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2 **FOURTEENTH JUDICIAL DISTRICT COURT**

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4 **PARISH OF CALCASIEU**

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6 **STATE OF LOUISIANA**

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9 **CRAIG STEVEN ARABIE, ET AL**

10 **VS NO. 2007-2738 G**

11 **CITGO PETROLEUM CORPORATION**
12 -----

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14
15 **MOTIONS**

16 **EVIDENCE ADDUCED AND PROCEEDINGS** had in the
17 above numbered and captioned cause at Lake Charles,
18 Louisiana, on December 11, 2013, at 9:00 a.m., before the
19 **HONORABLE G. MICHAEL CANADAY**, Judge of
20 the Fourteenth Judicial District Court, in and for the Parish of
21 Calcasieu, State of Louisiana.
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Official Court Reporter
Fourteenth Judicial District Court
Lake Charles, Louisiana

 **DUPLICATE**

 **ORIGINAL**
1

Appearances;

MR. WELLS T. WATSON

MR. JAKE BUFORD

Baggett, McCall, Burgess

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For; Plaintiffs

MR. CRAIG ISENBERG

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1 Proceedings;

2 * * * * *

3 THE COURT:

4 Let's call Arabie, et al versus
5 Citgo, 2007-2738.

6 We are here today on some
7 motions basically, something that had
8 been in existence for some time having
9 to do with privilege log and motion to
10 compel certain information that the
11 Court had previously received.

12 If I could have some
13 appearances.

14 MR. WATSON:

15 Wells Watson and Jake Buford on
16 behalf of the plaintiffs.

17 MR. ISENBERG:

18 Good morning, Your Honor.
19 Craig Isenberg on behalf of Citgo.

20 THE COURT:

21 Let me kind of narrow this.
22 First, I guess, just to -- because I
23 got impressions from reading some of
24 the memos -- is Mr. Landry not
25 appearing today?

26 MR. ISENBERG:

27 No, Your Honor.

28 THE COURT:

29 Y'all are all co-counsel. You
30 are adopting all of his arguments, I
31 would assume?
32

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1 MR. WATSON:

2 That's not fair, Judge, to put
3 all that on Mr. Isenberg.

4 MR. ISENBERG:

5 Well, it was a joint effort,
6 Judge. So --

7 THE COURT:

8 All right.

9 MR. ISENBERG:

10 We are aligned.

11 THE COURT:

12 And the way that it was worded
13 was kind of -- I don't know if it was
14 complete. But he said there is not any
15 relevant need for the information
16 because it's only causation and
17 damages, there is no punitives. But he
18 didn't say the words that, "liability
19 is stipulated to."

20 Are the only issues that are
21 coming before us on these additional
22 cases causation and damages? Liability
23 is established. And of course, we know
24 what the punitive issue has been as far
25 as the way that it's gone up the
26 Louisiana chain.

27 MR. ISENBERG:

28 Your Honor, I think that
29 is accurate. That the issues are
30 causation and damages for trial.

31 THE COURT:

32 All right.

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1 MR. ISENBERG:

2 Citgo's conduct is not at
3 issue. We stipulated to fault before
4 the original Arabie trial, and that
5 position hasn't changed.

6 Now that punitive damages are
7 not in the case Citgo's conduct should
8 not be at issue.

9 THE COURT:

10 All right. The only reason I
11 say that is I want to maybe channel
12 your argument within those parameters
13 as to causation and damages.

14 MR. WATSON:

15 Well, I mean, if -- I mean,
16 there are a lot of cases pending before
17 Your Honor, not just these. And so,
18 I'm trying to get these documents.

19 I mean, this, I believe, is for
20 all the cases that are arising out of
21 the Citgo release that are pending in
22 your docket. I don't think Citgo has
23 stipulated to liability in every case.

24 THE COURT:

25 Only ones that have --

26 MR. WATSON:

27 They've --

28 THE COURT:

29 Maybe Mr. Isenberg is ready to
30 do that at this point.

1 MR. ISENBERG:

2 Your Honor, this is not going
3 to be an issue. We're not going to
4 relitigate fault. I mean, we took that
5 position in the Arabie case, we're not
6 going to change that position in the
7 other cases brought by Mr. Watson in
8 this Court or the other divisions of
9 this Court.

10 Mr. Watson's case is --

11 THE COURT:

12 You can sit. I'd rather have
13 you close to that mic because you're --

14 MR. ISENBERG:

15 I'm sorry, Your Honor. It's
16 been a while since I've been here.

17 THE COURT:

18 I know, and I understand. I
19 understand the rules and such, but --

20 MR. ISENBERG:

21 But as far as Mr. Watson's
22 cases in this Court and in the other
23 divisions in this Court, we will be
24 stipulating to fault. I believe the
25 only issues will be causation and
26 damages in all of the trials.

27 MR. WATSON:

28 And to me, Your Honor, that's
29 different than them actually
30 stipulating in all the cases. And I
31 don't think it makes a difference for
32 the motion, but that's "I think we will

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1 be, and "I don't see any reason we
2 won't be," that is not the same as
3 saying, "Yeah, we stipulate to
4 liability in every case that's pending
5 in the 14th JDC." That hasn't been
6 done. The only one that they've done
7 that in is the one that was tried
8 before Your Honor.

9 So, the present posture of the
10 case is that all issues are on the
11 table as far as any -- otherwise, Mr.
12 Isenberg can correct me if a pleading
13 has been filed in that regard, but I
14 haven't seen it.

