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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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NML CAPITAL, LTD.,

Plaintiff,

v.

THE REPUBLIC OF ARGENTINA,

Defendant.

08-CV-6978 (TPG)
09-CV-1707 (TPG)
09-CV-1708 (TPG)
09-CV-8757 (TPG)
09-CV-10620 (TPG)
10-CV-1602 (TPG)
10-CV-3507 (TPG)
10-CV-3970 (TPG)
10-CV-8339 (TPG)
10-CV-4101 (TPG)
10-CV-4782 (TPG)
10-CV-9587 (TPG)
10-CV-5338 (TPG)

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New York, N.Y.
August 12, 2015
2:05 p.m.

13 Before:

14 HON. THOMAS P. GRIESA,

District Judge

16 APPEARANCES

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APPEARANCES (cont'd)

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1 (Case called)

2 THE COURT: We have a motion. Who would like to speak
3 for the motion.

4 MR. COHEN: I would, your Honor. Robert Cohen from
5 Dechert on behalf of NML and speaking today on behalf of the
6 Aurelius parties. If I may, your Honor, I'll go to the podium.

7 THE COURT: That would help a lot.

8 MR. COHEN: Your Honor, we are here on the motions of
9 NML and the Aurelius parties seeking sanctions against
10 Argentina for its failure to provide court-ordered discovery.

11 I'd like to recount the chronology of events that led
12 us to today's hearing and then describe what sanctions we seek
13 and perhaps, most importantly, why they are appropriate and
14 totally consistent with what the federal rules call for when a
15 party fails to comply with discovery orders and with what other
16 federal courts, including those in this circuit, have imposed
17 against sovereigns in similar circumstances.

18 The chronology, your Honor, starts all the way back in
19 December of 2011, when Aurelius served discovery requests
20 seeking information about Argentina's worldwide assets. In
21 January of 2012, Argentina served its responses and objections.
22 It provided no documents. It objected on the grounds of
23 attorney-client privilege, among other things, but provided no
24 privilege log with respect to documents withheld on the ground
25 of attorney-client privilege.

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1 In August of 2012, NML served its discovery and we
2 asked for asset information. Slightly different from that
3 which Aurelius asked for, we asked for asset information with
4 respect to property that was in whole or in part in the United
5 States, and we also asked for information about four entities
6 that we believe are alteregos of Argentina, and we wanted
7 information about those entities.

8 At about this time, your Honor, August 20, six days
9 after we served our discovery, the Second Circuit handed down a
10 decision in a related case. It was an affirmance of your
11 Honor's order with respect to discovery from third parties, and
12 your Honor concluded that the Foreign Sovereign Immunities Act
13 provided no immunity from discovery of a sovereign's assets.
14 The Second Circuit affirmed that decision and required third
15 parties to provide information with respect to Argentina's
16 assets. Argentina petitioned for certiorari from that Second
17 Circuit ruling and the Supreme Court granted certiorari.

18 Going back now to the discovery that we served in
19 August of 2012, on September 27, 2012, Argentina responded and
20 objected to NML's discovery and in response they objected on
21 the basis of attorney-client privilege, among other things, and
22 provided no privilege log. They did produce 71 documents, all
23 relating to the alterego inquiries that we had made, nothing at
24 all about their assets, and most of the information that they
25 provided to us was publicly available or merely described

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1 members of boards of directors or things that were generally
2 available. That was September 2012.

3 In June of 2013, NML and Aurelius moved to compel
4 responses to our discovery.

5 On September 3, 2013, your Honor heard those motions.

6 And on September 25, 2013, your Honor granted those
7 motions to compel with one minor exception. Your Honor decided
8 that we would not be entitled to information with respect to
9 one of the entities that we suggested was an alterego. That
10 was the BNA entity. We were not entitled to discovery with
11 respect to BNA. In all other respects your Honor said all
12 information responsive to NML and Aurelius requests must be
13 produced within 30 days, 30 days of September 25, 2013.

14 Argentina appealed from your Honor's order. Argentina
15 did not ask for a stay of that order or protective order. And,
16 of course, it did not make the production within the 30 days,
17 as your Honor had ordered.

18 The Second Circuit delayed oral argument on that
19 appeal pending the Supreme Court's decision on the matter that
20 it granted cert. on in the related decision with respect to
21 third parties.

22 On June 16, 2014, the Supreme Court decided that
23 appeal. It rejected Argentina's argument that the Foreign
24 Sovereign Immunities Act provided the sovereign with immunity
25 with respect to postjudgment discovery. And then on December

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1 17, 2014, the Second Circuit heard argument on the postponed
2 appeal of your Honor's decision from September of 2013.

3 In that argument a member of the panel asked
4 Argentina's counsel whether if the Court affirmed your Honor's
5 decision requiring production of responsive information
6 Argentina would comply with that order, and Argentina's counsel
7 said he couldn't answer that question. He didn't have
8 instructions from his client.

9 Six days later the Second Circuit affirmed this
10 Court's discovery order in all respects.

11 THE COURT: And the date of that was, again?

12 MR. COHEN: December 23, 2014.

13 On January 23 of this year, 2015, I sent a letter to
14 Argentina's counsel demanding responsive information and
15 documents and a log of documents being withheld on a privilege
16 basis and saying we will seek sanctions if the Court's order is
17 not complied with promptly.

18 THE COURT: Summarize that letter just once more,
19 please.

20 MR. COHEN: Sure. I demanded --

21 THE COURT: The date of the letter was what?

22 MR. COHEN: January 23, 2015.

23 THE COURT: And summarize that again.

24 MR. COHEN: It demanded responsive information and
25 documents because we had interrogatories and document requests

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1 and a log of documents being withheld based on privilege, and I
2 said we will seek sanctions if the Court's order is not
3 complied with promptly.

4 THE COURT: Let me go to this privilege log. I gather
5 you interpreted prior proceedings as involving an assertion of
6 privilege, right?

7 MR. COHEN: Yes, your Honor.

8 THE COURT: And, therefore, in the January letter you
9 requested that Argentina provide a privilege log, right?

10 MR. COHEN: Yes.

11 THE COURT: Just a minute, please. What privilege had
12 been asserted? Was it the attorney-client privilege or some
13 other privilege?

14 MR. COHEN: It was the attorney-client privilege,
15 something called the deliberative process privilege.

16 THE COURT: Just a minute. Attorney-client privilege
17 and then what was the next?

18 MR. COHEN: Deliberative process privilege, something
19 we are not sure exists with respect to sovereigns.

20 THE COURT: Deliberative process?

21 MR. COHEN: Yes, your Honor.

22 THE COURT: Go ahead. You were talking about the
23 response.

24 MR. COHEN: Yes.

25 THE COURT: The letter of demand of January 23.

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1 MR. COHEN: Yes. On January 30, Argentina's counsel
2 writes back, essentially refusing to produce documents or a
3 privilege log and saying plaintiffs, that we had to completely
4 revise our discovery based on the Second Circuit's decision.

