigation—after hearings and the presentation of extensive evidence supporting Chevron’s claims for interim relief, the Tribunal issued an interim order requiring the ROE “to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against [Chevron] in the Lago Agrio case” pending further order of the Tribunal. *See* ER 469.

On January 25, 2012, the Treaty Arbitration Tribunal confirmed its February 2011 order and converted it into an enforceable interim award. *See* First Interim Award on Interim Measures, Treaty Arbitration between Appellees and the Republic of Ecuador in The Hague, Permanent Court of Arbitration, Case No. 2009-23 (Jan. 25, 2012). On February 16, 2012, the Tribunal reconfirmed its Interim Order and First Interim Award and expanded the scope of its orders in the Second Interim Award on Interim Measures, requiring the ROE, including its judiciary, to take all measures necessary to prevent enforcement of the Ecuadorian judgment within and outside of Ecuador. *See* Second Interim Award on Interim Measures, Treaty Arbitration between Appellees and the Republic of Ecuador in The Hague, Permanent Court of Arbitration, Case No. 2009-23 (Feb. 16, 2012). Nevertheless, the ROE is presently in violation of the terms of the interim awards and the Lago Agrio plaintiffs have commenced enforcement proceedings in

Canada. *See* Statement of Claim, *Yaiguaje v. Chevron Corp.*, No. cv-12-454778 (Ont. Sup. Ct. May 30, 2012).

On February 27, 2012, the Tribunal held that it has jurisdiction to hear the dispute. *See generally* ER 114-250. The Tribunal adopted a “twin track” procedure in which certain discrete legal issues will be resolved by way of briefing and a hearing on November 26-28, 2012, followed by briefing on the merits of the dispute. The ROE’s brief on the merits is due on February 18, 2013. Procedural Order No. 11 at 2, Treaty Arbitration between Appellees and the Republic of Ecuador in The Hague, Permanent Court of Arbitration, Case No. 2009-23 (May 15 2012). Although the Tribunal is vested with the power to order the production of evidence, to date, neither party has asked the Tribunal to exercise this power. *See generally* ER 101-105.

III. The Roles Of Drs. Mackay And Kelsh In The Lago Agrio Litigation And The Treaty Arbitration

Drs. Mackay and Kelsh were retained to assist Chevron in its defense of the Lago Agrio litigation. In that capacity, they worked closely with Chevron’s lawyers, in-house scientists, outside consultants, and other experts similarly retained. Many of the documents and communications prepared by Drs. Mackay and Kelsh, along with many of the documents and communications provided to them, were created in anticipation of litigation with the intent that they would be

kept confidential because they revealed thought-processes regarding Chevron's defense strategies.

Dr. Mackay submitted expert testimony to the Lago Agrio court in the form of four reports authored in 2006, 2007, and 2010. Dr. Mackay primarily opined on the parties' respective sampling and analysis plans and the scientific defensibility of the Lago Agrio plaintiffs' Judicial Inspection and expert reports. *See* No. 12-mc-00008-GSA (E.D. Cal. July. 15, 2012), Dkt. 12. Dr. Kelsh, an experienced epidemiologist, was retained in 2008 to rebut allegations about excess cancer deaths and the need for new public health infrastructure, which were made in the global damages assessment of the supposedly neutral court-appointed expert Richard Stalin Cabrera Vega—a report that Chevron has since discovered was ghostwritten by the Lago Agrio plaintiffs. *See* ER 418. Dr. Kelsh also submitted a report in 2009, in response to a supplemental report supposedly authored by Cabrera, and reports responding to similar claims made by experts retained by the Lago Agrio plaintiffs in 2010.

The documents Respondents withheld as work product in the cases below primarily involve communications that took place between and among Chevron's litigation team members, which—due to the complex and highly technical nature of the allegations in the Lago Agrio litigation—included lawyers, in-house scientists, consultants, and expert witnesses, and revolved around litigation and

technical strategy, investigation, and case management. These communications were not merely recitations of the facts or data considered by the experts in drafting their respective reports. For example, Respondents withheld an email chain among Dr. Mackay and his co-authors discussing a draft of their report, emails between another Chevron expert and his assistant, and an email chain among Chevron's experts, employees, and lawyers discussing a draft of Dr. Mackay's report. *See* No. 12-mc-00008-GSA (E.D. Cal. July. 15, 2012), Dkt. 34.

The district courts' orders compel Respondents to turn over to the ROE all of these documents even though there is no dispute that they were prepared by Chevron's agents in anticipation of litigation and, therefore, are protected under the plain language of the Rules.

SUMMARY OF ARGUMENT

Prior to its amendment in 2010, most courts interpreted Federal Rule of Civil Procedure 26 as creating a "bright-line rule" requiring the disclosure of all materials in the possession of a testifying expert. The 2010 amendments to Rule 26, however, eliminated the language requiring disclosure of all testifying expert materials, and replaced it with language requiring only that "facts or data" be disclosed. That language change was specifically intended to limit the scope of discovery regarding testifying experts.

These appeals present a narrow but important legal question arising out of the 2010 amendments to Rule 26, which no circuit court in the nation has yet decided: Are documents prepared in anticipation of litigation, in connection with the work of an expert witness performed *for* a party to the litigation, protected under Rule 26(b)(3)(A), even if they do not fall within the more specific protections of Rules 26(b)(4)(B) or (C)? The rulings below hold they are not. But those holdings are based on the old “bright-line rule,” and are contradicted by the plain text of the current rule and the motivation behind the 2010 amendments.

The text of Rule 26 is unambiguous: Rule 26(b)(3)(A) protects all “documents and tangible things that are prepared in anticipation of litigation or for trial *by* or *for* another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).” Fed. R. Civ. P. 26(b)(3)(A) (emphasis added). The ROE does not, and cannot, dispute that the documents at issue were prepared in connection with expert witnesses working for Chevron and Chevron’s attorneys in the Lago Agrio litigation, and thus they fall squarely within the text of the rule.

Thus the question before this Court is whether Rule 26 requires disclosure of all documents provided to an expert witness, regardless of whether they are protected trial preparation materials and regardless of whether they constitute “facts or data” considered by the expert. The text of Rule 26 provides no basis to

require such a broad disclosure. Rather, the text of Rule 26, as amended in 2010, creates only narrow exceptions to the protection provided for trial preparation materials. It requires the disclosure of otherwise protected facts, data, and specific categories of communications between the expert and a party's attorneys. Nowhere in the Rule is there a provision requiring disclosure of all documents in the possession of a testifying expert.

Indeed, as illustrated in the diagrams below, the ROE's view of Rule 26 is *identical* to Respondents' view in all but one respect: The ROE says the documents at issue are unprotected because of an unidentified exception to Rule 26(b)(3)(A)—indicated in Diagram B by a large white oval unmoored to any subsection of Rule 26—supposedly requiring disclosure of all expert-related materials unless they fall within the protections of two *other* rules, Rules 26(b)(4)(B) and (C):

DIAGRAM A: RESPONDENTS' VIEW

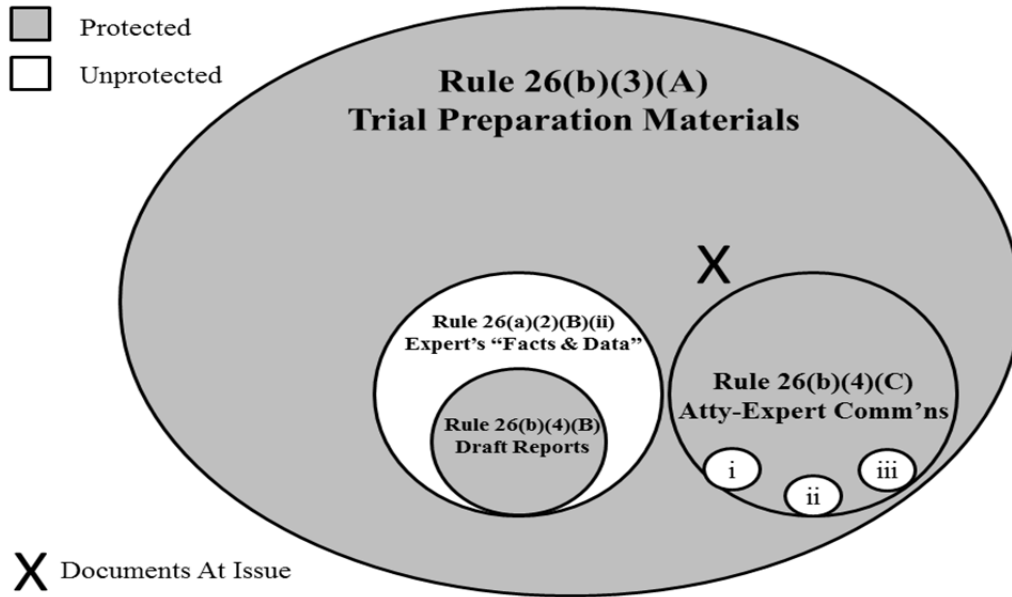
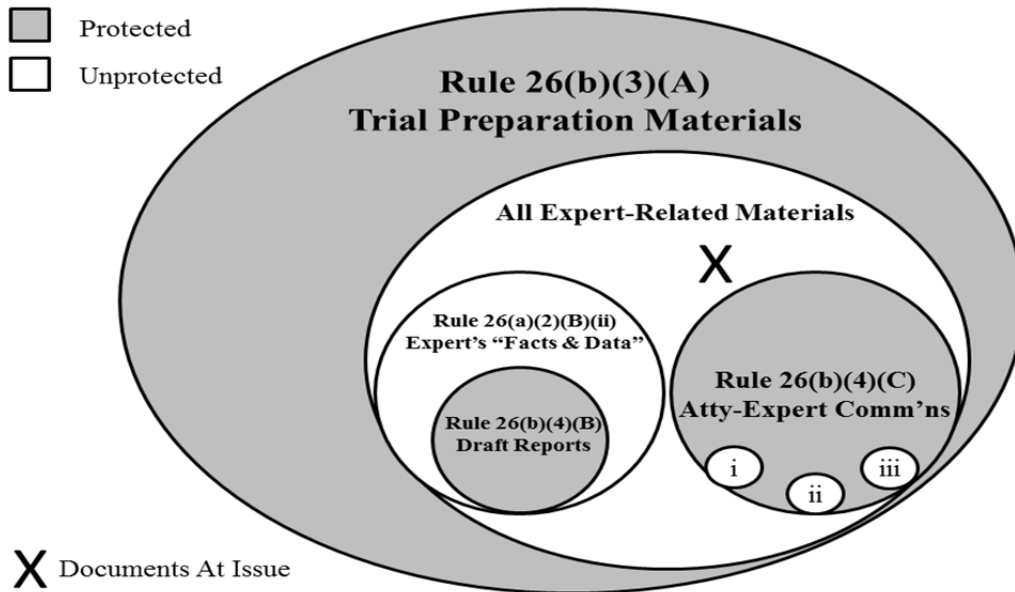


DIAGRAM B: THE ROE'S VIEW



The plain terms of Rules 26(b)(4)(B) and (C), however, explain that the protections they offer—for drafts of expert reports and certain communications between experts and counsel, respectively—are merely *aspects* of the broader

protection provided by Rule 26(b)(3)(A). There is nothing in the language of those rules saying that Rules 26(b)(4)(B) and (C) are the *only* protections provided by Rule 26(b)(3)(A) with respect to work performed by expert witnesses, as the district courts concluded. Put another way, the work product protection provided by Rule 26(b)(3)(A) should apply even if the experts' documents and communications fall outside the specific protections provided by Rules 26(b)(4)(B) and (C).

Under this correct interpretation of the current Rule 26, Chevron and its experts asserted work product protection over documents and communications prepared in connection with their work—all of which was performed for Chevron and its attorneys in anticipation of litigation—unless they fell within a defined exception. The applicable exceptions are described in Rule 26(a)(2)(B)(ii) and Rules 26(b)(4)(C)(i)-(iii). In accordance with those rules, Respondents collectively produced over 259,000 pages of documents, including any documents or communications identifying “the facts or data [they] considered . . . in forming” their expert opinions in the Lago Agrio litigation. Fed. R. Civ. P. 26(a)(2)(B)(ii).⁴ And Respondents correctly withheld communications between and among

⁴ Under Rule 26(b)(4)(B), however, Respondents withheld draft expert reports even if they contained “facts or data” considered by Chevron’s experts. That provision is not at issue in these appeals.

Chevron-retained experts—including the experts’ own team members—relating to their work on the Lago Agrio litigation, unless they (i) “relate[d] to compensation for the expert’s study or testimony”; (ii) “identif[ied] facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed”; or (iii) “identif[ied] assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.” Fed. R. Civ. P. 26(b)(4)(C)(i)-(iii).

Respondents therefore respectfully request that this Court reverse the district courts’ orders to the extent they held that Respondents’ productions were insufficient as a matter of law.

STANDARD OF REVIEW

This Court reviews *de novo* a district court’s interpretation of the Federal Rules of Civil Procedure. *United States v. \$133,420.00 in U.S. Currency*, 672 F.3d 629, 637 (9th Cir. 2012).