15 But Your Honor, that doesn't
16 make a difference. These documents --
17 as Your Honor remembers, although we
18 litigated the punitive part of the case
19 in the first Arabie trial -- and so
20 there was a lot of evidence as to the
21 punitive behavior.

22 There was also a great --
23 Citgo contested which -- I mean, if we
24 really want to start shortening
25 something, they could come in and say,
26 Your Honor has already found exposure,
27 the waste surrounded the Calcasieu
28 refinery for two months, I mean, it was
29 out there.

30 And so, there is really not any
31 meaningful contested exposure. The
32 Supreme Court although they overturned

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1 the punitive part, they went into a
2 pretty indepth analysis as to how
3 correct you were on finding exposure
4 and the methodology of the experts the
5 plaintiffs used, and affirmed the
6 general -- your rulings generally on
7 exposure and causation.

8 So, I don't think those should
9 be issues. But if you will remember, we
10 had a huge fight about exposure and the
11 monitoring results and whether benzene
12 was there or not there, and what the
13 people's exact exposure was.

14 Citgo cited these monitoring readings,
15 and we showed the Court how the
16 monitoring readings were not
17 applicable, and that they never
18 monitored any of the people
19 individually. Citgo argued that some of
20 the hazardous chemicals would have gone
21 somewhere besides in our plaintiff's
22 breathing environment.

23 And in connection with this
24 release Citgo did investigation.
25 And attached to our memo are some of
26 the reports of the investigation. And
27 it says, Citgo Oil Spill Investigation
28 Interview. The interview date of the
29 first one that is marked as an exhibit
30 is June 27th, 2006.

31 So, we're talking eight days
32 after the release. Do you have those,

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1 Judge? Those are the documents we're
2 fighting about and --

3 THE COURT:

4 Do you know which ones he's
5 referring to, Mr. Isenberg?

6 MR. ISENBERG:

7 I believe I do. These were
8 attached to the motion, Wells?

9 MR. WATSON:

10 Yes.

11 MR. ISENBERG:

12 Yes.

13 MR. WATSON:

14 Those are the investigation
15 documents we're fighting about. And
16 they gave us some of them, but they
17 haven't given all of them. And you can
18 see they have attorney/client privilege
19 stamped on them.

20 And as you'll remember Citgo's
21 documents, they all tried to be
22 confidential, and they all tried to be
23 attorney/client privilege. Your Honor
24 has made numerous rulings about Citgo
25 having to produce certain documents
26 based upon finding of fraud or other
27 exceptions to privilege. And that's
28 gone up and writs have been denied, and
29 those have been produced.

30 Well, these have
31 attorney/client privilege marked on
32 them. There's no attorney involved in

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1 this. It's not legal advice, it's what
2 happened.

3 And attached to my memo are
4 excerpts of depositions where the Citgo
5 witnesses say, "We need to know what
6 happened. We run this refinery, it's
7 part of our business to find out what
8 happened."

9 There are cases out there that
10 say that -- one in particular about an
11 airplane crash. And the airplane
12 company tried to say, okay, right
13 afterwards we got our attorney
14 involved, he was involved in all the
15 investigation. And so, we don't have
16 to give you the reasons or the results
17 of our investigation in the airplane
18 crash.

19 And the court said, no, you're
20 in the business of flying airplanes and
21 making airplanes and all that. And
22 said, you investigate and find out what
23 happened, and it has a legitimate
24 business purpose to find out what
25 happened so it doesn't happen again.
26 You can't hide it just because you say
27 an attorney might be involved or an
28 attorney's direction.

29 Well, this is even further
30 removed. This is eight days after the
31 event, they're taking statements from
32 witnesses. There's no callable evidence

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1 of an attorney. It's clearly what
2 happened.

3 There is no privilege. No one
4 can cite what privilege that would
5 apply to. It's not work product. It's
6 not attorney work product that would be
7 mental impressions. There is no
8 attorney mental impressions. It's not
9 attorney/client communications because
10 there's not an attorney involved.

11 So there is no privilege. If
12 there is a privilege, Your Honor, today
13 is the day they have to come in and
14 prove the privilege. Privileges, they
15 say, are a very narrow exception to the
16 broad exchange of information. And to
17 take advantage of that narrow
18 exception, the defendants have to prove
19 entitlement to it -- or plaintiffs --
20 whoever is making claim of privilege.

21 So, Judge, for them to claim a
22 privilege they have to come in and
23 prove it. There is no proof. There is
24 no proof that that's either work
25 product or attorney/client privilege.
26 So, we need to -- the motion to compel
27 those documents should be granted.

28 Even, Judge, if --

29 THE COURT:

30 Let me ask you this, though.

31 MR. WATSON:

32 Yes.

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1 THE COURT:

2 Because, obviously, I think we
3 have two, large boxes -- at least -- of
4 documents that have been received in
5 camera that are being held some -- and
6 I'll be candid, I haven't gone through
7 those documents -- but trying to set up
8 the standard as to whether or not
9 they're going to be granted and what
10 degree, if any, they would be
11 transferred to counsel.

12 But some of those, obviously,
13 even though they may say
14 attorney/client they may actually be
15 communications between counsel.

16 MR. WATSON:

17 Well, I think --

18 THE COURT:

19 Obviously, if there is
20 something between counsel wouldn't you
21 feel that that would be an
22 attorney/client privilege?

23 MR. WATSON:

24 Potentially. You know, I just
25 don't know. And I don't know what the
26 boxes are. Because Your Honor ruled --

27 THE COURT:

28 And, obviously, we have ruled
29 previously that there was civil fraud
30 in place and that vitiated the
31 attorney/client privilege and they were
32 able to receive those documents -- you

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1 were able to receive documents that
2 were connected with that prior ruling

3 --

4 MR. WATSON:

5 Right.

6 THE COURT:

7 -- previously.