5 THE COURT: Summarize that again, please.

6 MR. COHEN: They essentially refused to produce
7 documents or a privilege log and said that we needed to
8 completely revise our discovery in light of the Second
9 Circuit's decision.

10 THE COURT: Go ahead.

11 MR. COHEN: Even though we were well past the motion
12 to compel phase and there was no obligation for us to do this,
13 your Honor, we called for a meet and confer with Argentina's
14 counsel. And on February 6, we had a teleconference where we
15 talked about whether Argentina would or would not produce
16 documents.

17 THE COURT: The date of that again was what?

18 MR. COHEN: February 6, 2015.

19 THE COURT: That was a teleconference?

20 MR. COHEN: Yes, your Honor. They signaled that they
21 would not be producing any documents but said they would confer
22 with their client.

23 THE COURT: Go ahead.

24 MR. COHEN: On February 17, having heard nothing
25 further from Argentina's counsel, I sent an e-mail to

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1 Argentina's counsel to ask if Argentina intended to produce
2 responsive information. The next day, February 18,
3 Mr. Boccuzzi wrote back saying he aims to have a response to me
4 by later this week or early next week. That was February 18,
5 2015.

6 We heard nothing further, your Honor, from counsel for
7 Argentina. And on June 17 we moved for sanctions.

8 THE COURT: Motion for sanctions was on when?

9 MR. COHEN: June 17, your Honor.

10 Just two days before Argentina's brief and response to
11 our motion for sanctions was due, Cleary sent us a disk of
12 documents. Now, I say it was two days after. The cover letter
13 that accompanied that disk is not dated, but we believe that we
14 received it on July 15. In any event, shortly before their
15 response to our motion was due --

16 THE COURT: You are referring to the undated letter
17 from Christian Bresnahan?

18 MR. COHEN: That's right, your Honor.

19 THE COURT: What happened after that letter? Although
20 it is undated, you believe that you received it about what?

21 MR. COHEN: July 15.

22 THE COURT: Very good.

23 MR. COHEN: Very shortly before the responsive brief
24 was due on July 17. There was no suggestion in the cover
25 letter or otherwise that the disk was intended to be or that is

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1 the documents on the disk were intended to be in full
2 compliance with their discovery obligations, nor could there be
3 because the disk contained absolutely no information about
4 assets or property of Argentina, nothing at all, nor did it
5 include a privilege log of documents that were being withheld
6 from production.

7 What it contained was limited information about
8 entities that we contend are Argentina's alterego, including
9 such things as SEC filings, publicly available government
10 decrees, some board minutes for one of the entities, and
11 similar documents.

12 THE COURT: Do I understand you to say it contained no
13 information about assets?

14 MR. COHEN: That's absolutely right, your Honor.

15 THE COURT: Because the Court has not been furnished
16 with that. But you are saying it did not contain any
17 information about assets.

18 MR. COHEN: Absolutely right, your Honor, no
19 information about assets.

20 We think this production shows that there clearly are
21 responsive documents available and that this was a cynical and
22 perhaps desperate attempt to suggest that Argentina is somehow
23 complying with its obligations on the eve of the brief it had
24 to file. In fact, Argentina makes reference to that production
25 as if somehow it puts them into compliance.

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1 THE COURT: This was shortly before their brief?

2 MR. COHEN: Yes, your Honor.

3 THE COURT: And their brief was dated when?

4 MR. COHEN: July 17, your Honor.

5 THE COURT: Go ahead.

6 MR. COHEN: Your Honor, it's been three years since
7 the discovery was served, two years since your Honor ordered
8 Argentina to produce all responsive information within 30 days,
9 and eight months since the Second Circuit affirmed your Honor's
10 order in all respects. Argentina does not contend that it has
11 fully complied with the Court's order, nor could it. The
12 meager production it made, mostly of publicly available
13 documents about the alterego entities and none of it responsive
14 to the information about property and assets, unquestionably
15 represents knowing noncompliance with the order.

16 We are here today with a litigant that has refused,
17 blatantly refused to comply with its discovery obligations,
18 importantly not even providing a log of documents it claims are
19 privileged.

20 THE COURT: Let me interrupt you. When you are
21 talking about noncompliance, you are talking about
22 noncompliance with the discovery order of September 25, 2013,
23 are you not?

24 MR. COHEN: I am, your Honor, yes.

25 THE COURT: Go ahead.

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1 MR. COHEN: Argentina has fought and lost the battle
2 over whether it is entitled to withhold documents sought in
3 discovery about its assets anywhere in the world, even its
4 diplomatic and military assets.

5 The question I submit, your Honor, is not whether
6 sanctions are appropriate but what those sanctions should be.
7 We are helped, your Honor, by federal rule 37(b), which is
8 captioned failure to comply with court order which sets out the
9 sanctions available when a party fails to obey an order to
10 provide discovery.

11 THE COURT: Rule 37 what?

12 MR. COHEN: (b), your Honor.

13 THE COURT: The parties' failure, etc. I have that.

14 MR. COHEN: Rule 37(b)(2)(A) says in relevant part:
15 If a party fails to obey an order to provide discovery, the
16 Court may issue further just orders. They may include the
17 following.

18 THE COURT: Where are you reading?

19 MR. COHEN: 37(b)(2)(A).

20 THE COURT: I have it. I wanted to get it in front of
21 me.

22 MR. COHEN: They may include the following and then
23 there is little i: Directing that matters embraced in the
24 order be taken as established for purposes of the action as the
25 prevailing party claims.

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1 What that says is, your Honor, that if you fail to
2 provide discovery about a particular issue, the Court may take
3 as established for purposes of the action the matter that
4 discovery was sought about as the prevailing party claims.
5 That's one available sanction and I will come back to how we
6 ask for one that fits that one aspect of Rule 37.

7 Little ii says that the sanctions may include
8 prohibiting the disobedient party from supporting or opposing
9 designated claims or defenses or from introducing designated
10 matters as evidence. So if we prevail we may be able to get a
11 sanction that prohibits Argentina from opposing designated
12 claims or introducing evidence with respect to the matters that
13 were covered by the discovery that we sought. Those are two
14 sanctions available to us, and I am going to talk more about
15 how we ask for sanctions that fit directly within those two
16 permissible sanctions.

17 THE COURT: Let me ask you to go back to something.
18 Of course, I'll hear from Argentina's counsel, but you've
19 interpreted Argentina's counsel as pretty consistently
20 asserting privilege, right?

21 MR. COHEN: Absolutely right, your Honor, yes.

22 THE COURT: Is it your contention that upon the
23 assertion of that privilege, if it was asserted, there should
24 be promptly provided a privilege log?

25 MR. COHEN: It is, your Honor. I am going to quote to

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1 you from a case --

2 THE COURT: In other words, it doesn't wait until
3 today, right?

4 MR. COHEN: Absolutely not.

5 THE COURT: So, in other words, the assertion of
6 privilege should have been followed promptly at the time with a
7 privilege log. Is that what you are arguing?