ARGUMENT

The plain language of Rule 26(b)(3)(A) is unambiguous and controls the outcome of this appeal: Materials prepared for a party or that party’s attorney, in anticipation of litigation or in preparation for trial, are protected from disclosure unless an explicit exception located elsewhere in the Federal Rules applies. Respondents, therefore, properly asserted work product protection over documents

and communications prepared in connection with Dr. Mackay's and Dr. Kelsh's work—all of which was performed for Chevron and its attorneys in the Lago Agrio litigation—unless it fell within a defined exception. The district courts' orders, which both reached a contrary interpretation of Rule 26, should be reversed.

I. This Dispute Is Governed By The Plain Text Of The Federal Rules Of Civil Procedure.

This Court interprets the Federal Rules of Civil Procedure in accordance with their plain text. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 391 (1990) (“We therefore interpret Rule 11 according to its plain meaning[.]”); *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (“Our interpretation of the Federal Rules of Civil Procedure begins with the relevant rule’s ‘plain meaning.’”). Only if the text of a particular rule is unclear does this Court consult the Advisory Committee Notes accompanying the rule. *See United States ex rel. Eisenstein v. City of New York*, 540 F.3d 94, 97 (2d Cir. 2008), *aff'd*, 2009 U.S. LEXIS 4316 (June 8, 2009) (“When interpreting a rule of procedure, we review the text for its plain meaning. *To the extent that the text is ambiguous*, we seek to determine the intent by looking to other materials, such as the Advisory Committee Notes that often accompany the rules.”) (internal citations and quotation marks omitted) (emphasis added); *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 732 (9th Cir. 2007) (“Statutory interpretation begins with the plain meaning

of the statute's language. Where the statutory interpretation is clear and consistent with the statutory scheme at issue, the plain language of the statute is conclusive and the judicial inquiry is at an end.") (quoting *Botosan v. Paul McNally Realty*, 216 F.3d 827, 831 (9th Cir. 2000)).

In addition, the plain language of a rule trumps any contradictory interpretation in the Advisory Committee's notes. As the Fourth Circuit explained:

Whether we agree with all of the policy considerations or whether the rule effectively addresses them, we are bound to apply the rule in the manner in which it is written. . . . If the Advisory Committee Note was the authority controlling this case, its ambiguity might be resolved in favor of the policy arguments and legislative history which the parties have called to our attention. *But the Advisory Committee Note is not the law; the rule is.* Accordingly, if the Advisory Committee Note can be read in two ways, we must read it, if we consult it at all, in a manner that makes it consistent with the language of the rule itself, and if the rule and the note conflict, the rule must govern. Because the rule on the issue before us is unambiguous, we need not even consult the note to determine the rule's meaning.

United States v. Carey, 120 F.3d 509, 512 (4th Cir. 1997) (emphasis added).

II. The Plain Text Of Rule 26(b)(3)(A) Protects The Documents At Issue As Work Product.

All the documents the ROE seeks were prepared by or for Chevron and its attorneys in the Lago Agrio litigation. *See* ER 49; ER 252. Accordingly, both the documents *prepared by* Drs. Mackay and Kelsh and the documents *provided to* Drs. Mackay and Kelsh that were prepared for the Lago Agrio litigation, fall within the scope of Rule 26(b)(3)(A)'s protection for trial preparation material:

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

- (i) they are otherwise discoverable under Rule 26(b)(1); and
- (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

Fed. R. Civ. P. 26(b)(3)(A); *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 667 (3d Cir. 2003) (documents and communications that were “intended to be confidential and made in anticipation of litigation” meet the requirements for work product protection). As protected trial preparation materials, these documents are not discoverable unless they are subject to an exception requiring disclosure. *See United States v. Nobles*, 422 U.S. 225, 238–39 (1975).

A. Revised Rule 26(a)(2)(B) Provides An Exception To, But No Longer Eliminates, The Work Product Protection Afforded Expert Witness Documents Under Rule 26(b)(3)(A).

Prior to the December 2010 amendments to Rule 26, many courts—including courts in this Circuit—applied a broad exception to work product protection for expert witness materials. *See, e.g., SEC v. Reyes*, No. 06-cv-04435-CRB, 2007 WL 963422, at *1 n.1 (N.D. Cal. Mar. 30, 2007); *Ass'n of Irrigated Residents v. Fred Schakel Dairy*, 1:05-cv-00707-AWI-SMS, 2008 WL 2509735, at *1 (E.D. Cal. June 23, 2008). The foundation for the old “bright line” rule was the

plain text of Rule 26 as it existed at that time, specifically the testifying expert disclosure provisions of Rule 26(a)(2)(B), which required disclosure of “the data *or other information* considered by the witness.” Fed. R. Civ. P. 26(a)(2)(B) (1993) (emphasis added); *see United States v. Sierra Pac. Indus.*, No. CIV S–09–2445 KJM EFB, 2011 WL 2119078, at *8 (E.D. Cal. May 26, 2011) (“[The] bright-line waiver rule within the Ninth Circuit . . . stems from the . . . require[ment] [for] parties to disclose the ‘data [or] other information’ that reporting experts considered in forming their opinions. Fed. R. Civ. P. 26(a)(2)(B) (effective until December 1, 2010). The ‘data [or] other information’ language was intended to put a stop to arguments that materials given to testifying expert witnesses were privileged or protected.”). As one federal circuit court explained:

[T]he 1993 [version of] Rule 26 of the Federal Rules of Civil Procedure make[s] clear that documents and information disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party, whether or not the expert relies on the documents and information in preparing his report. Rule 26(a)(2) requires that the testifying expert’s report contain . . . the **data or other information** considered by the witness in forming the opinions. The accompanying Advisory Committee Note explicitly states that the report is to disclose the **data and other information** considered by the expert. *Given this obligation of disclosure*, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.” *See also TV-3, Inc. v. Royal Ins. Co. of Am.*, 194 F.R.D. 585, 589 (S.D. Miss. 2000) (correspondence between counsel and expert witness is discoverable,

“*given plain language of Rule 26(a)(2) and its accompanying Advisory Committee Note*”).

In re Pioneer Hi-Bred Int’l, 238 F.3d 1370, 1375 (Fed. Cir. 2001) (internal quotation marks and alterations omitted) (emphases added). Other courts interpreting that same phrase similarly held that “[h]ad the drafters intended to require disclosure of facts only, they would not have needed to include the phrase ‘or other information.’” *Reg’l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 716 (6th Cir. 2006). They further reasoned that because the phrase “or other information” in old-Rule 26(a)(2)(B) was unqualified, litigants were required to produce *all* documents provided to testifying experts, including otherwise privileged documents. *Id.*

In December 2010, however, the language of former Rule 26(a)(2)(B) was significantly narrowed, requiring testifying experts to disclose only “the *facts or data* considered by the witness.” Fed. R. Civ. P. 26(a)(2)(B)(ii) (2010) (emphasis added). Thus, the “bright line” rule’s textual foundation—the unqualified, expansive phrase “or other information”—was discarded in favor of new language limiting the universe of discoverable expert witness work product to documents identifying “facts or data.” As the Advisory Committee explained, “[t]he refocus of disclosure on ‘facts or data’ is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel.” Fed. R. Civ. P. 26

Advisory Committee's Note, "2010 Amendments." Accordingly, all of the pre-amendment case law relying on a "bright-line" discoverability of testifying experts' documents has been superseded by the amended Rule, which eliminated the entirety of the old "bright-line" approach's former textual basis.

Indeed, the Rules Advisory Committee comments show that the revised Rule 26(a)(2)(B) can no longer be read to imply the discoverability of all documents or communications involving expert witnesses like Drs. Mackay and Kelsh, but only documents and communications identifying "facts or data" they considered in forming their opinions. The Rules Advisory Committee explained this precise distinction in the context of identical "facts or data" language in Rule 26(b)(4)(C): "[T]he exception applies only to communications 'identifying' the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected." May 29, 2008 Advisory Committee Report.

Thus, Rule 26(a)(2)(B) cannot be the basis for the district courts' orders. Respondents have already produced any documents identifying the "facts or data" considered by Drs. Mackay and Kelsh and do not dispute the discoverability of those documents. The only documents at issue in these appeals are documents that do *not* identify "facts or data," whose Rule 26(b)(3)(A) protection is unaffected by the amended Rule 26(a)(2)(B).

B. Rule 26(b)(4) Does Not Eliminate The Work Product Protection Afforded Dr. Mackay's And Dr. Kelsh's Documents Under Rule 26(b)(3)(A).

The 2010 amendments to Rule 26 also added two new provisions intended to guarantee that certain documents and communications relating to expert witness work would be protected. Rule 26(b)(4)(B) and (C) provide as follows:

(B) Trial-Preparation Protection for Draft Reports or Disclosures. *Rules 26(b)(3)(A) and (B) protect* drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. *Rules 26(b)(3)(A) and (B) protect* communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Fed. R. Civ. P. 26(b)(4)(B), (C) (2010) (emphasis added). These provisions do not purport to be the only work-product protections available for expert-related documents and communications, as the district courts held. Nor do they purport to be standalone protections that uniquely apply to expert-related work. Instead, as can be seen in the italicized language above, both provisions are *specific aspects* of

the broader work-product protection provided by Rules 26(b)(3)(A) and (B).

The ROE has argued that Rules 26(b)(4)(B) and (C) serve no purpose unless they are interpreted as the *only* protections available for expert-related materials. *See* No. 11-mc-80171 (N.D. Cal. Dec. 9, 2011), Dkt. 45. But that is not so. The explicit protection of all experts' draft reports under Rule 26(b)(4)(B) ensures that drafts will not be discoverable even if they contain "facts or data" (as most will). And Rule 26(b)(4)(C) establishes a detailed list of three exceptions to the protections provided to expert communications with an attorney.

If Rules 26(b)(4)(B) and (C) were intended to be the only work product protections for expert documents and communications, the Rules would have said so, rather than including them within the broader umbrella of Rule 26(b)(3)(A). *See United States v. Carey*, 120 F.3d 509, 512 (4th Cir. 1997) ("Whether we agree with all of the policy considerations or whether the rule effectively addresses them, we are bound to apply the rule in the manner in which it is written."). Nothing in the plain text of Rules 26(b)(4)(B) or (C) displaces the protection for trial preparation material in Rule 26(b)(3)(A). *See In re Cendant Corp. Sec. Litig.*, 343 F.3d at 664-65 ("Rule 26(b)(3) provides work product protection independently of Rule 26(b)(4)(B)."). Emphasizing this point, the Advisory Committee's notes state that Rule 26(b)(4)(C) "does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine." Fed. R. Civ.

P. 26 Advisory Committee's Note, "2010 Amendments." Thus, contrary to the district courts' holdings, expert witness-related documents and communications lying beyond the scope of Rules 26(b)(4)(B) or (C) are still protected work product if they fall within the scope of Rule 26(b)(3)(A).

In particular, to the extent Dr. Mackay's and Dr. Kelsh's communications with Chevron employees and other Chevron-retained experts—including members of their own respective teams—fit within Rule 26(b)(3)(A)'s definition of trial preparation material and do not identify facts or data considered by Dr. Mackay or Dr. Kelsh, that protection is not limited, reduced or eliminated by Rule 26(b)(4)(C). As the Advisory Committee notes, "communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected" by the provisions of Rule 26(b)(4)(C). Fed. R. Civ. P. 26 Advisory Committee's Note, "2010 Amendments." These communications relate to litigation and technical strategy, investigation, general case information, and case management that were "intended to be confidential and made in anticipation of litigation." *In re Cendant Corp. Sec. Litig.*, 343 F.3d at 667. They are thus protected by Rule 26(b)(3)(A) regardless whether they fall within the scope of Rule 26(b)(4)(C).

III. Protecting The Documents At Issue Furthers The Goals Of The 2010 Amendments.

Because the plain text of Rule 26 is clear, examining the underlying purpose of the Rule and the amendments thereto is unnecessary. But Respondents' interpretation of the Rule has the added virtue of advancing the underlying purpose of the 2010 Amendments. Prior to the 2010 Amendments, the Rules Committee had been "told repeatedly" about the undesirable effects of "routine" discovery of expert communications: "Costs have risen. Attorneys may employ two sets of experts—one for purposes of consultation and another to testify at trial [E]xperts adopt strategies that protect against discovery but also interfere with their work." Fed. R. Civ. P. 26 Advisory Committee's Note, "2010 Amendments."

In amending Rule 26, the Rules Committee specifically stated that the 2010 changes—including the elimination of the "data or other information" language from Rule 26(a)(2)(B)—were "intended to alter the outcome" of earlier decisions that limited collaboration and coordination with testifying experts by removing some of the inefficiencies and expenses plaguing the process of working with experts. *Id.* Therefore, it would make little sense for the rules to protect communications between an attorney and a testifying expert, and between an attorney and a consulting expert, but not between the experts themselves and not between experts and in-house scientists or other vital members of the litigation

team. Implementing such a distorted interpretation of the rule, as the ROE urges, would only force consulting experts and in-house scientists to route their communications with testifying experts through the attorneys, and vice versa, resulting in exactly the inefficient, costly, and counterproductive process the Rules Committee intended to avoid.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse the judgments below and hold that Respondents' materials prepared in anticipation of litigation or for trial, in connection with the work of an expert witness for a party to the underlying litigation, are protected by Rule 26(b)(3)(A) even though they fall outside the narrower protections of Rule 26(b)(4)(B) or (C).