8 MR. WATSON:

9 And you went through and gave
10 us those.

11 THE COURT:

12 But there appears to be a
13 different evaluation or different
14 standard with a work product production
15 and an attorney/client privilege
16 production as far as some of the
17 jurisprudence.

18 MR. WATSON:

19 And I think -- these are the
20 documents that I know about that I know
21 that I should get. I mean, there's just
22 -- there can be no -- I mean, you know,
23 with all due respect, Your Honor, you
24 just can't rule that those are
25 privileged. They're just not, you know.
26 There is no potential possibility
27 that's a privileged document.

28 THE COURT:

29 Under either argument.

30 MR. WATSON:

31 Yeah. There is none. I mean,
32 there's --

1 THE COURT:

2 You're just saying there is not
3 a privilege under that evaluation or
4 just the fact that they wanted to do
5 two separate investigations doesn't
6 make one of them privileged and one of
7 them not.

8 MR. WATSON:

9 No, and it's -- and even -- so,
10 they can't establish a privilege
11 because it's not attorney work product,
12 or it's not work product that would
13 have mental impressions.

14 They can't establish a
15 privilege. And if they are going to
16 establish a privilege they have to do
17 so today, and they haven't done so to
18 my knowledge in this case.

19 But even, Your Honor, if for
20 some callable reason someone argues
21 that they're work product, there is an
22 exception to the work product rule. And
23 that is, that plaintiffs can't get the
24 information through any other means.
25 And there is no way for us to get that
26 information of any other means, Judge.
27 There is just not.

28 Those folks --

29 THE COURT:

30 Bring me up to date with regard
31 to possibly -- I know early on in the
32 depositions that there were basically

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1 no responses, that they claimed the
2 Fifth on a number of occasions, and
3 there was also some ongoing Federal
4 penalty phase litigation. But
5 afterwards it appeared that -- at least
6 from what we had with some witnesses --
7 once they had that resolved those
8 witnesses seemed to release that Fifth
9 protection and started communicating.

10 Has that happened with all of
11 these individuals including the
12 privileged team members?

13 MR. WATSON:

14 Well, what happened is that the
15 -- originally, we took like some 25
16 depositions where people took the Fifth
17 Amendment. That was the closest in time
18 to the event.

19 The longer time went by, and
20 eventually we started getting -- I
21 think after some point in the criminal
22 investigation, once they pled, then
23 they were ready to start talking. But a
24 long time had gone by between -- I
25 mean, we're talking about years, you
26 know -- between the time of the event
27 or that these statements were taken and
28 the time when we were going to depose
29 somebody.

30 And these statements were
31 taken, you know, right after the event,
32 and that was fresh in the people's

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1 memory. And to say we can get the same
2 information at any point after they
3 quit taking the Fifth Amendment, that's
4 just not -- that can't be true.

5 And so, the only way for us as
6 plaintiffs to get that information is
7 to get these documents. And if --

8 THE COURT:

9 Are you saying that the
10 witnesses would not remember or that
11 the witnesses would be coached to give
12 more generic answers rather than
13 something that could be detrimental?

14 MR. WATSON:

15 Well, I mean, I don't know how
16 they would -- I mean --

17 THE COURT:

18 When you said it can't be
19 obtained, I guess, is what strikes me.

20 MR. WATSON:

21 Well, it can't be. Because we
22 wouldn't know every question to ask,
23 you know. I mean, we'd say, okay --
24 what if we said, "Tell us all the
25 information you know about the event."
26 And to a person -- it wouldn't
27 regurgitate exactly what was in their
28 think -- they'd say, "That would be a
29 long time ago", or they'd say, I
30 remember this, I remember that.

31 But exactly what's in those
32 documents there's no way for us to

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1 couch the question. I mean, there's
2 one in there about benzene, benzene in
3 the water. And if you'll remember
4 benzene is a cancer-causing chemical.
5 And it was a very important aspect of
6 the first trial.

7 THE COURT:

8 And omitted from the
9 substituted MSDS.

10 MR. WATSON:

11 That's right.

12 THE COURT:

13 And then subsequently
14 discovered later.

15 MR. WATSON:

16 That's right. And one of those
17 talks about benzene being tested in the
18 water. That's right after the event.
19 That is extremely relevant to our case,
20 and it's information we cannot get
21 otherwise.

22 And to say, well, maybe we can
23 through happenstance fall on it by
24 deposing some guy and he happened to
25 mention it, you know, -- they're not
26 allowed to have information that we
27 don't have. I mean, we have to have a
28 level playing field.

29 So, if we go into this trial
30 and they've been allowed to have read
31 all this stuff and us not have read it
32 -- and there's no reason for it. This

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1 is -- these are people who are telling
2 you what happened very quickly after
3 the event. And to make the playing
4 field level we get them.

5 And there is no privilege that
6 applies. And so, under the law, under
7 equity, under any rationale we get
8 those documents. So, that's the --
9 those are two reasons.

10 Number one, they can't prove
11 privilege. There is no privilege.

12 Number two, even if there is a
13 callable work product argument, we
14 cannot get those documents. And it
15 would unfairly prejudice the
16 plaintiffs. Article 1424A states, (As
17 Read) The Court can order production of
18 documents if the Court finds that
19 denial of the production would unfairly
20 prejudice the plaintiffs.