8 MR. COHEN: Yes, your Honor.

9 THE COURT: Go ahead.

10 MR. COHEN: I wanted to give you the statutory basis
11 for the relief that we are seeking, and Rule 37(b)(2)(A) is a
12 source of statute that provides for the sanctions that I am
13 going to request and with respect to this waiver of privilege
14 that we ask for. Rule 26(b)(5) and local civil rule 26.2
15 (a)(2)(A) make clear that a failure to provide the privilege
16 log subjects the party to sanctions under Rule 37(b)(2) and may
17 be viewed as a waiver --

18 THE COURT: What rule are you referring to now? Can
19 you go over that again.

20 MR. COHEN: Yes. Rule 26(b)(5) and local civil rule
21 26.2 --

22 THE COURT: You are going a little fast for me. Rule
23 what?

24 MR. COHEN: Rule 26(b)(5).

25 THE COURT: That says what?

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1 MR. COHEN: That requires the production of a
2 privilege log, your Honor.

3 THE COURT: Go ahead.

4 MR. COHEN: And local civil Rule 26.2(a)(2)(A).

5 THE COURT: Give me the numbers again.

6 MR. COHEN: 26.2(a)(2)(A). That's the local civil
7 rule, your Honor, that describes what must be included on a
8 privilege log. And the advisory committee notes to Rule
9 26(b)(5) make it clear that a failure to comply with that rule
10 subjects the party to sanctions under Rule 37(b)(2) and may be
11 viewed as a waiver of the privilege.

12 THE COURT: What rule is that?

13 MR. COHEN: That's the advisory committee notes, 1993
14 advisory committee notes to the amendment to Rule 26(b)(5).

15 THE COURT: Go over that again. That says what?

16 MR. COHEN: It says, quote: A failure to provide the
17 privilege log, quote, subjects the party to sanctions under
18 Rule 37(b)(2) and may be viewed as a waiver of the privilege.

19 THE COURT: Go ahead.

20 MR. COHEN: Sanctions under these three rubrics are
21 regularly imposed on parties who fail to obey discovery orders.
22 There is nothing unusual or extreme about imposing those
23 sanctions, even in the sovereign context.

24 What specific sanctions are we asking for. There are
25 three, your Honor.

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1 The first is that Argentina be deemed to have waived
2 any privilege with respect to documents responsive to the
3 document requests.

4 The second is that it has been established that
5 Argentina's property in the United States is used for
6 commercial activity and that Argentina dominates and controls
7 the alteregos about which we sought information and did not get
8 information.

9 And the third is that Argentina be prohibited from
10 arguing that its property in the United States is immune from
11 attachment because the property is not used for commercial
12 activity or that BCRA, ENARSA and YPF, which are the three
13 alteregos about which we sought discovery, are its alteregos.
14 It is prohibited from arguing that.

15 Those holdings are appropriate because the discovery
16 NML has sought for three years and still doesn't have is
17 directly related to gathering that information, information
18 about their assets and the use of its assets, about its
19 alteregos, and the interrelationship between Argentina and its
20 alteregos, and we did not get that information.

21 THE COURT: Go over the three sanctions once more.

22 MR. COHEN: Waiver of privilege.

23 THE COURT: I've got that.

24 MR. COHEN: And then there is what we want the Court
25 to deem established and what we want Argentina prohibited from

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1 arguing. Under the establishment heading we want it
2 established that Argentina's property, if we find any, in the
3 United States is being used for commercial activity. And I'll
4 talk some more about why that's important and why it's
5 appropriate. And that Argentina dominates and controls the
6 three alterego entities in the ways that our brief discusses.
7 That's what we would like the Court to rule has been
8 established.

9 What we would like the Court to rule is Argentina is
10 prohibited from arguing, which are the two 37(b) sanctions as
11 described, they are prohibited from arguing that Argentina's
12 property of the United States is immune from attachment because
13 the property is not used for commercial activity. They can no
14 longer argue that. We still have a burden to show that it's
15 their property, that it's in the United States. We just do not
16 have the burden to make the factual showing that it's being
17 used for commercial activity. And that's a perfectly
18 permissible factual showing with respect to a litigant who
19 fails to provide discovery that would allow that showing to be
20 made.

21 THE COURT: Obviously, you are not talking about the
22 embassy.

23 MR. COHEN: The embassy is something that they may
24 have other kind of arguments about, but under the Foreign
25 Sovereign Immunities Act and commercial activity, they could

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1 not argue that. But they may be able to introduce arguments
2 about Vienna Convention.

3 THE COURT: Your contention is that the embassy is
4 used for commercial activity.

5 MR. COHEN: Your Honor, we are not talking about the
6 building of the embassy, necessarily. But we are talking about
7 accounts that may be used by -- if they disclose to us their
8 accounts in the embassy and what they are used for, unless they
9 are used for embassy purposes, diplomatic purposes, they enjoy
10 no protection under the Vienna Conventions, and they might then
11 argue, well, while they may not be used for diplomatic
12 purposes, they are used for some other purpose that is not a
13 commercial purpose.

14 And our position is, once we are past the use for a
15 diplomatic purpose, they can't argue over commercial purpose.
16 They have not provided us that information and they have waived
17 that. But it's entirely possible, your Honor, and we have
18 talked about this before, that if all accounts that had the
19 name of an embassy on it were automatically off limits that
20 that's the way in which Argentina will, for example, try to pay
21 the exchange bondholders. They will just put it in some
22 account someplace, call it a diplomatic account and pay other
23 creditors. We are entitled to know what that money is being
24 used for, if it's being used for diplomatic purposes it's off
25 limits. If it's being used for some other purpose, we may be

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1 able to take it. That's the position that the Second Circuit
2 has taken and that we have talked with your Honor about in the
3 past.

4 Your Honor, the sanction that we ask with respect to
5 the waiver of the privilege is the one that will have the most
6 immediate effect. Because if granted, even if Argentina
7 refuses to produce documents, including those withheld on
8 privilege grounds, which, of course, it's obligated to do, the
9 fact that they have not up until this point done it, they are
10 still obligated to respond to the document requests. Its
11 agents, including its counsel, will have to produce responsive
12 documents in their possession.

13 I'd like to take a minute to the explain why it is
14 reasonable to believe that Argentina's counsel does have
15 possession of responsive but ostensibly privileged documents
16 that we would get if the Court rules that Argentina has waived
17 its privilege.

18 Your Honor, Argentina's responses and objections to
19 our interrogatories and document requests say in several places
20 that, quote, the Republic states that it maintains no accounts
21 in the United States in which it keeps funds used for
22 commercial activity in the United States. Those responses and
23 objections were signed by Mr. Boccuzzi on September 27, 2012.

24 From that, your Honor, one thing must be true and
25 another almost certainly is true. Because Rule 26(g)(1)(A)

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1 provides that by signing a disclosure in response to a
2 discovery request, the attorney certifies that to the best of
3 the person's knowledge, information, and belief, informed after
4 a reasonable inquiry, the disclosure is complete and correct as
5 of the time it is made.