Respectfully submitted,

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Dated: June 25, 2012

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellants certify that there are no related appeals pending in the Ninth Circuit.

/s/ Ethan D. Dettmer

Dated: June 25, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I, the under-signed counsel, certify that this Appellants' Opening Brief is proportionately spaced, has a typeface of 14 points or more, and contains 7,563 words of text (not counting the cover, Tables of Contents and Authorities, this Certificate of Compliance, the Statement of Related Cases, the Proof of Service, or the Addendum) according to the word count feature of Microsoft Word used to generate this Brief.

/s/ Ethan D. Dettmer

Dated: June 25, 2012

ADDENDUM TO APPELLANTS' CONSOLIDATED OPENING BRIEF

**RELEVANT FORMER AND CURRENT VERSIONS OF FEDERAL RULE
OF CIVIL PROCEDURE 26**

Fed. R. Civ. P. 26(a)(2)(B) (1993)

(a) Required Disclosures; Methods to Discover Additional Matter.

...

(2) Disclosure of Expert Testimony.

...

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Fed. R. Civ. P. 26(a)(2)(B) (2010)

(a) Required Disclosures.

...

(2) *Disclosure of Expert Testimony.*

...

(B) **Witnesses Who Must Provide a Written Report.** Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored

in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

Fed. R. Civ. P. 26(b)(3)(A) (2010)

(b) Discovery Scope and Limits.

...

(3) *Trial Preparation: Materials.*

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

Fed. R. Civ. P. 26(b)(4)(B) (2010)

(b) Discovery Scope and Limits.

...

(4) *Trial Preparation: Experts.*

...

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

Fed. R. Civ. P. 26(b)(4)(C) (2010)

(b) Discovery Scope and Limits.

...

(4) *Trial Preparation: Experts.*

...

(C) Trial-Preparation Protection for Communications Between a Party's Attorney

and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Nos. 12-15572, 12-15848

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPUBLIC OF ECUADOR; DR. DIEGO
GARCÍA CARRIÓN,
Plaintiffs-Appellees

v.

DR. DOUGLAS M. MACKAY,
Defendant-Appellant

CHEVRON CORPORATION,
Intervenor-Appellant

Consolidated with

REPUBLIC OF ECUADOR; DR. DIEGO
GARCÍA CARRIÓN,
Plaintiffs-Appellees

v.

DR. MICHAEL A. KELSH,
Defendant- Appellant

CHEVRON CORPORATION,
Intervenor-Appellant

On Appeal from the United
States District Court for the
Eastern District of
California, No. 12-mc-
00008

(Honorable L. O’Neill)

On Appeal from the United
States District Court for the
Northern District of
California, No. 11-mc-
80171

(Honorable C. Breyer)

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INTRODUCTION

Appellees Dr. Michael A. Kelsh, Dr. Douglas M. Mackay, and Chevron Corp. (collectively, “Chevron”) seek to undermine the Republic of Ecuador and Dr. Diego García Carrión’s (collectively, “the Republic”) efforts to obtain discovery by way of 28 U.S.C. § 1782 in aid of a multi-billion dollar arbitration (the “Treaty Arbitration”) brought by Chevron against the Republic. Yet Chevron’s efforts were unavailing in the courts below, where Chevron argued that a recent amendment of Rule 26 to exclude two discrete categories of expert-related documents—draft reports and attorney-expert communications—had the effect of extending the federal work product doctrine to areas where it has never before applied. Despite the decisions of the courts below, Chevron persists in withholding thousands of documents based on a strained interpretation that Rule 26 protects communications between testifying experts and non-attorneys, or among testifying experts, even though the communications were considered by the experts in preparing their respective expert reports. Chevron even expands the work product protection to protect documents in the expert’s own files, thereby affording experts their own independent work product protection.

Chevron’s overbroad interpretation of Rule 26 has no merit. As the 2010 amendments make clear, and as the courts below have agreed, work product protection concerning reporting experts afforded by Federal Rule of Civil

Procedure 26 is limited to *only* two classes of documents: (i) the expert's draft reports and (ii) certain communications between the expert and counsel. That, moreover, has been Chevron's own position in a series of Section 1782 proceedings in which it has successfully sought discovery of expert-related materials for its *own* use in the same Treaty Arbitration. Chevron was right then, and it is wrong now.

COUNTER-STATEMENT OF ISSUES

- I. Whether the courts below abused their discretion in refusing to allow Chevron to assert work product protection over documents in the files of its testifying experts, Kelsh and Mackay, other than documents that are specifically protected from disclosure by amended Rules 26 (b)(4)(B) and (b)(4)(C)?
- II. If so, whether Kelsh, Mackay, and Chevron are nevertheless judicially estopped from asserting work product protection over the discovery sought by the Republic where Chevron has itself successfully sought and obtained Section 1782 discovery (in connection with the same arbitration and from experts acting in equivalent roles) of documents that other parties withheld on the same grounds that Chevron now espouses in these appeals?
- III. If the Court concludes that Chevron has appropriately asserted work product protection for the expert-related documents at issue here, whether the

Republic has nevertheless demonstrated substantial need for the documents at issue?

COUNTER-STATEMENT OF FACTS¹

Chevron retained Appellants Kelsh and Mackay as experts to defend against liability for its oil extraction operations in Ecuador. Kelsh was primarily retained to opine on the health effects, including cancer, of Chevron's twenty-plus year operation in Ecuador; Mackay was retained to offer his opinions on the propriety of Chevron's soil and water testing during the trial as well as on the expert opinions of Chevron's adversaries. The following facts provide general background on this long-running dispute and offer context to explain the relevance and importance of the discovery sought in this proceeding.

A. Chevron's Oil Operations In Ecuador Cause Ecuadorian Citizens To Commence A Class Action In New York And Thereafter In *Lago Agrio, Ecuador*

Chevron merged with Texaco, Inc. in 2001.² From 1964 through June 1992, Texaco's subsidiary, known as "TexPet," was a partial equity participant (50 percent and later 37.5 percent) in an oil exploration and development concession

¹ In citing the record, this brief will use the following abbreviations: "ER____" for Excerpts of the Record filed by Chevron; and "SER____" for Supplemental Excerpts of the Record filed by the Republic.

² *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 389 n.1 (2d Cir. 2011).

(the “Concession”) in the Eastern section of Ecuador’s Amazonian rain forest. TexPet served as the Concession’s sole operator, or manager, for twenty-five years, from 1965 to 1990. *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 338-41 (S.D.N.Y. 2005) (“*ROE I*”).

One year after TexPet’s interest in the Concession expired, a group of indigenous residents of the *Oriente* region filed a class action complaint against Texaco in the U.S. District Court for the Southern District of New York (the “*Aguinda*” action). The *Aguinda* plaintiffs alleged that TexPet had polluted private and public lands and streams in Ecuador. They demanded both monetary damages and extensive equitable relief to reimburse them for oil-related health problems and “to compel the cleanup of their community’s environmental resources.” *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473-74 (2d Cir. 2002) (“*Aguinda II*”); *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452, 456 (S.D.N.Y. 2007) (“*ROE II*”).

Texaco moved to dismiss the *Aguinda* action on, among other grounds, *forum non conveniens* principles, arguing that the case should be tried in the Ecuadorian courts. *Jota v. Texaco, Inc.*, 157 F.3d 153, 156 (2d Cir. 1998). In support, Texaco submitted a dozen affidavits from Ecuadorian law experts praising the Ecuadorian court system and process.

After two trips to the Second Circuit, and after Texaco promised to submit to jurisdiction in Ecuador and to satisfy any final judgment against it, the case was dismissed on *forum non conveniens* grounds. *Aguinda I*, 142 F. Supp. 2d at 537; *Aguinda II*, 303 F.3d at 473.

Following the *forum non conveniens* dismissal of the *Aguinda* action in New York, most of the *Aguinda* plaintiffs re-filed their claims in *Lago Agrio*, Ecuador against Chevron, which had by then merged with Texaco and bound itself to Texaco's commitments.³ *ROE I*, 376 F. Supp. 2d at 341-42. As in *Aguinda*, the Plaintiffs alleged that (a) TexPet, as manager, caused contamination and harmed the people residing in the region, and that (b) the methods and technology that TexPet had employed had already been prohibited in other countries "due to their lethal effects on the environment and human health."⁴ The Plaintiffs further alleged that TexPet's "willful misconduct" and "negligence" caused severe contamination of the land and waters in the region, affecting not only the drinking water and crops, but also the livelihood, culture and general health of the

³ *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 389 n.3 (2d Cir. 2011) (stating that "Chevron Corporation . . . remains accountable for the promises upon which we and the district court relied in dismissing Plaintiffs' action").

⁴ SER 6, 14-15, Complaint in *Maria Aguinda y Otros v. ChevronTexaco Corp.*, No. 002-2003-P-CSJNL, Superior Court of Nueva Loja (May 7, 2003) §§ I(5), I(7), IV(5)-(6).

population, which allegedly saw a rise in cancer, birth defects, and other illnesses.⁵ As in *Aguinda*, the Plaintiffs demanded that: (i) medical monitoring and care be established for the affected residents; (ii) the polluting elements still in the region be removed; and (iii) remediation be performed on both private and public lands to repair the environmental damage.⁶

The *Lago Agrio* action proceeded in Ecuador with dozens of judicial site inspections, thousands of test samples, and voluminous reports by both party and court-appointed experts investigating and analyzing the extent and causes of pollution, health risks, and other harm to the land and inhabitants of the Concession area.⁷ As is specifically relevant here, Chevron relied on Dr. Mackay to support its argument in the Treaty Arbitration that the scientific evidence in the *Lago Agrio* Court's trial record so strongly supports Chevron's defenses that the court's decision (currently under review by an Ecuadorian appellate court) could only have resulted from fraud, procedural irregularity or judicial corruption. For his part, Dr. Kelsh served as an expert for Chevron and offered extensive opinions

⁵ *Id.* at SER 6, 11-13, 16, §§ I(7), III(1)-(5), IV(9).

⁶ *Id.* at SER 13-16, § VI.

⁷ *See* SER 43, Aff. of Andrew Woods (Mar. 3, 2010), ¶ 8, *filed in Chevron Corp. v. Stratus Consulting, Inc.*, No. 10-cv-00047-JLK-MEH (D. Colo.) (stating that the *Lago Agrio* record is 200,000 pages).

challenging the Plaintiffs' claims of excess cancer deaths, other health problems, and the need for additional health care infrastructure.

B. The Republic Signs A Limited Settlement And Release Agreement

While the *Aguinda* action was pending, the Republic, its state-owned oil company, PetroEcuador, and TexPet entered into a series of Settlement and Release Agreements wrapping up TexPet's oilfield remediation obligations *vis-à-vis* the Government of Ecuador. Under these agreements, TexPet agreed to perform specified remedial work in exchange for a release by the Government and PetroEcuador of all of their claims against TexPet and Texaco. *ROE I*, 376 F. Supp. 2d at 341-42. Because the *Aguinda* case was then pending in New York, these agreements by their terms “applied *without prejudice to the rights possibly held by third parties*”—particularly the *Aguinda* plaintiffs—“for the impact caused as a consequence of the operations of the former PetroEcuador-Texaco Consortium.”⁸

⁸ SER 49, Memorandum of Understanding between the Government of Ecuador, PetroEcuador, and Texaco Petroleum Company (Dec. 14, 1994) art. VIII (emphasis added).

Notwithstanding that limitation, Chevron has argued in the *Lago Agrio* litigation, unsuccessfully, that the Republic's release not only prohibited future claims by the Republic.⁹

C. After Failing In Its Efforts To Pursue AAA Arbitration, Chevron Initiates Arbitration Under The Ecuador-U.S. Treaty

Although it could have done so, and indeed it advised the Second Circuit that it would do so upon a *forum non conveniens* dismissal,¹⁰ Chevron made no effort to implead the Republic into the *Lago Agrio* action or otherwise file an independent action against the Republic in the Ecuadorian courts that Chevron had previously praised. Instead, in June 2004, Chevron commenced a separate AAA arbitration in the U.S. District Court for the Southern District of New York seeking a declaration that PetroEcuador, the Republic's oil company, was contractually obligated to indemnify Chevron for all defense costs and liability that Chevron had incurred and would incur in defending the *Lago Agrio* action.¹¹ PetroEcuador and the Republic successfully moved to stay the AAA arbitration on the ground that

⁹ Under the Ecuadorian Constitution, the Republic did not have the authority to waive the rights of its citizens to pursue their own third-party claims for damages allegedly caused by Chevron. SER 62, Excerpt from Foreign Law Declaration of Genaro Eguiguren and Ernesto Albán (Dec. 20, 2006) ¶ 113.

¹⁰ See SER 74, Excerpts from Br. for Def. Appellee (Dec. 20, 2001), filed in *Aguinda v. Texaco, Inc.*, No. 01-7756(L). (2d Cir. Feb. 10, 2010).

¹¹ See SER 104, ChevronTexaco Corp. and Texaco Petroleum Co.'s Demand for Arbitration (June 11, 2004).

neither the Republic nor PetroEcuador was bound by an agreement that neither had ever signed. *ROE II*, 499 F. Supp. 2d at 469, *aff'd* 296 F. App'x 124 (2d Cir. 2008), *cert. denied*, ___ U.S. ___, 129 S. Ct. 2862 (2009).