21 I cited the Ogea case. I mean,
22 read the paragraph handed down from the
23 Supreme Court as to -- almost identical
24 to this case concerning early
25 information, the party seeking
26 discovery. We were not responsible for
27 any delay, they were. And so, under the
28 Ogea case we should get it.

29 THE COURT:

30 For the record that is Ogea
31 versus Jacobs, 344 So.2d 953.
32

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1 MR. WATSON:

2 Yes, sir. And the final reason
3 is that there is partial production.
4 And they have given us some of the
5 documents, but they haven't given us
6 all of the documents. And the law says
7 that you can't just maintain privilege
8 over some of the same type of
9 documents.

10 So, we cited *Wigmore, Evidence*.
11 We cited Supreme Court case of
12 succession of *Smith V Kavanaugh*. (As
13 Read) The rationale was later based on
14 partial disclosures that permitting a
15 party to make such an incomplete
16 disclosure without losing its privilege
17 with respect to the remainder of the
18 communication or communications on that
19 subject would be unfairly adversary
20 because it would give the privilege
21 holder unchecked editorial control over
22 the available evidence to a degree that
23 would practically ensure a distorted
24 presentation of the communication or
25 communications.

26 It's not up to Citgo to say we can
27 see this interview, this interview,
28 this interview, not that interview, not
29 that interview, this interview, not
30 that interview, this interview, not --
31 they can't do that.

32 They have given us these

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1 documents -- some of these documents.

2 The law says partial production is not
3 appropriate. And Citgo does not get the
4 unfettered right to say, hey, this is
5 what we want to give you.

6 THE COURT:

7 But it would appear that the
8 succession of *Smith versus Kavanaugh* --
9 and that is K-a-v-a-n-a-u-g-h, 513 So.
10 2d 1138 -- that it stood for that
11 premise, but it was only dealing with
12 attorney/client privilege. They don't
13 have any actual discussion of work
14 product privilege.

15 MR. WATSON:

16 But I think it discussed
17 privilege in general, and it said that
18 you can't just -- and I agree it was an
19 attorney/client privilege case. But the
20 same rationale would apply, that you
21 can't just allow the defendant to say,
22 hey, we want to give you "X", "Y", and
23 "Z", but we don't want to give you "A",
24 "B", and "C", although they're the same
25 -- they can't look at the other notes
26 and just say, okay, we'll let Watson
27 and Buford see these but not see these.
28 It doesn't work like that.

29 So, three clear basis for us to
30 get those documents, Judge. Number one,
31 they haven't proven privilege. If they
32 have please direct me -- or maybe Mr.

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1 Isenberg can direct to their proof as
2 to how these are privileged. There is
3 none.

4 Number two, even if they have
5 proven a privilege it would unfairly
6 prejudice the plaintiffs in its
7 inception of the work product rule if
8 we do not get these types of documents.
9 There is no other way to do it.

10 We're talking about an event
11 that occurred years ago. They took the
12 Fifth Amendment for a long time. These
13 are right after the fact. It's
14 published, you know -- and you've seen
15 so many cases both in your private
16 practice and in court that memories
17 aren't just fate, they just aren't.

18 And even if there is one line
19 that's left out that's different, it
20 would unfairly prejudice plaintiffs --
21 for the defendants to have gotten to
22 read all this stuff and plaintiffs not.

23 I mean, they know things that
24 happened that we don't. They know what
25 people talked about that we don't, and
26 that's not fair, and the law does not
27 allow it not to be fair.

28 Finally, and the third reason
29 is that they have given us some of
30 them, and because they have given us
31 some of them they got to give them all.
32 They can't just say under the same

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1 fairness deal that we're allowed to
2 play with the same cards they are.
3 We're allowed to play on the same field
4 they're allowed to play on. So, they
5 can't just say, hey, you can have these
6 certain interviews but not others.

7 THE COURT:

8 I may have some more questions
9 on rebuttal, but let's see what -- Mr.
10 Isenberg is about to wear that chair
11 out sitting there.

12 MR. ISENBERG:

13 Thank you. Good morning again,
14 Your Honor. Craig Isenberg for Citgo.

15 I want to address each of Mr.
16 Watson's points, but I think I'll start
17 with the last one, which was that you
18 can't produce a set of privileged or
19 work product protected documents
20 without waiving --

21 THE COURT:

22 Opening the door theory.

23 MR. ISENBERG:

24 Opening the door theory, yes.
25 The case law is very clear on this. We
26 cited a number of cases, both in our
27 original briefing and the supplemental
28 briefing that we submitted last week,
29 showing that the courts make a clear
30 distinction between waiver in the
31 context of attorney/client privilege
32 and waiver in the context of work

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1 product.

2 Now, in this case as Mr. Watson
3 pointed out, there were certain
4 documents that were produced. That was
5 explained in our original brief, that
6 we originally had an expert witness who
7 had been involved in the investigation
8 and there were interview memos that Mr.
9 Watson referred to and attached to his
10 motion that were produced in the case.

11 So, one of the things I note is
12 while Mr. Watson is complaining about
13 not having certain information he's got
14 all those memos. The reason he's
15 pointing out things to you that were
16 part of the privileged investigation is
17 because he has that information. So,
18 clearly not prejudiced by having
19 information.

20 And when those documents were
21 produced those were clearly work
22 product, and the work product is
23 because there were two investigation
24 teams, as you remember. And there was
25 one investigation team that was
26 directed by lawyers, and they were
27 formed in anticipation of litigation to
28 investigate the causes of the releases
29 on June 19th, 2006. So, it was properly
30 done under work product protections.