6 I think it is fair to assume that Mr. Boccuzzi or
7 someone under his supervision actually explored with their
8 client the correctness of the disclosure that Argentina
9 maintains no such accounts in the United States. It is almost
10 certainly the case that Argentina disclosed to Cleary accounts
11 it maintains in the United States and sought Cleary's advice as
12 to whether the account could be characterized as not being used
13 for commercial activity. I say that it is almost certainly the
14 case because if Argentina had no accounts in the United States,
15 the disclosure would not have been qualified by, used for
16 commercial activity in the United States. It would have simply
17 said, Argentina has no accounts in the United States.

18 The importance of this is that if Argentina's
19 attorney-client privilege is deemed waived for failing to
20 provide a privilege log, then its attorney, Cleary, can be
21 required to produce documents it holds about Argentina's
22 accounts in the United States in the event Argentina continues
23 to refuse to produce all responsive documents. That would be
24 an enormous breakthrough with respect to the identification of
25 Argentina's property in the United States, your Honor. It

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1 would be a game changer.

2 THE COURT: What do you mean by an enormous
3 breakthrough?

4 MR. COHEN: We have never gotten information about
5 accounts in the United States from Argentina or its agents. We
6 have always been confronted with the objection that by their
7 own determination it has no accounts in the United States used
8 for commercial activity. That objection has now been stripped
9 by the decisions of the Supreme Court and Second Circuit. They
10 are obligated to provide to us information so that we can
11 determine whether a particular account is or is not used for a
12 commercial activity.

13 And the importance of stripping them of the privilege
14 is that if Argentina won't give it to us and it's Argentina's
15 privilege, if it's waived, there is no basis upon which its
16 counsel can refuse to give us the documents it has, and then
17 for the first time we will see what Argentina has in the United
18 States. That's a supposition. I believe it's consistent with
19 the facts as we know them. But if Cleary Gottlieb has
20 documents with respect to Argentina's assets and there is no
21 privilege that applies to that, we would be able to get it. It
22 would be a very major change, your Honor.

23 The sanction of waiver of privilege for failure to
24 produce a privilege log is, as Cleary knows, available in the
25 sovereign context. As found in a case called FG Hemisphere v.

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1 the Republic of Congo, the Congo, which was represented by
2 Cleary, ignored a 151 million dollar money judgment and the
3 plaintiff, FG, was forced to conduct postjudgment discovery to
4 locate assets subject to execution.

5 THE COURT: Societe Generale?

6 MR. COHEN: No. FG Hemisphere is the name of the
7 plaintiff. It was the claimant who held notes of the Congo.
8 FG served discovery and Congo made a small production and
9 asserted attorney-client privilege. Congo did not provide a
10 privilege log. In holding that Congo had waived any claim of
11 privilege that might otherwise have existed with respect to all
12 responsive documents, the Court said --

13 THE COURT: What court is this?

14 MR. COHEN: This is the Southern District of New York,
15 your Honor. It's Magistrate Pitman by reference from Judge
16 Scheindlin. And in that opinion it was said, quote: It should
17 be clear to all attorneys that the Federal Rules of Civil
18 Procedure and the local civil rules are not starting points for
19 a discussion concerning the handling of privileged documents,
20 nor are they merely suggested practice guidelines that
21 attorneys are free to disregard. They are rules and, in the
22 absence of a court order or stipulation providing otherwise,
23 they must be obeyed.

24 In this case the Congo served its response to FG's
25 postjudgment discovery request on or about March 3, 2003, and

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1 there is no dispute that it was not accompanied by an index of
2 documents withheld on the ground of privilege. As other judges
3 in this district and I have repeatedly held, the unjustified
4 failure to list privileged documents on the required log of
5 withheld documents in a timely and proper manner operates as a
6 waiver of any applicable privilege, and he cites 12 Southern
7 District cases in support of that proposition, your Honor.

8 So I submit the sanction of deeming that Argentina has
9 waived any applicable privilege is perfectly justified in the
10 present circumstances and, if granted, would almost certainly
11 provide us for the first time documents disclosing property of
12 Argentina in the U.S., and that would be, as I've said, an
13 enormous game changer for us.

14 With respect to our other requested sanctions, holding
15 that Argentina's property in the U.S. is being used for a
16 commercial activity does not mean, as Argentina argues, that we
17 can attach any property we want. We would still have to show
18 that the property is in the United States and belongs to
19 Argentina. The holding would simply mean that if we locate
20 such property, the facts necessary to prove one aspect of the
21 exception to immunity under the Foreign Sovereign Immunities
22 Act that is used for commercial activity, which is often the
23 most difficult, time-consuming, and expensive aspect of the
24 proof that we have to establish and which Argentina has refused
25 to help us with by providing us with discovery, will be deemed

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1 established. That is precisely the sanction that Rule 37
2 contemplates for a failure to obey a discovery order.

3 With respect to the holding that facts have been
4 established supporting the claim that Argentina is an alterego
5 of the three entities and contrary to Argentina's assertion,
6 such a holding would not preclude those entities from
7 contesting the alterego holding in a proceeding, for example,
8 where NML seeks to attach property in the name of the alterego.
9 The holding would only bind Argentina and preclude Argentina
10 from contesting the facts held to be established. The alterego
11 would be free to argue why the property should not be taken.

12 And in another Southern District case, your Honor,
13 involving Zimbabwe, that is precisely what happened. The
14 sovereign failed to produce in a postjudgment context discovery
15 with respect to alterego entities, and the Court entered a
16 sanction finding that those entities were, in fact, alteregos,
17 not binding those alteregos, but binding the sovereign to that
18 fact.

19 Your Honor, the Second Circuit affirmed the Court's
20 September 23, 2003 order that Argentina provide all responsive
21 documents within 30 days in all respects. That affirmance was
22 eight months ago. We have been significantly prejudiced
23 because we still have no meaningful production and no privilege
24 log.

25 THE COURT: You are talking about the order of

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1 September 25, 2013.

2 MR. COHEN: Yes, your Honor. We think it's time to
3 impose sanctions.

4 THE COURT: What did you just say? I interrupted you.

5 MR. COHEN: I said it's been a long time, your Honor,
6 since your Honor's order and since it's been affirmed by the
7 Second Circuit, and we still have virtually no production and
8 no privilege log. We think it's time to impose sanctions and
9 our proposed sanctions are consistent with the federal rules,
10 consistent with what other courts regularly impose, even
11 against sovereigns, and are entirely justified under the
12 circumstances.

13 If your Honor has no questions, I'll be prepared to
14 reply.

15 THE COURT: I'll hear from the other side.

16 MR. BOCCUZZI: Good afternoon, your Honor, Carmen
17 Boccuzzi, Cleary Gottlieb, for the Republic of Argentina.

18 The sanctions that plaintiffs are demanding here are
19 unprecedented and they are not supported by the record in this
20 case or the law of this circuit or any case that we have found.
21 My adversary has gone through the three buckets and I would
22 like to address each of those.