In the action, Chevron argued (as it had in *Lago Agrio*) that Texaco's settlement agreement with the Republic prohibited all third-party actions against it. The district court did not need to, and did not, reach that issue.

With the indigenous plaintiffs having re-filed the *Aguinda* action in *Lago Agrio*, Ecuador, and with Chevron having lost its indemnification action against the Republic in the Southern District of New York, Chevron filed a Notice of Arbitration on September 23, 2009 under the arbitration rules of the United Nations Committee on International Trade Law ("UNCITRAL")¹² at the Permanent Court of Arbitration in The Hague, Netherlands pursuant to Article VI(3)(a) of the Ecuador-U.S. Treaty.¹³ Chevron thereby injected into a third forum—the present Treaty Arbitration—issues identical to those that had already

¹² See SER 125, Chevron Corp. and Texaco Petroleum Co.'s Notice of Arbitration (Sept. 23, 2009). Interestingly, Chevron filed its Notice of Arbitration challenging its liability in Ecuador before the *Lago Agrio* Court even issued its decision.

¹³ SER 151, Treaty Between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, at Art. VI(3)(a) signed August 27, 1993.

been placed before the U.S. District Court for the Southern District of New York and the *Lago Agrio* court.

Thus, in the present arbitration, Chevron resuscitates its claims that the Republic is violating its contractual release by “allowing” the *Lago Agrio* Court to hear the very environmental claims that Chevron asked the U.S. federal courts to dismiss in favor of an Ecuadorian forum. SER 141-142 at ¶¶ 66-68. Chevron also claims that the Republic has violated Chevron’s rights under the Ecuador-U.S. Treaty by failing to afford it due process in the environmental litigation. *Id.* at ¶¶ 68-69. As part of these allegations, Chevron argues that the Ecuadorian proceedings have been tainted by corruption and collusion involving the Government of Ecuador, its courts and the plaintiffs. *Id.*

Chevron has introduced as evidence in the Treaty Arbitration twenty-eight of its *Lago Agrio* environmental expert reports, one of which incorporates by reference another forty expert reports. And Chevron has argued from these reports that the scientific evidence overwhelmingly supports a finding that the affected lands and waters present no health dangers or risks at all, and that, alternatively, the lands have been effectively remediated. This evidence, Chevron suggests, supports its arbitral contention that any adverse judgment from the Ecuadorian judiciary must be the product of fraud. *See e.g.*, SER 251, 324, Chevron’s

Memorial on the Merits, *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. 2009-23 (Sept. 6, 2010).

D. The *Lago Agrio* Court Issues A Multi-Billion Dollar Judgment Against Chevron

Shortly after Chevron instituted the present Treaty Arbitration, almost eighteen years after the private Ecuadorian plaintiffs first brought their action in New York, and eight years after the Plaintiffs commenced the environmental suit in Ecuador, on February 14, 2011, the *Lago Agrio* court issued a judgment against Chevron and in favor of the private plaintiffs. As summarized by Chevron, among other things, the court ordered damages for reparation in the following amounts:

- \$600 million for groundwater remediation;
- \$5.396 billion for soil remediation;
- \$200 million to restore native flora, fauna, and aquatic life;
- \$150 million to implement a potable water system in the allegedly affected areas;
- \$1.4 billion to establish a healthcare system to remediate the impacts of the pollution on the population of the affected communities;
- \$800 million for “a plan of health,” including potential cancer treatment for the most seriously affected citizens; and
- \$100 million to rebuild ethnic communities and indigenous culture.¹⁴

¹⁴ SER 638-647, Letter from Randy M. Mastro to Judge Lewis A. Kaplan (Feb. 24, 2011), transmitting certified copy of Judgment in *Maria Aguinda y Otros v. Chevron Corp.* No. 002-2003, Provincial Court of Sucumbrio (Feb. 14, 2011), submitted in *Chevron Corp. v. Donziger, et al.*, No. 11-CV-0691 (LAK) (“*Lago Agrio* Judgment”); the *Lago Agrio* Court subsequently adjusted its damages award upward to approximately \$19 billion.

Pursuant to Ecuadorian law, the court also ordered Chevron to pay an additional 10 percent to the Amazon Defense Front—an organization representing the Plaintiffs.¹⁵ In addition, the court ordered Chevron to pay what Chevron argues is a “punitive penalty” of 100 percent of the reparations damages if it did not issue a public apology within fifteen days of the judgment.¹⁶ Both parties appealed the court’s judgment—a judgment to which Ecuador is not a party.

Though most of the voluminous evidence in the record was undisputed by Chevron, it had alleged that two of the expert reports were tainted by corruption. The *Lago Agrio* court, while declining to find fraud or corruption, nonetheless granted Chevron’s request to disregard the reports submitted by both of the disputed experts.¹⁷ The court instead found Chevron liable, and awarded damages, based on the voluminous remaining testing data and scientific evidence before it.

Since the granting of the Section 1782 applications at issue here—on January 3, 2012—the first-level court of appeals in Ecuador affirmed the *Lago Agrio* trial court’s decision. Shortly thereafter—on January 20, 2012—Chevron

¹⁵ *Id.* at SER 646.

¹⁶ *Id.* at SER 645.

¹⁷ *Id.* at SER 508 (disregarding the Calmbacher Report); SER 510 (disregarding the Cabrera Report).

appealed that affirmance to the National Court of Justice. That appeal is still pending.

E. Kelsh's And Mackay's Involvement In Ecuador For Chevron And The Importance Of The Discovery Sought By The Republic To The Treaty Arbitration

Kelsh, an epidemiologist, served as an expert witness designated by Chevron in the *Lago Agrio* litigation. ER 14. He submitted various expert reports in response to claims made in the global damages report of the court-appointed expert, Richard Cabrera. *Id.* Kelsh's rebuttal reports challenged Plaintiffs' claims of excess cancer deaths, other health problems, and the need for additional health care infrastructure. *Id.* These reports, as well as others authored by Kelsh, were later introduced by Chevron in the Treaty Arbitration. *Id.*

Mackay likewise provided expert testimony in support of Chevron in the *Lago Agrio* case—in written reports authored in 2006, 2007, and the fall of 2010. Br. 17, ER 51. The principal topic on which Mackay opined was the state of the soil and groundwater in the geographic area under scrutiny in the *Lago Agrio* litigation, and the parties' respective sampling and analysis practices. Br. 17.

In the discovery requests at issue here, the Republic seeks evidence from Kelsh and Mackay in part to better understand the critical science underlying Chevron's claims and to respond to Chevron's allegations in the Treaty Arbitration. While Chevron and the indigenous plaintiffs have litigated these

matters for the better part of two decades, the Republic (through its lawyers, rather than through its courts) has had no reason until recently to delve into the underlying science—because Chevron had not injected these issues into its dispute with the Republic until it launched the Treaty Arbitration.

Critically, the Republic also seeks to determine whether Chevron may have employed testing techniques deliberately designed to skew the results and “guarantee” the findings it desired. Documents produced to the Republic in another 1782 action strongly suggest that Chevron engaged in extensive, unilateral “pre-inspections” at many of the judicial inspection sites. *See, e.g.*, SER 650, Judicial Inspection Playbook for Sacha Norte 1 (Apr. 2006). From the massive amounts of sampling data generated, Chevron and its experts then appear to have “cherry-picked” specific, “cleaner” site locations for further supposedly “random” testing as part of the judicial inspections. The Republic now believes that a more robust review of *all* of Chevron’s pre-inspection site sampling data will (1) disprove many of the expert reports Chevron filed with the *Lago Agrio* Court,¹⁸

¹⁸ *See, e.g.*, SER 676, Pedro J. Alvarez, Douglas M. Mackay, Robert E. Hinchey, *Evaluation of Chevron’s Sampling and Analysis Methods* (Aug. 28, 2006) (“the sample selection . . . methods used are appropriate and are consistent with common practices and standards used by governments, companies, and consultants involved in the environmental remediation business worldwide We believe there is no foundation for the serious allegations in the Maest 3/06 report, including the allegation that the sampling program that Chevron’s experts are

and (2) show pollution at sites where Chevron, based on its pre-selected “representative” samplings, has repeatedly denied that evidence of pollution even exists.

For example, the Republic has recently learned from a Section 1782 request directed at another Chevron expert that Chevron created a “Judicial Inspection Playbook” for the inspection of the Sacha Norte 1 Production Station. That Playbook includes a section on “Chevron Site Inspections, 2004-2006,” covering four such inspections, and strongly suggesting that Chevron was attempting through its experts to skew the results of the judicial inspections in various ways.¹⁹

conducting deliberately hides or minimizes the existing contamination and associated risks.”).

¹⁹ The Playbook’s narrative includes the results of various pre-inspection “delineation borings” at two pits closed in 1986, Chevron’s purpose being to establish “clean” sampling points for use in the judicial inspections:

The second closed pit was associated with a former flare and was near the current location of the AS-114 wellhead. A hand augur boring within the pit (SA NORTE1-P1-SB41) encountered degraded petroleum below 0.9 m of clean cover, and an impacted interval that extended to at least 3.1 m (TPH-DRO = 5100 mg/kg, TPH GRO = 49 mg/kg), and a second boring (SA-NORTE1-P1-SB42) to the NW also encountered impacted soil below 2.8 m (TPH-DRO = 440 mg/kg). [Defint TPH-DRO’] A visually clean delineation point for this pit was established with a third boring (SA-NORTE1-P1-SB43) located 100 m NW of the first boring, although analysis of the sample revealed TPH DRO of 20 mg/kg Two borings were collected N of the flare outside the fence line and one (SA-NORTE1-P1-SB45) **established a clean delineation** for the former pits and discharges from the former effluent pipes. No impacts were noted to a depth of

The Republic received the information described above as a result of Section 1782 discovery directed at another Chevron expert, who was involved in four judicial inspections. The Republic anticipates that Mackay, who was involved in the judicial inspections, *e.g.*, SER 675, will be able to provide discovery sufficient for the Republic to determine whether Chevron employed such tactics throughout the inspection process, thereby casting substantial doubt on the validity and reliability of Chevron's expert reports first submitted to the *Lago Agrio* Court, and more recently to the Treaty Arbitration Tribunal.

3.2 m in this **clean delineation** boring. The second boring (SA-NORTE1-P1-SB44) was drilled to 0.5 m in a historic drainage ditch and was not visually impacted, but analysis of a composite sample determined that 1800 mg/kg of TPH DRO was present.

SER 656, Judicial Inspection Playbook for Sacha Norte 1 (Apr. 2006) (emphases added).

The pre-inspection test results were then used to instruct Chevron's experts where they should sample during the actual judicial site inspections, so as to yield a "clean" sample result. Thus, in order to accomplish Chevron's stated objective of "[d]efin[ing] clean line around site to show no widespread impacts," Chevron's judicial inspection expert for Sacha Norte 1 admonished that "[l]ocations for perimeter sampling should be chosen **to emphasize clean points around pits when possible.**" SER 737-738 (quoting Mackay Dkt. 35-10, Summary of Sampling and Testing Program for Judicial Inspection Sites: Sacha Norte 1 Production Station Strategy, at BJORKMAN00046359) (emphasis added). And to achieve that end, the expert was to "[c]ollect soil samples at 4 or more locations surrounding the site, **using locations that the PI [pre-inspection] team has shown to be clean.**" *Id.* (emphasis added).

The Republic therefore needs, and as explained below is entitled to, discovery from Kelsh and Mackay to defend itself in the Treaty Arbitration, through which Chevron seeks a multi-billion dollar arbitral award against the Republic.

F. Kelsh, Mackay, And Chevron Are Withholding Documents Based On Mistaken Claims Of Work Product Protection

The courts below granted the Republic's Section 1782 Applications and ordered that the subpoenas sought by the Republic be served on Kelsh and Mackay. ER 265 (Kelsh); ER 55 (Mackay). In turn, Kelsh and Mackay, under Chevron's supervision, withheld from production thousands of documents on the ground that they were protected against discovery by the attorney work product doctrine. The Republic then filed motions to compel, setting out specific objections to *each* disputed claim of privilege on Kelsh and Mackay's privilege logs. *See* SER 691, Motion to Compel and Annex A, *In re Application of the Republic of Ecuador* (Kelsh), No. 11-mc-80171 (N.D. Cal. Nov. 18, 2011); SER 723, Joint Statement Regarding Discovery Disagreement, *In re Application of the Republic of Ecuador* (Mackay), No. 11-mc-00052 (E.D. Cal. Dec. 27, 2011); SER 752, Annex A to Joint Statement Regarding Discovery Disagreement, *In re Application of the Republic of Ecuador* (Mackay), No. 11-mc-00052 (E.D. Cal. Dec. 27, 2011).

As explained below in detail, and as the courts below agreed, the only documents in Kelsh and Mackay's files that are *not* discoverable under Rule 26 are Kelsh and Mackay's (i) draft reports and (ii) certain communications with counsel. *See* Fed. R. Civ. P. 26(b)(4)(B)-(C). Kelsh is nonetheless withholding from production:

- Emails exchanged between Kelsh and other Chevron non-attorney experts, agents, and employees concerning matters addressed in Kelsh's reports. (706 documents withheld).
- Emails on those matters exchanged between Kelsh and other Chevron non-attorney experts, agents, and employees where an attorney is listed as one of numerous recipients. (15 documents withheld).
- Memoranda, draft memoranda, draft letters, notes, worksheets, draft worksheets, presentations, outlines, and agendas on those matters and authored by Kelsh or other Chevron non-attorney experts, agents, and employees. (408 documents withheld).
- Redacted documents on those matters authored by Kelsh whose distributions are unknown. (3 documents withheld).
- Draft reports on the same matters authored by *other* Chevron experts (28 documents withheld).