31 Now, what the courts have said
32 repeatedly -- and plaintiffs have cited

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1 not a single case to the contrary -- is
2 that if you waive -- if you produce
3 certain documents protected by work
4 product that's not a blanket waiver of
5 all documents protected by work
6 product.

7 And that's not what the law is.
8 The law says there is a distinction
9 between attorney/client privilege and
10 work product. And the reason for that
11 -- and we explained this in our brief
12 -- is there is actually a rationale for
13 this, that if you have an
14 attorney/client privilege document that
15 is released and you have a subject
16 matter waiver, the only documents that
17 would then be subject to release would
18 be documents pertaining to that same
19 legal advice. That would be a subject
20 matter waiver.

21 The problem with applying that
22 same doctrine to attorney work product
23 is attorney work product is a much
24 different type of protection. It
25 protects documents and information and
26 impressions that are made in
27 anticipation of litigation.

28 And so, if you had a subject
29 matter waiver applied to work product
30 it would throw open the doors to
31 numerous documents just because they're
32 all in anticipation of litigation. So,

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1 it doesn't work -- it wouldn't work the
2 same way that attorney/client does.

3 And the courts have recognized this and
4 have held repeatedly and consistently
5 that there is no such thing as a waiver
6 of work product because of partial
7 production, and the plaintiffs have
8 cited no cases to the contrary.

9 So, that argument should be
10 rejected.

11 THE COURT:

12 Let me ask you this; because
13 doesn't it seem like many documents
14 would contain both attorney/client
15 privilege and work product?

16 MR. ISENBERG:

17 It's certainly possible. You
18 could have documents that contain both,
19 but the documents that were produced in
20 this case were work product.

21 Mr. Watson pointed out those
22 documents were not attorney/client
23 privilege documents, they were part of
24 the investigation team's interviews and
25 they were work product. They were done
26 -- those interviews were done at the
27 direction of attorneys, and the
28 documents were originally withheld
29 under work product, not attorney/client
30 privilege.

31 So, that production is not a
32 product of attorney/client privilege

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1 documents.

2 THE COURT:

3 But that was a classification
4 that Citgo made.

5 MR. ISENBERG:

6 That's a classification that we
7 made, which I believe is correct. If
8 you look at the documents that were
9 attached to our memo they're not
10 attorney/client privilege --

11 THE COURT:

12 But like the documents that he
13 attached, I mean, they merely talk
14 about an interview and discussion of
15 basically factual observations.

16 MR. ISENBERG:

17 Right, right. And those were
18 the interviews that were done --

19 THE COURT:

20 There's not any --

21 MR. ISENBERG:

22 -- at the direction of
23 attorneys in anticipation of the
24 litigation. That's why we've asserted
25 work product. But we did produce them,
26 they have those interview memos.

27 THE COURT:

28 Partially.

29 MR. ISENBERG:

30 Well, they have those interview
31 memos.

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1 THE COURT:

2 At least these.

3 MR. ISENBERG:

4 Yes.

5 THE COURT:

6 Or was that -- and we don't
7 know if that was inadvertent or if that
8 was intended.

9 MR. ISENBERG:

10 No, that was intended. It was
11 -- we explained that in our brief.
12 Those documents were --

13 THE COURT:

14 But these were not on the
15 privilege log?

16 MR. ISENBERG:

17 Originally, they were, and then
18 they were produced afterwards. After
19 we hired an expert who is going to
20 refer to those --

21 THE COURT:

22 So you believe that many of the
23 documents even on the privilege log
24 that were obtained by that
25 investigative team should be
26 discoverable?

27 MR. ISENBERG:

28 No, I don't believe that. I
29 believe those documents were originally
30 withheld as attorney work product and
31 properly withheld, but by producing
32 them we haven't waived any privilege.

1 THE COURT:

2 Okay. Maybe I'm just not
3 understanding.

4 MR. ISENBERG:

5 Sure.

6 THE COURT:

7 Because you felt that these
8 were sufficient to give them, from a
9 factual discovery response.

10 MR. ISENBERG:

11 But that isn't why we produced
12 them. We didn't produce them because we
13 decided they weren't privileged, we
14 produced them because there was an
15 expert witness who was going to testify
16 about them, and so they were produced
17 for that reason.

18 We said we can't really hold
19 these back if the witness is going to
20 rely on those, and that's why that
21 particular set of documents was
22 produced.

23 THE COURT:

24 So, if it would not have been
25 that witness then you would not have
26 produced these documents to plaintiff's
27 counsel?

28 MR. ISENBERG:

29 Unless there was another
30 reason, that's probably true. We think
31 they were properly withheld under the
32 attorney work product.

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1 THE COURT:

2 And you think there would
3 have been a way for him to obtain the
4 information if you didn't use an expert
5 that's being --

6 MR. ISENBERG:

7 Was there a way for him to
8 obtain that information?

9 THE COURT:

10 Correct.

11 MR. ISENBERG:

12 Yes, easily. Because there was
13 another investigation that was done.
14 They obtained all of that information.
15 In addition, Mr. Watson and plaintiff's
16 counsel has had access to all the
17 witnesses since 2008. So, they could
18 have taken the depositions -- and they
19 did take depositions.

20 So, I disagree with the
21 argument that there was no way to
22 obtain the information from witnesses
23 because those witnesses have been
24 available for five years, many of whom
25 they simply chose --

26 THE COURT:

27 You don't think they --

28 MR. ISENBERG:

29 -- not to depose.