23 The main contention is that they have been hamstrung
24 in getting information and it's important to remember that they
25 have a lot of information, including information produced by

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1 the Republic, as he conceded on the alterego issues that they
2 have that were produced prior to this motion being brought and
3 in the midst of the briefing of the motion, and they also are
4 not writing on a clean slate in that these three entities,
5 BCRA, ENARSA and YPF, have each been subject to judicial
6 proceedings concerning the alleged alterego status.

7 BCRA is before this Court in another case where your
8 Honor has been dealing with alterego allegations. And your
9 Honor yourself has not accepted plaintiff's position that they
10 be treated as an alterego for all purposes, which is basically
11 the finding they want your Honor to make under the guise of
12 these discovery sanctions.

13 The denial of the motion to dismiss in that case is
14 pending before the Second Circuit. The Second Circuit has
15 acknowledged in its previous ruling concerning BCRA that
16 discovery has been produced by the bank and in those
17 proceedings, so they have information and we have produced
18 information. They complain about the information that I've
19 produced or that has been produced, but they didn't come back
20 and say, we need this or we need that. They just keep folding
21 their arms in front of their chests and saying, we are entitled
22 to everything, produce everything. And that's just not a way
23 that discovery gets managed and it's also not what the Second
24 Circuit said in the decision from December of last year when it
25 affirmed your Honor's ruling.

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1 The Court in that case at the end of the decision
2 said: Although we affirm the district court order's in all
3 respects, we stress that Argentina, like all foreign
4 sovereigns, is entitled to a degree of grace and comity. These
5 considerations are of particular weight when it comes to a
6 foreign sovereign's diplomatic and military affairs.

7 Accordingly, we urge the district court to closely
8 consider Argentina's sovereign interest in managing discovery,
9 and to prioritize discovery of those documents that are
10 unlikely to prove invasive of sovereign dignity. And they
11 don't want to do that. They want to keep saying, we get
12 everything. And because we don't get everything, your Honor
13 can make these factual findings that are completely contrary to
14 all the work that's been done in this court and in other courts
15 that have dealt with attempts to attach purported assets of the
16 Republic, as well as questions concerning alterego.

17 To get back to the alterego findings that they want to
18 have, the other entity they want is a finding concerning
19 ENARSA. Your Honor, ENARSA has been the subject of two
20 complaints in this court and your Honor has dismissed both of
21 them for failing to state a claim as to alterego. Again, he
22 mentioned Rule 11. Presumably, they didn't bring that
23 complaint based on nothing. They have information, including
24 information that the Republic has given them, and they can't
25 plead an alterego theory. And now they want the Court to say,

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1 that doesn't matter. I find that they are an alterego. Again,
2 the case law does not support that either in the FSAA context
3 or outside the FSAA context.

4 The Second Circuit was very clear in the Kronisch
5 case. In the Kronisch case, the United States Government had
6 destroyed documents and the Court said our analysis does not
7 end there. We now have to consider whether the destroyed
8 documents, there is any indication that they would support what
9 it is that plaintiffs are trying to say. There is no
10 indication here that in fact all these entities that have been
11 ruled not to be alteregos are in fact alteregos. They want a
12 factual finding divorced from everything we know and in the
13 context of where there has been discovery. And they have not
14 come back and said, well, this gap in discovery is really what
15 shows it produced this. Again, their mantra is everything,
16 everything, everything. But that's not any normal discovery
17 request. And the Second Circuit in that paragraph didn't say
18 everything, everything, everything.

19 THE COURT: I don't read them as continually saying
20 everything. They acknowledge, either today in court or in the
21 briefs, that on the alterego issue there has been material
22 furnished. What they are asking for is the rest of the
23 material. I don't hear them continually saying everything,
24 everything, everything. They are making a request that the
25 materials that haven't been furnished, which are something, be

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1 furnished. That's all they are doing. That is all they are
2 doing.

3 MR. BOCCUZZI: Your Honor, those demands are very
4 broad. Everything about the relationship among these entities,
5 I believe, is one of the demands. How does one produce
6 documents responsive to that?

7 THE COURT: By producing documents in response to
8 that. That's the way.

9 MR. BOCCUZZI: But, your Honor, my point is that it
10 lacks any definition that would narrow that request and they
11 have not come back and said, this particular thing is missing,
12 we need to have this. They just said read the requests
13 basically, and give us more. I don't think more can be the
14 answer to the question here.

15 Putting that aside, the final entity is YPF. Again,
16 in the federal court in the Northern District of California
17 denied discovery in that context from a third party, saying YPF
18 is not the alterego of the Republic. And, again, they are
19 trying to undo that in this context and in this court. They
20 have plenty of information about YPF. We have disclosed
21 minutes of shareholder meetings, board minutes. If they want
22 more information, again, I think they need to come back as
23 opposed to getting the sanctions that undermines findings by
24 other courts and by this Court as to these entities.

25 As to the assets in the United States, again, that has

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1 been a subject of so much litigation, as your Honor is well
2 aware, in this court, in the district court of Columbia, out in
3 California. And your Honor asked exactly the precise question
4 and the right question when you said to Mr. Cohen, this doesn't
5 mean the embassy, does it, and Mr. Cohen didn't say --

6 THE COURT: That doesn't mean the what?

7 MR. BOCCUZZI: The embassy. Because he says he wants
8 to preclude the Republic from saying that this or that asset,
9 any asset in the United States, he wants the Republic not to be
10 able to argue that that particular asset is not being used for
11 a commercial activity. Your Honor asked quite rightly, you are
12 not talking about the embassy, are you, and he is talking about
13 the embassy. He is talking about the embassy. In their
14 papers, your Honor, they refer to the litigation we have over
15 patents. I don't know if your Honor recalls, I think it was
16 resolved ultimately in 2011. Aurelius brought a motion seeking
17 to act and execute on patents, patent applications, royalties
18 under licensing agreements. Your Honor appointed a receiver to
19 oversee that, to oversee discovery. Thousands of pages of
20 documents were produced. We came to your Honor. Your Honor
21 ordered us in because you wanted to have a hearing and at that
22 hearing you said, I'm vacating these attachments. I don't see
23 anything here to support these attachments. We had produced
24 discovery.

25 Now they are saying, thanks to this finding that they

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1 want, well, now there is a finding that all these assets are
2 being used for a commercial activity in the United States. But
3 we have been through that discovery. In my discussions with
4 them they didn't say, we need more information about the
5 patents. In fact, in our discussions, I don't recall the one
6 phone call we had focused at all on assets in the United
7 States.

8 The last round of the discovery battles and also,
9 frankly, the pari passu injunctions have basically been based
10 on the position of the plaintiffs and everybody's recognition
11 that there are not commercial assets of the Republic in the
12 United States. They argued for the extraordinary remedy, the
13 pari passu injunction, based on the fact that they had no
14 adequate remedy at law. They said there are no assets. We
15 can't get any assets. We are injured by the fact that the
16 Republic has taken assets out of the country, according to
17 them. They got their injunctions based on that.