Similarly, Mackay has produced and now seeks the return of:

- Emails concerning matters addressed in Mackay's reports and exchanged between Mackay and other Chevron non-attorney experts, agents, and employees. (573 documents withheld).
- Emails on those subjects exchanged between Mackay and other Chevron non-attorney experts, agents, and employees where an attorney is listed as one of numerous recipients. (18 documents withheld).

- Memoranda, notes, workplans, draft worksheets, outlines, and agendas on those subjects and authored by Mackay or other Chevron non-attorney experts, agents, and employees. (72 documents withheld).

Finally, the Republic does not challenge the assertion of work product protection of Kelsh and Mackay's draft reports. The Republic, however, does challenge the breadth of their assertions as to what constitutes a draft report. Kelsh alone has asserted work product protection over 648 "draft reports," and Mackay has asserted work product protection over 232 "draft reports." Including these 880 documents, there are thus 2,703 withheld documents at issue in these appeals. *See* Annexes A, SER 712 (Kelsh); SER 752 (Mackay) (setting out the Republic's specific objections to each privilege claim).

G. The Courts Below Agree That Chevron's Assertions Of Work Product Protection Are Overbroad

In deciding the Motions to Compel brought by the Republic against Chevron, the courts below have uniformly agreed that Rule 26 means what it says and protects from disclosure only (i) draft reports and (ii) certain communications between the expert and Chevron. Confronted with the Republic's document-specific objections, the district courts summarily affirmed rulings by their respective Magistrate Judges and agreed that Chevron's assertions of work product beyond these two "defined exceptions" were without merit. *E.g.*, ER 16.

Specifically, following an *in camera* review of the documents at issue here, the *Kelsh* Court found that "expert materials that fall outside the scope of Rule

26(b)(4)(B)-(C) are not work product and are, therefore, discoverable.” ER 19. It also disallowed Kelsh’s assertion of attorney work product protection of documents in his own files. As the district court put it, “[t]he intention of the work product rule is to protect the mental impressions and legal theories of a party’s attorney, not its experts.” ER 21 (citation omitted).²⁰ And on that basis the court ordered Kelsh to produce categories of non-protected documents.

The *Mackay* Court was equally on point in ordering the production of these same types of documents:

[T]his Court finds that under Rule 26, Respondents are required to produce every document listed on their privilege log(s) unless it falls under one of the following two categories: (1) Draft reports prepared by Mackay; and (2) Communications directly between Mackay and counsel that contain counsel’s legal strategies and/or mental impressions.

ER 8-9, (ordering in camera review of draft reports to determine whether documents withheld were indeed draft reports).

²⁰ The court nonetheless rejected the Republic’s position that Chevron was barred from objecting to the propounded discovery based on the doctrine of judicial estoppels. The court instead found that Chevron was not judicially estopped from arguing a position contrary to one it had argued in related Section 1782 applications. ER at 18-19.

The courts below also ruled and agreed with Chevron that the version of Rule 26 as it existed before the 2010 was inapplicable to this dispute and that Kelsh was a reporting expert under Rule 26 and not a fact witness or non-reporting testifying expert for the Treaty Arbitration. In the interests of judicial economy, the Republic has elected not to challenge these rulings on appeal. *See* ER 16, 18 (Kelsh); ER 8 (Mackay).

SUMMARY OF ARGUMENT

The arguments espoused by Chevron here, that narrowly tailored amendments to Rule 26 somehow extended general work product protection to independent, third-party experts, is untenable.

Chevron's argument rests on an analysis of Rule 26(b)(3)'s "plain language" that is superficially—but only superficially—attractive. According to Chevron, that rule extends general work product protection to any document prepared "by or for" a party or its attorney. *See* Br. 25-32. Because a testifying expert is retained by a party or its attorney, and in that sense performs his or her work "for" them, anything in the expert's files, in Chevron's view, has necessarily been prepared "for" the party or its attorney. *Id.* at 23-24. But this simplistic reading of the Rule's text has several fundamental problems.

First, as we explain below in Section I.A, Chevron's position is belied by the 2010 amendments, which for the first time granted protection to two specific types of expert-related materials—draft reports and communications from the party's attorney. *See* Rule 26(b)(4). If Chevron's reading of Rule 26(b)(3)'s "by or for" language were correct, it would not have been necessary to add these new provisions: they would be superfluous. Moreover, under the *expressio unius* principle, the Rule's express protection of two specific categories of expert-related

materials impliedly forecloses Chevron's effort to extend that same protection to other, unenumerated categories.

Chevron's position is also contradicted by the 2010 Advisory Committee Notes, which make clear that the amendments do not impair the existing, settled right to broad discovery from experts, other than the limitation that (i) draft reports and (ii) certain attorney communications are not discoverable. Moreover, the history of Rule 26 and the many interpretive decisions in this and other circuits support the principle that testifying experts may not invoke work product protection in the way Chevron suggests here.

What, then, does the "for" portion of the phrase "by or for a party or its representative" really mean? As we show in Section I.B., the history of Rule 26 demonstrates that in 1970, when the work product protection was added to the Rules, this phrase was a term of art. And for a document to be considered as having been prepared "for" a party or attorney, the preparer had to be an agent of one of them. *See Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 164 (3d Cir. 1995). Indeed, absent that limitation, *any* document prepared at the mere behest of an attorney—including documents prepared by the opposing party or an independent witness—would become non-discoverable except on a showing of substantial need. Accordingly, under the "term of art" canon, the phrase "by or for a party or its representative" should be given the meaning it had when the Rule was adopted

in 1970. And for that reason a document should be considered as having been prepared “for” a party or its attorney *only* if the preparer was an attorney or a agent.

That principle is dispositive here. In 1970, it was well established, as it is today, that an expert witness is not an agent of the party or attorney who retains her. Indeed, if a testifying expert were considered an *agent* of the party or the attorney, her opinions would lack the independence necessary for those opinions to be useful and therefore admissible under Federal Rules of Evidence 702. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th. Cir. 1995). Moreover, because a testifying expert is not an agent of the party or its attorney, it is equally well settled that, except for communications directly from an attorney to the expert, any work product protection that may exist is lost when a document is provided to the expert.

As we demonstrate in Section I.C., in the decisions under review here, both district courts correctly applied these principles in denying work product protection to the three categories of documents at issue in these appeals. And Chevron’s *only* challenge to those decisions is their failure to apply its sweeping—and newly discovered—interpretation of Rule 26(b)(3)’s “by or for” proviso.

If necessary, as explained in Section II, the Court should also affirm the orders in the Court below on either of the alternative grounds. First, Chevron

espouses a position here that is contrary to that which it has taken in other related Section 1782 applications where it was seeking discovery for its own use. It repeatedly argued that under Rule 26, as amended in 2010, testimonial and documentary privileges do *not* extend to testifying expert witnesses. Having prevailed in its argument in other courts, Chevron is judicially estopped from arguing the opposite premise here to its advantage.

Second, in any event, the Republic has a substantial need for the discovery sought from Chevron, and that substantial need trumps Chevron's assertions of attorney work product. Without the discovery sought by the Republic, it cannot determine whether Chevron did indeed "cherry pick" the data it relied on in the *Lago Agrio* litigation, while deliberately ignoring inculpatory facts or data. The propriety of Chevron's expert analysis in *Lago Agrio* has been placed at the center of the Treaty Arbitration, where Chevron so ardently complains that the *Lago Agrio* court "got it wrong" by finding them liable for \$18 billion.

For each of these independent reasons, the decisions below must be affirmed.

STANDARD OF REVIEW

This Circuit reviews district court rulings on discovery matters, such as those at issue here, under the highly deferential abuse of discretion standard. *See R & R Sails, Inc. v. Ins. Co. of Pennsylvania*, 673 F.3d 1240, 1245 (9th Cir. 2012)

(“This Court reviews the district court's rulings concerning discovery . . . for abuse of discretion”) (internal quotations omitted); *Ibrahim v. Dept. of Homeland Sec.*, 669 F.3d 983, 992 (9th Cir. 2012); *Nevada Dept. of Corrs. v. Greene*, 648 F.3d 1014, 1018 (9th Cir. 2011); *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 822 (9th Cir. 2011); *Quinn v. Anvil Corp.*, 620 F.3d 1005, 1015 (9th Cir. 2010). Although a material legal error generally constitutes an abuse of discretion, as we will show, Chevron has failed to establish any such error by either of the courts below.

ARGUMENT

I. Chevron’s Argument That The District Court Violated The “Plain Meaning” Of Rule 26 In Denying Work Product Protection To Documents Located In Expert Witness Files Is Patently Incorrect

Chevron’s central argument—that the work product doctrine protects documents prepared “for” a party in anticipation of litigation regardless of the role played by the person preparing the documents or their location—is patently incorrect. As this Court has long held, the work product doctrine, as set forth in Fed. R. Civ. P. 26(b)(3)(a), protects “from discovery documents and tangible things prepared by a *party* or *his representative* in anticipation of litigation.” *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1494 (9th Cir. 1989) (emphasis added). And the Supreme Court originally adopted the work product doctrine to protect an *attorney’s* thought processes by creating a “certain degree of

privacy, free from unnecessary intrusion by opposing parties and their counsel.” *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). While the doctrine has since been expanded to include an attorney’s *agents*, *United States v. Nobles*, 422 U.S. 225, 239 (1975), Chevron’s sweeping interpretation of the Rule’s “by or for” language would expand work product protection far beyond that permitted by the Rule, its drafters, or the Supreme Court. As we now show, that proposed interpretation violates settled principles of statutory construction even as it ignores the doctrine’s history, purpose, and long-settled limitations. Once those limitations are understood, it is apparent that the courts below acted well within their discretion in denying work product protection to the specific categories of documents at issue here.

A. Chevron’s Sweeping Interpretation Of Rule 26(B)(3)’s “By Or For” Language Would Violate Settled Principles Of Statutory Construction While Contravening The Advisory Committee’s Understanding Of Its Own Amendments And The Rule’s History

Chevron argues that materials prepared by or supplied to its testifying experts (and in-house non-attorney staff) fall within its sweeping interpretation of materials prepared “by or for” a party in anticipation of litigation. Br. at 25. But Chevron’s broad interpretation of “by or for” to include documents created by or given to testifying experts would make the new provisions of Rule 26(b)(4) unnecessary surplusage. This cannot be.

1. Chevron’s Interpretation Violates The “Meaning To Every Clause” And “Espresso Unius” Principles

Chevron’s argument is predicated on its claim that the recent amendment of Rule 26(a)(2)—which deals with voluntary *disclosures* of expert-related materials— somehow altered the work product rule in 26(b)(3) applicable to *discovery*. Br. at 28. That is false. It is obviously not supported by the text, since Rule 26(b)(3) was not amended. Nor is it supported by anything in the Rule 26 Advisory Committee Notes. The only connection between Rule 26(a)(2) and work product appeared in the 1993 Advisory Committee Notes, “[L]itigants should no longer be able to argue that materials furnished to their [testifying] experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure.”

The 2010 amendment merely changed “facts and other information” in Rule 26(a)(2)’s voluntary disclosure provision to “facts and data” because courts had interpreted the words “other information” to require disclosure of communications between experts and *attorneys*. The Advisory Committee notes make clear that this was the only purpose of the change: “This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation . . . The amendments to Rule 26(b)(4) make this change explicit . . .” Rule 26 Advisory Committee Notes (2010). Thus, the corresponding amendment of Rule 26(b)(4) provided that attorney-expert witness communications were *for the first time* protected by the

work product rule, subject to an exception for facts and data—thereby making that rule consistent with the amendment of Rule 26(a)(2) and its initial disclosure requirements.

Chevron’s argument assumes that anything in a testifying expert’s files that was created “by or for” a party in anticipation of litigation already fell within the work product protection of Rule 26(b)(3), but that this protection was effectively nullified by judicial interpretations of Rule 26(a)(2)’s requirement to disclose facts and “other information.” But if that were true, *all* that would have been necessary to restore this supposed work product protection for testifying experts would have been to change “facts and other information” in Rule 26(a)(2) to “facts and data.” There would have been no need to add the narrow protections for draft reports and attorney communications in Rule 26(b)(4)(C). Under Chevron’s view of the general work product protection in Rule 26(b)(3), then, the new express protections in Rule 26(b)(4)(C) were surplusage.

But that interpretation flies in the face of the settled “rule against superfluities:” “It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. It is our duty to give effect, if possible, to every clause and word of a statute.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotations and citations omitted). If, as Chevron

argues, work product protection now extends to documents created by or given to testifying experts, there would have been no need for the Advisory Committee to add protections for draft reports and attorney-expert communications in Rule 26(b)(4)(C). Chevron's sweeping interpretation of the "by or for" language in Rule 26(b)(3) thus makes the subsequently added protections in Rule 26(b)(4)(C) "superfluous."