30 THE COURT:

31 -- due to the contemporaneous
32 nature and the fact that they did not

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1 want to respond for a year or so,
2 that's not any prejudice to the
3 plaintiff, that everything -- then once
4 the door is open they should be able to
5 incur those additional expenses for
6 another 25 depositions in the hopes
7 that everybody has their memory?

8 MR. ISENBERG:

9 Right. Well, I also disagree
10 with the characterization that people
11 took the Fifth Amendment. We've been
12 over this, they had the right to do
13 that. And Mr. Watson certainly didn't
14 have to take 25 depositions to
15 establish the fact they were taking the
16 Fifth Amendment. That was his choice.

17 But once the criminal
18 proceedings were resolved in 2008, he's
19 had access to the people and he did
20 depose a number of people who testified
21 quite knowledgeably and thoroughly
22 about the event. I don't believe he was
23 prejudiced.

24 It's five years later now, but
25 that's not our fault. He could have
26 taken other depositions and chose not
27 to.

28 THE COURT:

29 So you were dealing with these
30 in reverse.
31
32

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1 MR. ISENBERG:

2 I was. Do you want me to keep
3 moving in reverse?

4 THE COURT:

5 No, no.

6 MR. ISENBERG:

7 I was gonna jump up to --

8 THE COURT:

9 No. I'll let you keep going
10 with your presentation, but --

11 MR. ISENBERG:

12 Okay. The first argument that
13 Mr. Watson made was that we failed to
14 prove these documents were privileged.
15 Well, that's not true.

16 THE COURT:

17 You would admit the burden is
18 on you to prove the privilege.

19 MR. ISENBERG:

20 Initially, the burden is on us
21 to prove privilege, which we did so in
22 the ordinary way that you --

23 THE COURT:

24 Then it shifts to show
25 hardship and injustice, etcetera.

26 MR. ISENBERG:

27 I agree with that.

28 THE COURT:

29 I understand that.

30 MR. ISENBERG:

31 Okay. What we did, Your Honor
32 -- and this was back in 2011 during the

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1 original briefing -- is we submitted
2 an extensive privilege log which we
3 color coded so that we could show
4 documents that had been ordered
5 produced originally by you, subject to
6 the earlier motions on privilege
7 issues, and then that showed the
8 documents that were at issue here.

9 And that is how you meet your
10 burden under 1424 of the Code of Civil
11 Procedure. And it has the information
12 that is required to be on a privilege
13 log so that the other side can review
14 it and make challenges.

15 And in this case the plaintiffs
16 have never come forward and made an
17 individual document-by-document
18 challenge. They simply said all the
19 investigation materials should be
20 produced.

21 But if you look through the
22 privilege log and see the information
23 contained on it you will see -- and you
24 alluded to this in your questions to
25 Mr. Watson -- that a number of the
26 documents on here are clearly
27 attorney/client privileged.

28 They have attorneys that are --
29 meetings with attorneys including the
30 general counsel of Citgo as well as
31 outside counsel, and there is no basis
32 for releasing those. A number of the

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1 documents refer to attorney meetings or
2 attorney interviews, and that would
3 require the disclosure of attorney
4 mental impressions, which would be
5 opinion work product.

6 And that isn't even subject to
7 the balancing test of need and hardship
8 and so forth that can allow for the
9 release of work product protected
10 documents in some instances.

11 So, what you have is an
12 extensive privilege log that gives the
13 information necessary to make
14 challenges so you can see the basis for
15 the assertions of privilege under
16 either attorney/client privilege or
17 work product, and plaintiffs have never
18 addressed that.

19 But we met our burden of
20 establishing privilege through the
21 privilege log. In addition, in the
22 original briefing we submitted an
23 affidavit from in-house counsel of
24 Citgo explaining the formation of the
25 investigation team -- and referring to
26 the privileged investigation team --
27 which explains that that investigation
28 team was set up at the direction of
29 counsel and worked at the direction of
30 counsel to help Citgo prepare for the
31 defense of the inevitable litigation.

32 So, again, we've met our burden

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1 of showing that these documents are
2 privileged. In addition, in past -- I
3 feel like it's a past life at this
4 point, Your Honor. But we had hearings
5 on the privileged investigation team,
6 and you heard evidence about how the
7 teams differed and how they were
8 separate and so forth.

9 And so, to some extent you've
10 heard some information about why the
11 privilege team was formed and how
12 that's different from the other
13 investigation team. So, we have met our
14 burden.

15 And then as you pointed out,
16 the burden would then shift to them to
17 show that the documents that are
18 protected by work product and that are
19 not attorney/client privilege and that
20 are not opinion work product could be
21 released under the standard which as
22 you pointed out would be need,
23 hardship, prejudice, of not receiving
24 that information.

25 And I strongly disagree that
26 there is any prejudice or need for
27 these documents. And I don't want to go
28 on and on about it because you've heard
29 a lot of this. But there is no
30 prejudice because they have had access
31 to witnesses and lots of other
32 documents that contain the same

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1 information or that gives them
2 everything they need to do to prosecute
3 the case.

4 You and I were both at the
5 trial several years ago, and the
6 plaintiffs did not seem handicapped at
7 all by the information that they had.
8 They had plenty of information to
9 prosecute their case.

10 But I would also point out --
11 and I think this is important -- the
12 purpose of the privilege investigation
13 team was to study the root causes of
14 the releases. It was to investigate
15 primarily the causes. And both
16 investigation teams were focused on why
17 did the event occur, and how did the
18 oil get out from the containment area.
19 That was the principal focus.

20 And as we discussed at the
21 beginning of this hearing that isn't
22 really what these cases are about
23 anymore. These cases are about
24 causation and damages. Punitive damages
25 are out of the case.