18 Now they are saying, that's fine, but now please find,
19 your Honor, that all of the assets in the United States are
20 actually commercial and we can get those. Again, that violates
21 the rule in Kronisch, and I would go back to another case they
22 cite, which is a Supreme Court case, the Insurance Company of
23 Ireland, where the court looks at two limiting factors on Rule
24 37 sanctions, the word just, which is in 37(b), which we saw,
25 and the requirement that they are related to a specific claim

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1 in the litigation.

2 These sanctions that they want, findings that are not
3 supported by the record and the facts we know and the fact that
4 we have been through a lot of these areas before or have
5 pending matters before your Honor concerning them are neither
6 just or substantially related to a specific claim. They are
7 not just because in the cases they cite, there is some at least
8 warning given as to what specific sanctions would be imposed
9 for failure to comply with some specific aspect of discovery.
10 All he said is that in a letter he wrote to me he threatened
11 sanctions. There wasn't any of this about a finding of assets
12 in the United States or these other findings that they wanted
13 to have made. That's number one.

14 Number two, the Supreme Court, in the insurance case,
15 and that was against a company owned by, I think, the Republic
16 of Guinea, found that it was appropriate. It was just because
17 there there were otherwise findings that supported the
18 assertion of jurisdiction. So in that case the fight was
19 about, was there jurisdiction that could be asserted over the
20 entity. The entity refused to produce documents. And the
21 Court said: I am going to find that you are subject to
22 personal jurisdiction.

23 But the Supreme Court in upholding that sanction said,
24 we can uphold this because actually there are other facts in
25 the record that support the assertion of personal jurisdiction

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1 over this entity. It is therefore just to assume that specific
2 documents not produced would further support that personal
3 jurisdiction finding. Here we are devoid of anything to
4 support the idea that what Mr. Cohen said is an example, which
5 is a completely far-flung, speculative concept, that the
6 embassy accounts or the embassy is being in any way used in a
7 commercial way. There is nothing that supports that. We just
8 can't have a finding of fact based on nothing and, in fact,
9 contradicting what otherwise this Court has done and what the
10 D.C. Court has done in rejecting -- your Honor may remember, in
11 2005, they sought to attach every piece of military and
12 diplomatic property in the District of Columbia and Maryland.
13 And your Honor made them vacate and get rid of all of them
14 except for three, who plaintiff said there was a close issue,
15 and we litigated those, and those were then vacated by the
16 Court down there. They didn't appeal that and now it seems
17 they want all that wiped away under the guise of this discovery
18 sanction. That is just not appropriate.

19 THE COURT: I would like to remind you and everybody
20 here that the reason we are in this courtroom in 2015 is that
21 the Republic of Argentina has failed to honor its obligations
22 to pay indebtedness that date back 12 years or so ago. That is
23 why we are here. The plaintiffs in these cases who represent
24 parties who are owed billions of dollars by the Republic of
25 Argentina have been trying for all these years to recover

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1 because the Republic will not honor its just obligations. I
2 would keep that in mind as you proceed. These are not people
3 who are struggling to abuse the processes of the Court with
4 arguments of no substance; just the opposite, and let us keep
5 that in mind as you proceed.

6 Now, you started by discussing the alterego situation.
7 I assume that at some point you'll discuss the asset situation.
8 Is that correct?

9 MR. BOCCUZZI: Yes, your Honor.

10 THE COURT: You are certainly entitled to take your
11 argument in the order you wish, but I assume that I will hear
12 some time from you about the asset situation, right?

13 MR. BOCCUZZI: I'm happy to address that now, your
14 Honor.

15 THE COURT: Why don't you go ahead.

16 MR. BOCCUZZI: The asset situation is, they are
17 seeking a finding that any assets to the Republic in the United
18 States are being used for a commercial activity here and to
19 prevent the Republic from arguing otherwise. And my point as
20 to that is that that sanction is not justified or in any way
21 supported by the record or the case law, whether we think about
22 it in the sovereign context or the nonsovereign context. The
23 record in these cases has been and the reason why, your Honor,
24 we are in the situation you've described, where we have had
25 outstanding judgments, and they have not been satisfied, is

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1 that there are no assets of a commercial nature in the United
2 States.

3 THE COURT: Are there assets of any kind in the United
4 States?

5 MR. BOCCUZZI: My understanding is that there are
6 diplomatic assets --

7 THE COURT: I'm not talking about diplomatic. You
8 know that.

9 MR. BOCCUZZI: But, your Honor, they are.

10 THE COURT: I am not.

11 MR. BOCCUZZI: Those are off the table. I am not
12 aware of other property of the Republic in the United States.
13 To be clear, I've asked by client, I've signed statements to
14 that effect, third-party discovery I think has further
15 confirmed that. Your Honor is aware that they have subpoenaed
16 just about every bank in New York and otherwise, so they know
17 about accounts and I'm sure if they found an account of the
18 Republic, there would have been a proceeding about it. The
19 only thing that's ever come up was the \$3 million account that
20 they have gotten the asset from. They had that money. That
21 was held at BNA in New York and BNA provided to them a list of
22 the accounts of the Republic located in New York. So they have
23 that information.

24 Mr. Cohen alluded to, he thinks I might have a list at
25 the offices of Cleary Gottlieb of all of the accounts of the

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1 Republic in the United States. I do not have that list, your
2 Honor. I don't know if such a list exists. I don't think I
3 need to have that list to be able to sign the document that I
4 signed, but I don't have it.

5 Just to get back to the process that led up to this
6 motion, and we do make the point that the rule is, one should
7 write a letter to the Court -- it's right there in the rule --
8 before seeking sanctions. They didn't do that. But I think
9 this is telling because if they had done this in a letter, this
10 is the first time I'm hearing that they seem to want to have
11 Cleary Gottlieb work product and they seem to be implying that
12 that needs to have been put onto a log. I've never had a
13 discussion with them about Cleary Gottlieb work product or
14 Cleary Gottlieb memos. The one time there was a Cleary
15 Gottlieb memo that was in the public domain, inadvertently so,
16 your Honor rightly said, that's not part of this litigation.
17 That was not meant to be disclosed. It's standard practice in
18 every litigation that I've had in this case that people do not
19 log the work product of the litigation counsel unless there is
20 a specific issue that comes up, and they have never raised that
21 until today.

22 On the rest of the privilege point, to the extent that
23 they want a log of all of the legal work inside of Argentina on
24 issues of Argentine law, talking about these entities, again,
25 it's never been put to me in those words, but I have to say, we

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1 should come to an agreement on scope before one can even begin
2 to say that a government has to provide an enormous privilege
3 log. But that's two ideas about the privilege log, neither of
4 which have been raised, though today he seems to be focusing on
5 Cleary Gottlieb. And I do have to say honestly, that issue has
6 not been raised, and appropriately so. They produced
7 discovery. Early on there were some factual issues that they
8 had to produce documents on. I don't think I ever saw a
9 privilege log of Dechert documents because, again, never
10 specifically asked for and that's just not the practice here.