Chevron's attempt to anticipate this obvious problem (Br. at 31) runs headlong into another settled principle of statutory interpretation—the "expressio unius" principle, which holds that a drafter's inclusion of one thing (or in the case of the 2010 Amendments, two things) necessarily implies the *exclusion* of other things. See, e.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (applying maxim "*expressio unius est exclusio alterius*."); *Nat'l R.R. Passenger Corp. v. Nat'l Assn. of R.R. Passengers*, 414 U.S. 453, 458 (1974). Under that principle, because the 2010 amendments to Rule 26(b) identify two specific protections available to testifying experts—draft reports and certain attorney expert communications—other work product protections must be considered to be excluded. Chevron's claim that these enumerated exceptions in Rule 26(b)(4) "are merely *aspects* of the broader protection provided by Rule 26(b)(3)(A)," Br. at 21, 22, and its contention that if these were the only protections for expert documents

and communications, “the Rules would have said so,” Br. at 31, contravene this settled principle of statutory construction.

In short, as a matter of statutory interpretation, Chevron’s sweeping interpretation of the “by or for” language in Rule 26(b)(3), and Chevron’s correspondingly expansive view of the impact of the change from “facts and other information” to “facts and data” in Rule 26(a), are untenable.

2. Chevron’s Interpretation Cannot Be Reconciled With The Advisory Committee’s Stated Intention To Preserve Broad Discovery Of Expert-Related Materials Other Than Draft Reports And Direct Attorney-Expert Communications

This conclusion is confirmed by the Advisory Committee notes to the 2010 amendments. There, the Advisory Committee repeatedly made it clear that those amendments were intended to address only two discrete issues—discovery of draft reports and certain attorney communications—and that they were *not* intended to otherwise impair the traditional broad discovery of expert witnesses:

Rules 26(b)(4)(B) and (C) *do not impede discovery* about the opinions to be offered by the expert or the *development, foundation, or basis of those opinions*. For example, the expert’s testing of material involved in litigation, and *notes* of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about *communications the expert had with anyone other than the party’s counsel* about the opinions expressed is *unaffected by the rule*.

Rule 26 Advisory Committee Notes (2010) (emphasis added).

Chevron omits or misquotes much of the relevant Advisory Committee notes in an effort to avoid the intended limited scope of the 2010 amendments. To begin, the Advisory Committee makes clear that “[t]he intention is that ‘facts or data’ be interpreted broadly to require disclosure of *any* material considered by the expert, from *whatever source*, that contains *factual ingredients*.” Rule 26 Advisory Committee Notes (2010) (emphasis added). Thus, as the Advisory Committee observes, the 2010 amendments had a limited intent; they were

intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of *all attorney-expert communications and draft reports*. . . . The refocus of disclosure on “facts or data” is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of *counsel*.

Rule 26 Advisory Committee Notes (2010) (emphasis added).

Chevron’s selective quotation of this section is telling. Br. at 33 (“In amending Rule 26, the Rules Committee specifically stated that the 2010 changes . . . were ‘*intended to alter the outcome*’ of earlier decisions that limited collaboration and coordination with testifying experts”). Read in full, the notes make clear that the amendments were not *generally* intended to alter the outcome of prior disputes, as Chevron would have it, but instead to alter the outcome only as to two limited categories of documents, draft reports and attorney core work

product.²¹ Indeed, “inquiry about communications the expert had *with anyone other than the party’s counsel* about the opinions expressed is unaffected by the rule.” Rule 26 Advisory Committee Notes (2010) (emphasis added); *see also id.* (“The refocus of disclosure on ‘facts or data’ is meant to limit disclosure to material of a factual nature by *excluding theories or mental impressions of counsel.*”) (emphasis added); *see id.* (“inquiry about communications the expert had with *anyone other than the party’s counsel* about the opinions expressed is unaffected by the rule”).

In making clear that the amended rule is not intended to “impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions,” the Advisory Committee confirmed that the amendments do not represent the seismic shift in discovery practice that Chevron seeks. To the contrary, the amendments were, as the Advisory Committee noted, intended “to

²¹ *See Republic of Ecuador v. Bjorkman*, 11-cv-01470-WYD-MEH, 2012 WL 12755, at *3 (D. Colo. Jan. 4, 2012) (“The Advisory Committee makes clear that the amendments are meant to alleviate the perceived uncertainty and rising costs associated with attorneys’ limited interactions with their retained experts as a result of court opinions allowing discovery of an expert’s draft reports and of all communications with counsel. The language of Rule 26(a)(2)(B) was amended specifically for these purposes.”).

alter the outcome” only with respect to those cases touching on disclosure of “attorney-expert communications and draft reports.”²²

3. **Chevron’s Interpretation Cannot Be Reconciled With The Long History Of Rules 26 And Its Interpretation By The Courts**

The history of and case law interpreting Rule 26 reaffirms the long-standing, general principle that testifying experts may *not* invoke privilege to shield disclosure of qualified (i.e., non-attorney) work product, whether documents or communications. For example, in a case decided shortly after *Hickman v. Taylor*, 329 U.S. 495 (1947), the Sixth Circuit said: “The obvious purpose of the Federal

²² It is equally clear that the Advisory Committee did not contemplate that the term “the party’s attorney” would encompass anyone other than counsel: “[T]his protection does not extend to the expert’s own development of the opinions to be presented; those are subject to probing in deposition or at trial.” Rule 26 Advisory Committee Notes (2010). Accordingly, Chevron’s view that Kelsh and Mackay’s communications with other experts in the *Lago Agrio* litigation pushes both the plain meaning and interpretive guidelines contained in the Advisory Committee notes too far, as other courts in related Section 1782 actions have agreed. *See* SER 758-759, Order, *Chevron Corp. v. Barnthouse*, No. 1:10-mc-00053, at 2-3 (S.D. Ohio Dec. 8, 2010); *accord. Bjorkman*, 2012 WL 12755, at *4 (“Documents containing communications between Bjorkman (and/or his assistant(s)) and individuals who are not Chevron attorneys may not be withheld.”); Memorandum Order, *Chevron Corp. v. Weinberg Group*, No. 11-mc-00030, at 9 n.5 (D.D.C. Sept. 8, 2011) (“The Weinberg Group provides me no reason to conclude that its communications with the experts was shielded by a privilege that protects confidential communications between a client and an attorney”); Memorandum and Order, *In re Chevron Corp.* (Allen), No. 2:10-mc-91, at 15 (D. Vt. Dec. 2, 2010) (permitting Chevron’s discovery of communications between an expert and another third party).

Rules of Civil Procedure . . . to broaden the scope of inquiry of an adverse witness or party . . . gainsays the thought that the [work product doctrine announced in *Hickman*] should be liberally extended to cover information sought of one who is not a lawyer, but has merely been retained by an attorney-at-law as an expert in a scientific field.” *Sachs v. Aluminum Co. of Am.*, 167 F.2d 570, 570-71 (6th Cir. 1948). And in 1967, the Fifth Circuit in *United States v. McKay*, 372 F.2d 174, 177 (5th Cir. 1967) adopted the same position. *McKay* acknowledged that an expert report had been secured “in anticipation of tax litigation” but distinguished *Hickman*, stating: “In the present case, the appraisal report which the Commissioner seeks to inspect is in no sense the work product of the lawyer, McKay. On the contrary, it would appear to be solely the work product of the expert witnesses whom he employed to prepare it.” *Id.* at 177.

Shortly thereafter, in *United States v. Meyer*, 398 F.2d 66, 74 (9th Cir. 1968), this Court likewise held that an expert’s “opinions and the data and analyses upon which they rest . . . do not become the work product of the attorneys . . . ; they are not immunized from discovery merely because the appraisers may have set them out in reports to counsel.” *See also* 8A C. Wright, A. Miller & R. Marcus, *Federal Practice & Procedure* § 2029, p. 17-18, n. 12 (2010) (“*Wright & Miller*”) (“The knowledge of an expert is not privileged, it is not part of the work product”).

These holdings became incorporated in Rule 26(b). The Advisory Committee Notes to the 1970 amendments—which first formulated the work product doctrine of Rule 26(b)(3) and the expert discovery rules of Rule 26(b)(4)—cited *United States v. McKay* with approval. In so doing, the Notes stated that the “new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert’s information privileged . . . [and] *reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine.*” (Emphasis added.)

The text of the 1970 version reinforced the conclusion stated in the Advisory Committee Notes in two ways. First, on its face, the rule does not apply to testifying experts—they are not mentioned, unlike consultants, who are addressed in a separate rule.²³ Second, the work product rule included a proviso in the opening sentence, still in the current rule, subjecting the Rule 26(b)(3) work product rule to the broad expert discovery rule in Rule 26(b)(4).²⁴

²³ As noted above, testifying experts are not agents. *Cf. U.S. v. Nobles*, 422 U.S. at 237, extending work product protection to investigators (“attorneys often must rely on the assistance of *investigators and other agents* in the compilation of materials in preparation for trial”) (emphasis added).

²⁴ Whether this proviso applied only to documents and tangible things prepared in anticipation of litigation, *i.e.*, qualified work product, or also to an attorney’s mental impressions, *i.e.*, core work product, led to a split of authority. *Compare Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 594-95 (3rd Cir. 1984) (core work product protected) *with Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 388-89

The 1993 amendments to Rule 26 led to expanded disclosure of both qualified and core work product under the “bright-line” waiver rule followed by some courts. *See In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001) (finding that all documents “disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party”); *see also Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 714 (6th Cir. 2006). But the 1993 expansion was not based on the text of the existing work product and expert provisions, subdivisions (b)(3) and (b)(4) of Rule 26, which remained materially unchanged and continued to provide no textual support for the application of the qualified work product doctrine to testifying experts.

But as the 2010 Advisory Committee Notes reveal, this “bright line” rule requiring disclosure of core work product in testifying experts’ files fell out of favor. To effect the desired change, the Advisory Committee made discrete changes aimed at the source of the authority—the phrase “other information”—contained in the initial disclosure provision in Rule 26(a)(2). As noted, the Advisory Committee replaced “other information” with “facts” in Rule

(N.D. Cal. 1991) (holding that the *proviso* applies to both qualified and core work product). But from the beginning, no decision has ever held that qualified work product in a testifying expert’s file is protected from discovery. *Sachs, supra*, 167 F.2d 570; *see also United States v. Nobles*, 422 U.S. 225, 237 (1975) (party’s election to present agent-investigator as witness waived work product protection).

26(a)(2)(B)(ii), and added two specific exemptions from discovery in the expert rule, Rule 26(b)(4)—for draft reports and for communications between the party’s attorney and the reporting expert containing core work product. What did not change, however, was Rule 26(b)(3)’s scope—which still does not extend work product protection to testifying experts—and the proviso in the same paragraph that discovery of qualified work product is “subject to Rule 26(b)(4)” —a reference that includes the same overarching authorization to depose testifying experts that has been in the Rule since 1970.²⁵

Chevron’s argument that the amendment of Rule 26(b)(4) to protect draft reports and core attorney work product somehow overrode the entire history, structure and text of these rules is fatally undermined by the continued existence of Rule 26(b)(4)(A), whose plain meaning authorizing expert discovery has been well understood since its adoption in 1970. Rule 26 still makes discoverable all other materials contained in the files of a testifying expert.

²⁵ Deposition discovery perforce includes the production of documents under Rule 34 and Rule 45. *See* Rule 26 Advisory Committee Notes (2010) (“The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery”).

B. Properly Understood, The *General* Rule Under Rule 26(b)(3) That Materials Prepared “By Or For” A Party Are Protected Work Product Does Not Extend To Documents Prepared By Or Provided To Third Parties, Like The Testifying Experts Here, Who Are Not Agents Of The Party Or The Attorney

Having established the implausibility of Chevron’s argument that the 2010 amendments somehow expanded the scope of Rule 26(b)(3) to protect all materials in a testifying expert’s files other than “facts and data,” it remains to explain exactly what expert-related materials Rule 26(b)(3) does and does not protect. As we now show, Chevron’s attempt to shield from discovery the documents at issue here—documents (other than draft reports and attorney-expert communications) prepared by or given to testifying experts—is erroneous. First and foremost, these documents do not fall within the general principle of Rule 26(b)(3) protecting documents prepared “for” an attorney or a party, because that phrase is term of art that is limited to *agents* of the attorney or party. In addition, Chevron’s argument ignores that the documents here either were never protected at all, or that any protection they had was waived when they were disclosed to a testifying expert.

1. A Document Can Only Be Deemed To Have Been Created “For” An Attorney Or A Party If It Was Created By Their Agent

It is a cardinal rule of statutory construction that “where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice it presumably knows and adopts the cluster of ideas that were attached

to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.” *Morissette v. United States*, 342 U. S. 246, 263 (1952); *see also NLRB v. Amax Coal Co.*, 453 U. S. 322, 329 (1981); *Braxton v. United States*, 500 U. S. 344, 351 (1991). Where a term of art is so adopted, “absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.” *Morissette*, 342 U.S. at 263.