26 THE COURT:

27 You would concede, though,
28 there is not a pleading which
29 stipulates to liability as to the
30 ongoing litigation.

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1 MR. ISENBERG:

2 Well, there is actually in the
3 Arabie case because this is still part
4 of Arabie, and we filed that
5 stipulation in Arabie. And so this is a
6 --

7 THE COURT:

8 There are some additional
9 plaintiffs you're saying it would apply
10 to?

11 MR. ISENBERG:

12 Yes. It would apply to the
13 Arabie case, we filed it in the Arabie
14 case. So -- and I apologize for this,
15 but I can't remember if the stipulation
16 was in Division "G". I think it might
17 have only been in Arabie.

18 But that is -- it's not going
19 to be an issue, I assure you. Citgo
20 will stipulate to fault just like they
21 did in Arabie, in the continuation of
22 Arabie and Biddy and any other of the
23 Cox/Baggett cases before this Court.

24 Judge, I'd be happy to answer
25 any other questions you have.

26 THE COURT:

27 With that stipulation with the
28 trial that we've had with all of the
29 previous findings and then having the
30 partial documents, what is the
31 prejudice to the defense if they
32 received the balance of those

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1 documents?

2 MR. ISENBERG:

3 You know, that's a good
4 question, Judge. I'm not sure there's
5 prejudice, but as many parties do --
6 both plaintiffs and defendants -- we
7 want to maintain the protection of
8 confidentiality of documents.

9 There are plenty of
10 attorney/client privileged documents
11 that aren't particularly harmful or
12 helpful to a case that you withhold
13 simply because you want to maintain the
14 integrity of the privilege. And it's
15 not typical that you voluntarily
16 produce confidential documents to an
17 opposing party, even if it's not
18 material at this point.

19 So, we have the right to assert
20 our confidentiality over those
21 documents and don't want to give them
22 up. But I agree with you; I don't
23 think it will make a bit of difference
24 in the trials if they happen. And at
25 this point --

26 THE COURT:

27 From a practical standpoint you
28 don't believe it would have much
29 effect, but basically to maintain the
30 integrity of the standards --

31 MR. ISENBERG:

32 True.

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1 Court said that the record didn't
2 support the punitive award, that there
3 wasn't enough evidence of conduct in
4 Houston, that it was more Lake Charles.
5 I don't think they were accurate about
6 that, and some of the things that they
7 said on the facts I don't think was
8 supported, but they made the call.

9 Who's to say if we had not
10 gotten all the stuff that the record
11 might have been different? You know,
12 that we might have seen something that
13 would have changed it and tipped it
14 more towards Houston as opposed to Lake
15 Charles? But they got to hold on to
16 stuff that we didn't get to see.

17 So, now they're saying we have
18 enough to prove whatever. And that's
19 not his call. Citgo doesn't get to say
20 what they think we should have. They
21 don't get to say -- when their lawyer
22 comes in and says, Judge, we don't
23 think fault is gonna be an issue in any
24 cases you have, and so, therefore we
25 don't have to give these documents.

26 Well, this talks about benzene,
27 and benzene is a damage issue. That's
28 a cancer-causing chemical and it deals
29 with fear of cancer. And it's directly
30 contrary to their argument at the last
31 trial that benzene wouldn't have made
32 it down to the Calcasieu refinery, that

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1 the benzene would have evaporated. No,
2 this is when they test the water, and
3 it had high levels of benzene.

4 And so, this is contrary to one
5 of their damage arguments. This deals
6 -- they're contesting exposure. These
7 interviews are factual -- however you
8 want to couch them -- deal with
9 exposure. They deal with what got out,
10 wherever it went, those types of
11 things. And so, they are important.

12 And again, even if they're not
13 they're not the ones that get to say.
14 We get the equal opportunity to say
15 whether they're important or not. Mr.
16 Isenberg, with all due respect, doesn't
17 get to say what is important for our
18 case.

19 And he's talking about them as
20 investigative documents because that's
21 what -- if you'll look at them --
22 they're stamped attorney/client
23 privilege. It just shows you, Judge,
24 they attempt to withhold by any means
25 they can withhold it.

26 And Citgo hasn't played fair.
27 They didn't play fair when they were
28 building that tank. They didn't play
29 fair when they leaked this stuff. They
30 haven't played fair in giving
31 information. They took the Fifth
32 Amendment.

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1 He says, oh, we could have
2 deposed the people. Well, we attached
3 deposition excerpts to our motion,
4 Judge, May 7th, 2008, almost two years
5 after the event, and they're still
6 taking the Fifth Amendment.

7 You know, that's a little bit
8 disingenuous to come in here and say we
9 could have gotten the information by
10 deposition when their witnesses are
11 taking the Fifth Amendment two years
12 after the event. And they have
13 statements taken five days after the
14 event, and they don't want to give it
15 to us.

16 And Your Honor hit the nail on
17 the head when they're talking about
18 this is work product. It's not work
19 product. There are no mental
20 impressions on these documents.

21 And so, for them to talk about
22 withholding some attorney's mental
23 impressions, then maybe they can give
24 us a better idea of what they're
25 talking about, because the documents
26 like this that were generated from
27 this, quote, "investigation team", do
28 not have mental impressions, they're
29 just facts.

30 And they're facts that both
31 sides should have. They're facts that
32 both sides need to have. And it's

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1 unfair. And it's not the law for them
2 to have access to them and us not to.
3 For Mr. Isenberg to go into court --
4 and I appreciate his compliments that
5 we were adequately prepared, we did a
6 good job the first time -- but I want
7 to see what else is out there, and if
8 there's other stuff.