11 Getting back to the discovery aspect, the assets that
12 your Honor asked about, they clearly are aiming at diplomatic
13 and military, and I assume they are also aiming at other areas
14 that have been litigated where now they want to come to a
15 different outcome, like the patents, which, again, makes a
16 showing in the reply brief, but hasn't been, to my memory,
17 specifically mentioned before that reply brief.

18 We are litigating with them in California over an
19 Argentine satellite. We have been through one round with them
20 before. They tried to seize an Argentine satellite that was
21 being launched for governmental and scientific purposes. The
22 Court in California refused that. They rejected it in no
23 uncertain terms, said this satellite is not being used for a
24 commercial activity in the United States. It's also not in the
25 public interest to stop the launch of the satellite which is

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1 being launched to further our knowledge of sea water salinity
2 and other issues. The satellite launched. They didn't appeal
3 that. They came back two years later and brought another
4 complaint saying, we can't get this satellite. We want to get
5 the contract rights to launch the satellite. They lost that,
6 too, your Honor. That case was dismissed and they are now
7 appealing it. We are in the Ninth Circuit with the satellite
8 and the associated contract rights.

9 Presumably, they want to use this finding they are
10 asking your Honor to find about assets in the United States to
11 say, we can't make that argument anymore. That's not
12 allowable. That's not consistent with what another court in
13 this country is doing, and it's also not tied into the
14 requirement that any findings that the Court make be relevant
15 to this action in this case.

16 What they are seeking in terms of the lay of the land
17 of assets in the United States, which, again, the focus to date
18 in the last year has been discovery of assets outside the
19 United States, and now they want to just to make this finding
20 about assets in the United States and the support for their
21 getting things like the pari passu injunction, have been the
22 fact that there aren't any assets there. They want your Honor
23 to rewrite these findings, and that doesn't satisfy the second
24 requirement of sanctions, what the Supreme Court refers to, and
25 that is that they have to be related to a particular claim.

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1 And in the Supreme Court case we were talking about, the
2 particular claim was the amenity to that defendant to personal
3 jurisdiction on the claim in that action. And the Court noted
4 the other things that support personal jurisdiction upheld that
5 adverse inference against them. Here there is no claim, and
6 the FSAA law is clear that someone is entitled to a finding.
7 All the assets of a state are being used for a commercial
8 activity.

9 THE COURT: Let me interrupt. The request for
10 sanctions here starts with the assertion that the Republic
11 failed to comply with the applicable discovery order. Now,
12 I'll come to that a little later, but right now I want to say
13 this. In my view it is reasonable for the plaintiffs here to
14 seek as thorough an answer as possible to their discovery
15 requests about possible assets, possible other instruments, and
16 so forth. That's what they are asking about types of assets
17 and if they exist. That's what they are asking about.

18 Now, in view of the obstruction that the Republic of
19 Argentina has posed to recover recovery on their legitimate
20 obligations, the Court views the request of the plaintiffs here
21 as wholly legitimate. The Court further views and finds that
22 the -- you have not gotten to this, but you briefed it and I am
23 going to just cut this a little short by finding right now that
24 the Republic has failed to respond in anything approaching a
25 complete manner to the discovery order of September 19 of 2013.

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1 I don't think there is any question about that. What has
2 really been the subject of briefing is mainly what kind of
3 sanctions there should be. But I think that the parties and
4 all people who are concerned should know that the Republic has
5 failed to answer the discovery requests that they were
6 obligated to answer, that is, the request in the discovery
7 order of September 2013.

8 I am not going to go into a lot of detail because I
9 would be going into a lot of detail about things that are well
10 known. But what is important are the conclusions, I believe,
11 that I'm stating. The Republic has indulged in name calling,
12 speaking of the investors as vultures and that is worth noting
13 because the indebtedness in question here would normally be
14 subject to negotiation by any responsible debtor. Instead, we
15 have the name calling, calling the other side, the investors,
16 vultures. That is not a small matter. It indicates an
17 unwillingness to sensibly and reasonably negotiate in a way
18 that would be to the benefit of the Republic of Argentina as
19 well as its creditors.

20 Now, what we have today is a request for the
21 imposition of specific sanctions for the Republic's failures to
22 honor its discovery obligations, and I would like to get to
23 that now. It is not an easy problem at all. And I think it
24 would be probably better to interrupt Mr. Boccuzzi momentarily.

25 I'd like to have some further discussion because the

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1 afternoon is wearing on. I would like to have some further
2 discussion starting with the plaintiff's side and, of course,
3 going to the defense side, of the issue of sanctions. I'm sure
4 you have tried to cover it, but I'd like to pursue that more
5 with you now. Could you go back to the lecturn.

6 MR. COHEN: Your Honor, we are asking for essentially
7 three categories of sanction. The first is that Argentina's
8 failure to produce documents, as ordered by the Court on
9 September 2013 and failure to provide a privilege log with
10 respect to the documents withheld following the Court's
11 September 2013 order -- I'm sorry. 2013 order constitutes a
12 waiver of any privilege with respect to documents responsive to
13 our document requests. That's the first request.

14 Second is that it be established that property that we
15 find in the U.S. is used for a commercial activity in the U.S.
16 That's one element of what we would have to establish in order
17 to attach property of a sovereign. So we would take that issue
18 as found in future proceedings. And we would also take it as
19 found in future proceedings that the three entities, YPF,
20 ENARSA, and BCRA, are alteregos of Argentina.

21 And the third is a prohibition, which is really a
22 reflection of the facts that are established. They would be
23 prohibited from arguing that property in the United States is
24 not used for a commercial activity, and they would be
25 prohibited from arguing that those three entities are not its

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1 alterego.

2 THE COURT: Let me ask you this. In my view,
3 everything you request is reasonable. But the question is, is
4 there property in the United States? I'm not talking about the
5 embassy or military ship. I'm talking about property that
6 could be -- let me finish.

7 MR. COHEN: Sorry.

8 THE COURT: Now, you have not, in your papers,
9 identified any such property, but I ask you this. Are there
10 any proceedings, discovery proceedings or whatever you want to
11 call them, that you believe would be useful in definitely
12 ascertaining whether there is property in the United States?
13 The answer to that may be no. But the answer may be yes. I'd
14 like to ask you that question.

15 MR. COHEN: Your Honor, I think what we have asked for
16 is intended to do exactly that. We know that there is property
17 and has been property in the United States used for a
18 commercial activity that Argentina has not disclosed to us.
19 And Mr. Boccuzzi made that argument for me. He said, we were
20 able to find an account that had about \$3 million in it that
21 was at BNA. Your Honor granted us that attachment. The Second
22 Circuit affirmed. They didn't tell us about it. We had to
23 find that through a third-party discovery. If they had
24 answered us about accounts in the United States and not hidden
25 behind their self-determination that it wasn't used for

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1 commercial activity, they would have disclosed it to us.