Here, by the time the term “by or for a party” was adopted into the Federal Rules, at least two states had promulgated identical formulations of the work product rule. In both of those states, Illinois and New York, the general work product doctrine was understood to extend only to an attorney and his agents, and no further. *See Monier v. Chamberlain*, 35 Ill. 2d 351, 358-59 (Ill. 1966) (finding that “only those memoranda, reports or documents which reflect the employment of the attorney's legal expertise” are protected by Illinois’ work product rule); *Babcock v. Jackson*, 40 Misc. 2d 757, 760-62 (N.Y. Sup. Ct. 1963) (finding work product extends only to attorney and agents). Indeed, while one Illinois state court had extended work product to a testifying expert physician, by 1966, four years before the Federal Rules were adopted, the Illinois Supreme Court had explicitly overruled that interpretation. *Compare Kemeny v. Skorch*, 22 Ill. App. 2d 160, 169 (Ill. Ct. App. 1959) *with Monier*, 35 Ill. 2d at 358-59.

New York’s formulation of the work product doctrine is similarly informative: In recognition that the general work product doctrine did not itself protect an expert’s materials, the C.P.L.R. explicitly extended limited protection to experts—in a separate provision devoted to that specific subject. *See* New York C.P.L.R. 3101(d)(1) (protecting “any opinion of an expert prepared for litigation”); *Matter of Town of Hempstead*, 50 Misc. 2d 101, 103 (N.Y. Sup. Ct. 1966) (protecting certain critical documents underlying two testifying experts’ opinions for, “[i]f the end result cannot be obtained, the component parts must be similarly protected”). But even that provision did not create a broad, general protection for all materials created “by or for” the expert.

As these pre-1970 amendment cases and rules show, the phrase “by or for a party or its representative” was a term of art in 1970, and it was limited to parties, their lawyers and agents. Although some jurisdictions also provided some protection for testifying experts’ materials, that protection was afforded through *separate* provisions—in further recognition that the “for” portion of the “by or for” phrase in the existing rules was limited to materials prepared by agents of the lawyer or the client.

Having incorporated the “by or for” phrase into Rule 26(b)(3) in the 1970 amendments, *see 8 Wright & Miller* § 2023, p. 489-90, n. 16 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981)), Congress is presumed to have

incorporated into the Rules the same understanding—i.e., that to be protected work product under this provision, materials prepared “for” a party or an attorney must have been prepared by their agent. Chevron’s arguments ignore this dispositive point.

2. Draft Reports Aside, The Work Product Doctrine Does Not Protect Documents Created By Testifying Expert Witnesses Because They Are Not Agents Of An Attorney

The text of Rule 26(b)(3)(A), and decisions construing it, confirm that it extends only to parties, their attorneys and agents. *See* Fed. R. Civ. P. 26(b)(3)(a) (“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).”); *In re CPUC*, 892 F.2d 778, 781 (9th Cir. 1989); *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (“[T]he doctrine protect[s] material prepared by agents for the attorney as well as those prepared by the attorney himself”). The work product doctrine, moreover, “promotes the adversary system directly by protecting the confidentiality of papers prepared *by or on behalf of attorneys* in anticipation of litigation. Protecting *attorneys’* work product promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients.” *In re Chevron Corp.* (U.B.R.), 633 F.3d 153, 165 (3d Cir. 2011) (citing *Westinghouse Elec. Corp. v. Republic of the*

Philippines, 951 F.2d 1414, 1428 (3d Cir. 1991)) (emphases added). Testifying experts fall into none of these categories and therefore their work is not generally protected as work product.

It is undisputed that Kelsh and Mackay are not attorneys. It is also undisputed that they are not consultants—their opinions were instead submitted to the *Lago Agrio* Court (and now to the arbitral tribunal) for their consideration in adjudicating a multi-billion dollar dispute.

Nor are they, in their role as testifying experts, “agents” of a party. That is because testifying experts have long been considered independent of the parties who retain them, not mere extensions of the parties or their counsel. Indeed, a testifying expert’s “independence” is a hallmark of his unique role in our judicial system. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (“[o]ne very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.”); *see also* Fed. R. Evid. 702 Advisory Committee Note (2000) (listing “independence” as a factor in determining an expert’s reliability).

Accordingly, as the Third Circuit stated in *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 164 (3d Cir. 1995), “[s]ince an expert witness is not subject to the

control of the party opponent with respect to consultation and testimony he or she is hired to give, the expert witness cannot be deemed an agent.” (citing Restatement (Second) of Agency § cmt. A (1958) (“The relation of agency is created as a result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents to so act.”)). And given that a testifying expert is not an agent of the party or its attorney, materials created by such an expert simply do not fall within Rule 26(b)(3)’s general protection for materials prepared “by or for” a party or its attorney.

Here, Chevron concedes that Kelsh and Mackay are reporting/testifying experts. Br. at 17, 18. As such, they are not parties, attorneys, consultants or agents; and the work product doctrine does not apply to them absent a specific provision elsewhere in the rules. As the district courts held below, the only such provisions are in Rule 26(b)(4)(B) and (C)—and those provisions are not applicable to the documents at issue here because the Republic is not seeking either attorney-expert communications or (genuine) draft reports.²⁶

²⁶ It is equally clear that the Advisory Committee did not contemplate that the expert’s own work product would be protected from disclosure (except with respect to draft reports): “[T]his protection does not extend to the expert’s own development of the opinions to be presented; those are subject to probing in deposition or at trial.” Rule 26 Advisory Committee Notes (2010) (discussing substantial need for attorney-expert communications).

3. Attorney Communications Aside, Any Work Product Protection Is Waived When Documents Are Disclosed To Testifying Expert Witnesses

Even assuming a document at one time enjoyed protection from compelled production, its subsequent use or disclosure may render the previously-protected document subject to discovery. That is true of any materials (other than attorney communications) provided to testifying experts: Once an expert is designated as a testifying expert—like Kelsh and Mackay were for the *Lago Agrio* litigation—any protections for documents considered by the expert are waived. Because they will be deposed and will testify under Rule 26(b)(4)(A), and the very purpose of disclosure to a testifying expert is to inform an expert’s opinion and testimony before a court, disclosure to or communications with testifying experts in connection with the development of their opinions have long been deemed a waiver of any applicable privilege. *In re Pioneer Hi-Bred Intern. Inc.*, 238 F.3d 1370, 1375-76 (Fed. Cir. 2001) (“because any disclosure to a testifying expert in connection with his testimony assumes that privileged or protected material will be made public, [*United States v.*] *Cote*, 456 F.2d [142,] 144-45 & n. 3 [(8th Cir. 1972)], there is a waiver to the same extent as with any other disclosure”); *In re Chevron Corp. (U.B.R.)*, 633 F.3d 153, 165 (3d Cir. 2011) (“We agree with the District Court that . . . ‘[b]y providing consulting expert reports to a testifying expert, the privilege is lost”). *Id.* at 164, n. 3; see *Bd. of Trs. of Leland Stanford*

Junior Univ. v. Roche Molecular, 237 F.R.D. 618, 623-4, n. 3 (N.D. Cal. 2006) (“in cases where the voluntary disclosure of attorney work product to an adversary or third party substantially increases the possibility of an opposing party obtaining the information, this would defeat the policy underlying the privilege”) (internal quotations and citations omitted).

As the Third Circuit has observed, where “material is disclosed in a manner inconsistent with keeping it from an adversary [then] the work product doctrine is waived.” *In re Chevron Corp.* (U.B.R.), 633 F.3d at 165; *accord. Ecuadorian Plaintiffs v. Chevron Corp.*, 619 F.3d 373, 378 (5th Cir. 2010) (“Although work product immunity is not automatically waived by disclosure of protected material to third parties, disclosure does waive protection if it ‘has substantially increased the opportunities for potential adversaries to obtain the information.’”). That is true of the materials here. Aside from attorney-expert communications, any disclosure of work product to a testifying/reporting expert constitutes a waiver of any protection that would otherwise apply.

4. Contrary To Chevron’s Argument, The Change In Rule 26(a) To Require Disclosure Of “Facts And Data” Simply Made That Provision, Which Deals With Initial Disclosures, Consistent With The Scope Of Third-Party Discovery Under Rule 26(b)

The breadth of testifying expert discovery available under Rule 26(b) is confirmed by the disclosure provisions of Rule 26(a). A testifying expert’s duty to

disclose encompasses all documents—and all “facts and data”—considered in forming his opinion except those explicitly protected by Rule 26(b)(4)(B) and (C). Black’s Law Dictionary defines a “fact” as “something that actually exists; an aspect of reality Facts include not just tangible things, actual occurrences, and relationships, but also states of mind such as intentions and opinions.” Black’s Law Dictionary 628 (8th ed. 2007).

Contrary to Chevron’s contention, Br. at 29, and as both district courts found, the documents at issue here fall squarely within “facts and data.” One of the principal categories of documents ordered produced by the courts below—communications between Kelsh and Mackay and other non-attorneys—are nothing if not facts: Those communications could only have been communicating “something that actually exists” which necessarily includes the non-attorneys’ “states of mind.”

Expert discovery under Rule 26 must also be construed in light of the Federal Rules of Evidence, which establish the procedure within which experts may offer their opinion at trial. *See Wright & Miller* § 2029, p. 23 (“The need for substantial discovery regarding experts who will testify at trial became more evident after the adoption of the Federal rules of Evidence in 1975”). In the context of the Federal Rules of Evidence, the Fourth Circuit has interpreted “facts or data” to include even “inadmissible evidence—including hearsay.” *See United*

States v. Palacios, 677 F.3d 234, (4th Cir. 2012). Similarly, numerous district courts—the very triers of fact whom experts are intended to assist—have interpreted “facts or data” to include opinions considered by an expert. *Rambus Inc. v. Hynix Semiconductor Inc.*, 254 F.R.D. 597, 600 (N.D. Cal. 2008) (“‘Facts or data’ may include other experts’ reliable opinions or hypothetical facts that are supported by the evidence.”); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 310 (D. Vt. 2007) (“‘facts or data’ may include reliable opinions of other experts and hypothetical facts that are supported by the evidence.”) Since an expert can consider another experts’ opinions as “facts or data” when testifying at trial, Rule 26(A)(2)(B) must be interpreted just as broadly to require disclosure of all expert opinions considered by a testifying expert, even if such information is ultimately rejected. *See Fialkowski v. Perry*, No. 11-5139, 2012 WL 2527020 (E.D. Pa. June 29, 2012).

The Advisory Committee notes are clear; “[t]he intention is that ‘facts or data’ be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients.” Rule 26 Advisory Committee Notes (2010) (emphasis added). And once again, that mandate squarely contradicts Chevron’s view that any materials prepared “by or for” a testifying expert in litigation are necessarily protected under the general work product rule articulated in Rule 26(b)(3).

C. The Decisions Below Properly Applied These Principles In Rejecting Chevron’s Work Product Claims As To All Three Categories Of Documents As To Which The Republic’s Motions Were Granted

The decisions below properly applied these principles in rejecting work product protection for each category of documents as to which Chevron claims protection here. Indeed, each of the courts below came to the same conclusion, albeit in different levels of detail. Moreover, contrary to Chevron’s assertion, Br. at 19, both courts held that the 2010 amendments applied, and neither court applied the pre-2010 “bright line rule.”

As previously noted, the documents and other materials that remain at issue in this case fall into three specific categories. And as we now show for each category, the district courts correctly applied the pertinent principles in rejecting Chevron’s work product claims.

1. Communications Between Non-Attorney Chevron Employees And Testifying Experts Or Their Assistants

The first category consists of communications between non-attorney Chevron employees and testifying experts or their assistants. *See* ER 23. In compelling production of those communications, which the *Kelsh* district court reviewed *in camera*, the district court applied section 26(b)(4) as written, observing: “If the rules committee intended to protect from disclosure all expert information prepared in anticipation of litigation, it would not have refashioned

section 26(b)(4) specifically to address expert discovery.” *Id.* at 13 (citations to recent district court cases applying Rule 26(b)(4) as opposed to Rule 26(b)(3)(A) omitted). In doing so, the court cited the Advisory Committee Notes discussed above limiting work product protection to communications with the attorney for the party. *Id.*

For reasons discussed above, Chevron’s only argument as to this category of documents—that any materials in the files of a testifying expert created “by or for” a party or attorney in anticipation of litigation are protected—is erroneous. And Chevron has offered no other basis for challenging the district courts’ conclusions as to this category of documents.

2. Communications Involving Non-Attorneys Claimed To Be “Agents” Of Chevron

The next category of documents consists of communications with non-attorneys claimed to be “agents” of Chevron.” In confronting Chevron’s claims that certain third party consultants were Chevron’s agents, the court below observed that Rule 26(b)(4)(C) extends specifically to reporting experts, and that the Advisory Committee Notes “foreclose the notion that consulting experts are afforded protection as ‘agents’ of a party or that party’s attorney.” ER 25-26. And indeed the Advisory Committee Notes state that the work product rule “does not

itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C).”

Under this rule, the court below held that communications between Chevron’s attorneys and consulting experts, between Kelsh and consulting experts, and between or among the consulting experts “cannot be cloaked” with protection on the ground that they involved Chevron’s “agents,” and therefore were not protected by the work product doctrine of Rule 26(b)(3). This conclusion too was clearly not an abuse of discretion: For reasons explained above, documents not involving Chevron’s attorneys (or Chevron itself) never enjoyed work product protection at all. Any protection that might have existed for documents involving interactions between Chevron’s attorneys and others—such as consulting experts—was waived once those documents were provided to the testifying/reporting experts.