9 And if this case ever finishes,
10 Judge, I'm going to go ask Mr.
11 Isenberg, I'm gonna say, "Craig,
12 tell me the best document that we
13 missed." You know, because we're
14 dealing with a million documents.
15 We're dealing with witnesses that take
16 the Fifth Amendment.

17 We're dealing with this
18 investigation team here and
19 investigation team there. And if we're
20 getting it all, Judge, we're just --
21 we're working hard, we're a little
22 lucky. But that shouldn't be the case,
23 we shouldn't have to be lucky, we
24 should get the stuff that they have,
25 too.

26 Thank you, Judge.
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RULING

THE COURT:

At this time the matter before the Court has to do with the assertion of a privilege by the Citgo defense team, which is being challenged by the Arabie, et al plaintiff's group.

I do respect Mr. Isenberg's position with regard to maintaining the integrity of the position whether he feels that it would have any practical or prejudicial effect directly to the litigation before us, and that causes me some concern.

However, I am going to rule at this point that the documents that were designated as a privilege, they do contain a number of matters that appear to be convoluted, including some factual information, some attorney/client information as well as potentially the work product in anticipation of litigation.

It is noted also that unique to this case is the factual witnesses who were initially uncooperative with substantial time that's gone by. That's established.

The Court has found a prior finding of civil fraud with regard to the handling of some of these

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1 documents.

2 That waiver or privilege was
3 waived and documents were shared with
4 the plaintiff, that has been evaluated.

5 In addition, there has been
6 some sharing of partial documents that
7 were contained in this privilege log
8 and work product protection to the
9 detriment of others.

10 It would appear that this
11 situation is unique, factually, and
12 that the intent of the privilege in
13 this Court's position was to act as a
14 firewall or a shield basically to keep
15 information that should have been
16 discoverable and relevant away from the
17 plaintiffs and their evaluation.

18 I am going to order that the
19 documents will be -- the privilege will
20 be waived. The documents will be
21 submitted to the plaintiffs.

22 I am going to sign a judgment,
23 but I will also sign a Stay that will
24 withhold the release of those documents
25 until legal delays have lapsed with
26 regard to review from the higher courts
27 if that's what they wish to do.

28 Again, this ruling is uniquely
29 based on the factual findings and
30 circumstances of this case as it has
31 progressed since it started in both
32 trial and subsequent motions, and would

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1 not necessarily be the Court's position
2 in a one of first impression in another
3 type, but it's the history of this case
4 that the Court finds and will rule in
5 that manner.

6 I will defer costs to the
7 merits. I will sign a judgment on
8 presentation.

9 MR. WATSON:

10 Thank you. Are our memos in the
11 record, Your Honor?

12 THE COURT:

13 You would have to ask the clerk
14 about that.

15 MR. WATSON:

16 All right.

17 THE COURT:

18 If you wish to -- you may want
19 to say at this point what you wish the
20 record to reflect with regard to your
21 position, both of you, so that at least
22 if there is something missing in the
23 suit record, it could be supplemented
24 without surprise.

25 MR. WATSON:

26 Our memorandum and attachments
27 is what we're interested in being part
28 of the record. And --

29 THE COURT:

30 What I have that initiated it
31 was actually a -- we had a motion for a
32 status conference that was submitted,

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1 a memorandum in support of the renewed
2 motion to compel.

3 MR. WATSON:

4 And that's our memorandum, then

5 I'm --

6 THE COURT:

7 That you're referencing?

8 MR. WATSON:

9 Yes, sir.

10 THE COURT:

11 Any objection to those being
12 considered, Mr. Isenberg?

13 MR. ISENBERG:

14 No, Your Honor.

15 THE COURT:

16 Then I have from the defense --
17 just so that I -- I had the December
18 4th correspondence of defendant Citgo
19 Petroleum's supplemental opposition to
20 plaintiff's renewed motion to compel.

21 I assume you're making that in
22 reference to the original motion to
23 oppose.

24 MR. ISENBERG:

25 That's correct, Your Honor.
26 The original opposition to plaintiff's
27 motion to compel was February 7, 2011.
28 So, we would like to have that noted
29 for the record as well.

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1 THE COURT:

2 I would also ask at this time,
3 Mr. Isenberg, if you would review the
4 record. If there are liability issues
5 or stipulations that need to be put
6 waiving liability on certain
7 plaintiffs, that that would clean up
8 the pleadings within the next 15 --
9 I'll give you 30 days because of the
10 holidays. If you feel that there needs
11 to be something filed Mr. Watson can
12 review it.

13 I just want to make sure that
14 my written record is in proper posture
15 and that we have the issues limited for
16 trial as to just causation and damages.

17 MR. ISENBERG:

18 Yes, Your Honor.

19 THE COURT:

20 And I do find that the
21 information overlaps to where I see
22 causation as a relevant issue in
23 obtaining this information specifically
24 with composition and findings that may
25 have been out there by the first
26 privilege team.

27 So that's the relevant portion.
28 Even though there wasn't a formal
29 objection, there was an argument of
30 relevance early on.

31 MR. WATSON:

32 Thank you, Judge.

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1 MR. ISENBERG:

2 Thank you, Your Honor.

3 THE COURT:

4 Who is going to prepare me a
5 judgment?

6 MR. WATSON:

7 We will, Your Honor.

8 THE COURT:

9 All right. Submit it to Mr.
10 Isenberg for review.

11
12 (Proceedings Concluded)

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