3. Communications Solely Among Testifying Experts

With respect to communications between Kelsh and other experts who provided reports in the *Lago Agrio* litigation, the court correctly pointed out that the amendments to Rule 26 had not changed the existing rule in *Penn Nat’l Ins. Co. v. HNI Corp.*, 245 F.R.D. 190, 194 (M.D. Pa. 2007), specifically adding that “Respondents cannot withhold communications between their testifying experts under a rule that protects only attorney-expert communications.” ER 26. The

court also cited the Advisory Committee comment that “inquiry about communications the expert had with anyone other than the party’s counsel about the opinions expressed is unaffected by the rule.” ER 27.

Here again, Chevron’s only challenge to this conclusion is its sweeping argument that anything in a testifying expert’s file that was prepared in some sense “by or for” an attorney or a party is protected from disclosure. Given that a testifying expert is not an agent of the party or attorney, materials prepared by such an expert are not generally protected by Rule 26(b)(3). And for the same reason, any work product protection that otherwise might apply to particular documents (other than attorney communications) is lost once those documents are supplied to a testifying expert. Accordingly, as to this category of documents as well, Chevron has established no abuse of discretion.

* * *

The pro-discovery policy reflected in Rule 26(b)(1) and elsewhere strongly supports the district courts’ conclusions that the documents at issue here are discoverable. As the District Court noted, the “work product doctrine is to be narrowly construed as its application can derogate from the search for the truth.” ER 24. And as courts have found over the last several decades, experts are often the most critical witnesses in the courtroom, and broad expert disclosure is therefore vital to permit the opposing party and judge to assess an expert’s

credibility and reliability. *United States v. Meyer*, 398 F.2d 66, 75 (9th Cir. 1968); *TV-3 v. Royal Ins. Co. of Am.*, 194 F.R.D. 585, 588 (S.D. Miss. 2000).

II. If Necessary, The District Court's Decisions Can And Should Be Affirmed On Alternative Grounds

The decisions of the courts below should be affirmed on two alternative grounds. First, Chevron is judicially estopped from arguing that testimonial and documentary privileges extend to Kelsh and Mackay having argued the opposite for tactical gain when it sought discovery of its opponents' testifying experts. Second, the Republic has a substantial need for the discovery it seeks from Kelsh and Mackay, as there is no other mechanism to examine the propriety of the experts' conclusions at issue in the Treaty Arbitration.

A. Chevron's Position In This Case Is Flatly Contrary To Its Position In Other Cases, And Is Therefore Barred By Judicial Estoppel

Chevron repeatedly and successfully argued in its own Section 1782 applications a position diametrically opposite to the one it espouses here: That testimonial and documentary privileges do *not* extend to testifying expert witnesses. Having sought and obtained Section 1782 discovery from the *Lago Agrio* Plaintiffs' environmental experts on these grounds, Chevron is judicially estopped from arguing that testimonial and documentary privileges extend to Kelsh and Mackay.

Chevron's conduct here is the sort of conduct that the judicial estoppel doctrine condemns. "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quotations and citations omitted). The doctrine therefore "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Risetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 497, 600 (9th Cir. 1996). As this Court previously observed, the doctrine "applies to a party's stated position whether it is an expression of intention, a statement of fact, or a legal assertion." *Helfand v. Gerson*, 105 F.3d 530, 535 (9th Cir. 1997). And the doctrine applies where there are (i) inconsistent positions; (ii) used to gain an unfair advantage; and (iii) where the change in position was not inadvertent. *See Wagner v. Professional Engineers in California Gov't*, 354 F.3d 1036, 1050 (9th Cir. 2004) (enforcing the doctrine where an inconsistent position was taken "to gain an advantage in the litigation"); *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th Cir. 1984) (requiring an unfair advantage). Each of these requirements is easily satisfied here.

First, it is undisputed that Chevron argued in support of many of its own Section 1782 applications a position inconsistent to the one it advances here. For example, to obtain 1782 discovery from an environmental expert, Barnthouse,

Chevron argued: “Because he is a testifying expert, he is subject to full discovery and is not shielded by any conceivable ‘privilege’ [C]ommunications between Plaintiffs’ counsel and Respondent are not subject to any privilege.” SER 767, 782, Memorandum in Support, *In re Chevron Corp.* (Barnhouse), No. 10-MC-00053 (S.D. Ohio Oct. 22, 2010); *see also* SER 807-808, Memorandum in Support, *In re Chevron Corp.* (Scardina), No. 10-mc-00067 (W.D. Va. Nov. 5, 2010) (“That rule extends even to materials simply ‘considered’ by testifying experts.”); SER 834-835, Memorandum in Support, *In re Chevron Corp.* (Picone), No. 10-cv-02990 (D. Md. Oct. 22, 2010) (same); SER 859, Memorandum in Support, *In re Chevron Corp.* (Shefftz), No. 10-mc-10352 (D. Mass. Oct. 22, 2010) (same); SER 881-882, Memorandum in Support of Application, *In re Chevron Corp.* (Allen), No. 10-mc-00091 (D. Vt. Oct. 22, 2010) (same); *cf.* Memorandum in Support of Motion to Compel, *In re Chevron Corp.* (Allen), No. 10-mc-00091 (D. Vt. Dec. 10, 2010) (arguing that Section 1782 discovery is not privileged or protected work product where the discovery is sought from a non-reporting expert who substantially collaborated with reporting experts).²⁷ Each and every court to which Chevron made this argument accepted Chevron’s unqualified position and agreed

²⁷ Chevron may be judicially estopped even though their inconsistent positions were advanced in other fora. *E.g., Helfand v. Gerson*, 105 F.3d 530, 534 (9th Cir. 1997) (enforcing the doctrine to prior inconsistent statements first made in a Hawaii state court and later in the United States federal courts).

that the Section 1782 discovery sought by Chevron was not privileged or protected. *E.g.*, SER 757-759.

Second, Chevron's inconsistent position is unquestionably for tactical gain. Chevron has adopted its contradictory position in this proceeding precisely because it seeks to deprive the Republic of equivalent discovery that the Republic can use in its own preparation for the Treaty Arbitration. In doing so, Chevron seeks an unfair advantage over the Republic. Having already obtained unprecedented discovery under Section 1782 from many of the environmental experts who opposed its own experts, Chevron now contends that the same Rule that afforded it that broad discovery may *not* be employed by the Republic to obtain comparable discovery for the identical Treaty Arbitration.

Chevron did not advance this legal proposition inadvertently. As shown above, in each of its Section 1782 applications to obtain discovery from the *Lago Agrio* Plaintiffs' environmental experts, Chevron affirmatively argued that the discovery sought was not privileged or protected work. Indeed, when the shoe was on the other foot, Chevron characterized the *Lago Agrio* plaintiffs' interpretation of Rule 26—which Chevron now adopts here—as “baseless,” an “interrupt[ion] [of] the discovery process,” and a delay technique designed to “frustrate Chevron's

efforts to obtain legitimate discovery to which it is entitled.”²⁸ In this proceeding, Chevron affirmatively, and deliberately, adopted a contrary view aimed at limiting disclosure of documents and communications on which its experts relied.

The court below was incorrect in finding that application of judicial estoppel is inappropriate here where Chevron’s prior position was taken before Rule 26 was amended in 2010. *Cf.* ER 19 (quoting *In re Application of Ecuador* (Hinchee), No. 11-mc-73 RH (WCS), at *6-7 (N.D. Fla. Dec. 8, 2011)) (“[C]ontrary to the estoppel arguments made by the Republic about Chevron’s prior discovery conduct, ‘there is nothing improper about obtaining a ruling under the rules as they exist at the time and later, after the rules are amended, asserting that the amendments govern further proceedings.’”). The court below was mistaken (and abused its discretion) in so finding, because Chevron’s prior inconsistent statements sought to compel discovery in light of the *amended* rule. *E.g.*, SER 758. Chevron is not relying on the Rule 26 change to excuse itself from the judicial estoppel doctrine—in fact there is no excuse for Chevron’s abrupt change in position here.

Chevron’s attempt to piggy back on the amendment to Rule 26 to excuse its inconsistent position constitutes the type of gamesmanship the judicial estoppel

²⁸ SER 891, Memorandum in Support of Motion to Compel, *In re Chevron Corp.* (Shefftz), No. 10-mc-10352 (D. Mass. Dec. 13, 2010).

doctrine condemns. As this Court has put it, the doctrine “prevent[s] parties from playing fast and loose with the courts,” *Helmand v. Gerson*, 105 F.3d 530, 534 (9th Cir. 1997) (citations omitted), which is exactly what Chevron is doing here.

Finally, though Kelsh and Mackay were not parties to Chevron’s numerous prior Section 1782 Applications, they are judicially estopped as Chevron’s privies. *See Maitland v. Univ. of Minn.*, 43 F.3d 357, 364 (8th Cir. 1994) (noting estoppel doctrines extend to a party’s privy); *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, No. 05 Civ. 3939 (CM), 2008 WL 4127830, at *9 (S.D.N.Y. Sept. 2, 2008) (A party may be “judicially estopped to assert a position because of a prior inconsistent position taken by the party’s privy.”); *see also Capsopoulos ex rel. Capsopoulos v. Chater*, No. 95 C 3274, 1996 WL 717456, at *2 (N.D. Ill. Dec. 9, 1996) (“Although judicial estoppel has generally been applied only where the identical party has taken the contradictory positions, a party in privity with the original party may also be estopped under judicial estoppel.”). Here, Kelsh and Mackay are plainly Chevron’s privies in light of their partnership in the *Lago Agrio* case and their common interest in the Section 1782 Application. *See Ruiz v. Comm’r of Dept. of Transp. of City of New York*, 858 F.2d 898, 903 (2d Cir. 1988) (finding privity where parties have a mutual interest in outcome of litigation). Their sharing of counsel serves as further proof of their privity. *See id.*

(representation by same attorneys is of “singular significance” in favor of finding privity).

B. In Any Event, The Republic Has Made A Showing Of “Substantial Need” And Hardship Sufficient To Overcome Any Work product Protection That Might Exist Here

Even if Chevron could assert “work product” protection for certain discrete documents under Rule 26, the Republic would nonetheless be entitled to disclosure if it can “demonstrat[e] . . . substantial need or inability to obtain the equivalent without undue hardship.” *Admiral Ins. Co.*, 881 F.2d at 1494; Fed. R. Civ. P. 26(b)(3)(ii). It has done so.

Specifically, the Republic has a “substantial need” for the documents at issue here because, absent disclosure, no mechanism exists for the Republic to examine and assess the propriety of Kelsh and Mackay’s drafting processes or otherwise determine whether they included in each of their reports only favorable data and facts while deliberately ignoring inculpatory facts or data. This is especially appropriate here, because in seeking to deny the Republic access to Kelsh and Mackay’s materials, Chevron appears to be hiding evidence of both (i) current oilfield pollution *and* (ii) its deliberate, and possibly deceptive, practice of selectively choosing the data on which its experts have relied.

Evidence now establishes that Chevron engaged in extensive, unilateral “Pre-Inspections” at the future Judicial Inspection sites listed by the *Lago Agrio*

Court. By engaging in such improper pre-inspections, Chevron and its experts knew exactly where the polluted locations were, and where they were not. They then “cherry-picked” specific “cleaner” site locations for further supposedly “representative” testing. As a consequence, Chevron’s experts’ Judicial Inspection sampling data—the data on which Kelsh’s and Mackay’s reports were allegedly based—appears to not be random at all. In this way, Chevron apparently guaranteed itself the expert conclusions it sought.

The pre-inspections issue is particularly poignant here because Mackay was retained in part to opine on the validity of Chevron’s own sampling methodology. In his expert report, Mackay stated that Chevron’s methodology produced results representative of the environmental conditions present. But as shown by Chevron’s own “Judicial Inspection Playbook”—the instructions given to its experts at each Judicial Inspection—Chevron’s sampling locations were selected based on where clean results had been obtained during pre-inspections. The experts were given a detailed narrative plus a map of each station indicating where pre-inspection sampling occurred and what the results were of those samples.

To the extent that any discrete set of documents might rightfully be deemed protected, the Republic thus has a substantial need for such documents to confirm whether Chevron’s experts’ conclusions are the product of selective sampling, thus

calling into question their reliability and validity. Exploration of such issues is the very purpose of expert discovery. *Meyer*, 398 F.2d at 75.

CONCLUSION

Chevron's effort to cloak these documents under a "work product" blanket is counter to the plain language, Advisory Committee notes, and purpose of Rule 26, leaving the Republic unable to evaluate the validity and reliability of Kelsh's and Mackay's expert opinions that Chevron submitted to the arbitral tribunal. For these reasons, the decisions below should be affirmed.

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STATEMENT OF RELATED CASES

The Republic of Ecuador does not know of any other matter pending before this Court that arises out of these consolidated cases, concerns these same cases, involves the same transaction or event, or raises the same or closely related issues.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(7)(B)(iii), the typeface requirements of Fed. R. App. P. 32(a)(5)(A), and the type style requirements of Fed. R. App. P. 32(a)(6). The brief, prepared in 14-point Times New Roman font, contains 13,973 words, exclusive of the words exempted from the word count limitation by Fed. R. App. P. 32(a)(7)(B)(iii), according to the word-count feature of the Microsoft Windows XP Professional ® program used to prepare the brief.

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 24, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I also certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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