2 THE COURT: My question to you is a little different
3 now. I'm asking you this. Are there proceedings or
4 investigations or something that you believe should be carried
5 out to ascertain whether there really is or is not property of
6 the Republic in the United States, property of the Republic or
7 property of entities, property that is subject to attachment?
8 We are at a point now where if there is to be recovery on that
9 judgment, there should be recovery. If there cannot be
10 recovery, there cannot be recovery. I don't know what's the
11 case. But I think that after all these years and the Republic
12 refusing to pay its debts, I would like to know from you, are
13 there proceedings to go perhaps farther than you've been able
14 to go so far in exploring that question?

15 MR. COHEN: Your Honor, we are vigilant in using
16 investigators. We serve third-party discovery regularly to
17 find assets and occasionally we do. The proceedings that
18 Mr. Boccuzzi referred to in California were discovered by
19 third-party productions to us. The issue there was not whether
20 or not it was Argentina's property in the United States. It
21 was a question of what it was being used for. They should have
22 disclosed that to us, but we used third parties to find
23 information. We use investigators to find information. We
24 follow the press to see whether there is any indication of any
25 commercial activity going on. The fact is, we have been

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1 aggressive in finding property for Argentina. We believe there
2 is significant property of Argentina in the United States.

3 THE COURT: I want to follow up. Do you believe there
4 is property?

5 MR. COHEN: We know there is, your Honor. The
6 contracts for these space launches, your Honor --

7 THE COURT: Let me interrupt you. I am not trying to
8 dictate a formal opinion, but I want to say this. Subject to
9 the privilege question, which I'll come to, it seemed to me the
10 plaintiffs are entitled to the sanctions you are talking about,
11 which are completely reasonable. All you are talking about is,
12 if there is property, how is the property to be deemed or
13 regarded. Isn't that right?

14 MR. COHEN: It is to be deemed.

15 THE COURT: That's what you are asking about.

16 MR. COHEN: Yes. Being used for commercial activity,
17 yes.

18 THE COURT: Fair enough. And I take it that on the
19 question of whether there is property, which is the crucial
20 question, you believe there is property and you will continue
21 to try to search that out, either through court process or
22 investigation or whatever, right?

23 MR. COHEN: Absolutely, your Honor. They have
24 disobeyed your injunction on pari passu. They have refused to
25 negotiate through the special master. We have no choice but to

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1 continue to find assets. We are not going to walk away, your
2 Honor.

3 THE COURT: It seems absolutely clear, subject to a
4 question about privilege, which I'll come back to in a moment,
5 but it seems to me that, obviously -- and there is no question
6 about it, even in the briefing, the Republic has failed to
7 respond to the discovery requests. That's almost a given. It
8 isn't even much challenged.

9 The real question is sanctions. That's been the
10 subject of the briefing. If there were assets, bank accounts,
11 securities accounts or something available in the United
12 States, of course, you could attach, execute upon them,
13 obviously, but you haven't found anything that obvious. Now, I
14 have to come back to your motion. I'll deal with the motion
15 now, subject to something I'll ask defense counsel about
16 regarding privilege.

17 MR. BLACKMAN: Your Honor, you said you would give us
18 a chance to reply and I would like briefly to do that.

19 THE COURT: Of course. I'm sorry. I beg your pardon.

20 MR. BLACKMAN: Jonathan Blackman, your Honor,
21 representing Argentina. I have not been at recent hearings
22 because I was recovering from some significant surgery and I'm
23 very happy to be back.

24 THE COURT: Happy to have you.

25 MR. BLACKMAN: Thank you. I think it's really

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1 important before the Court rules to try, instead of talking in
2 abstractions, to talk about specifics. I would like to give
3 you two specifics to keep in mind because they really
4 illustrate the problem of sanctions here.

5 The first Mr. Boccuzzi alluded to. It's what we call
6 the CONAE case. CONAE is the Argentine equivalent of NASA.
7 That issue, the attachment of satellites, which Mr. Cohen's
8 indefatigable investigators found, there is no big secret about
9 them. They found them. They have been publicized. He pursued
10 discovery and he litigated that issue before a sister court in
11 the Northern District of California and lost. And then he
12 tried to litigate it again and lost. And the second loss, the
13 first one wasn't appealed at all, is before the Ninth Circuit
14 as we speak.

15 THE COURT: That relates to what, again?

16 MR. BLACKMAN: The satellite. The Argentine
17 equivalent of NASA's satellite. He lost. The Court, your
18 fellow judge, found that that was not being used for commercial
19 activity in the United States, twice. He is asking you to
20 overrule that sister court with the finding you are making. I
21 guarantee you, if you enter the order that he's asking you --

22 THE COURT: Give me the name of the entity again.

23 MR. BLACKMAN: CONAE. It's an acronym. I can't say
24 what it is. It's the equivalent of NASA. It's a state agency
25 which operates the Argentine space program. And what does it

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1 do? It has a satellite. And in a cooperative program with our
2 NASA, and I believe with the French space agency, it launched
3 this satellite for scientific research. Nothing commercial
4 about it. But the point is, that issue was litigated. He
5 argued strenuously that it was commercial activity. He lost.
6 He didn't even appeal. And then two years later he tried to do
7 it again by saying that the rights to launch this noncommercial
8 satellite are commercial, and he lost that again, and now he
9 has that on appeal. He has asked you to overrule that court.

10 THE COURT: In California?

11 MR. BLACKMAN: In California. He has asked you to
12 overrule it. That's my first example, to overrule a sister
13 court. He is also asking you on ENARSA to overrule yourself.
14 You twice held, twice held that the plaintiffs had not -- and
15 they have all these investigators, and they have discovery.
16 You twice held that they had not even stated a claim, an
17 actionable claim that ENARSA was an alterego. Now he wants to
18 overrule that. BCRA, whose counsel is sitting here, you have
19 litigated the issue. Twice the Second Circuit held that that
20 property could not be attached, in part because it was being
21 used for central bank purposes, i.e., not commercial purposes.
22 And the issue of alterego for a limited purpose is now on
23 appeal. He wants you to overrule that. And my third example,
24 your Honor --

25 THE COURT: Wait a minute. What's the name of the

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1 entity?

2 MR. BLACKMAN: BCRA, The Central Bank of Argentina,
3 Banco Central De Republico Argentina. It's been before the
4 Second Circuit twice. Both times he lost. The Court held --
5 in fact it held that it doesn't even matter if it's an
6 alterego. Property used for central banking activities, which
7 the Court found to be the case, could not be attached. He
8 wants you to overrule that now.

9 The third example, and this goes to military property.
10 Every article you read about his client, Elliott, talks about
11 the fact that they went to Ghana in West Africa and attached
12 the flagship of the Argentine navy, and they lost that case.
13 They won at first instance and they trumpeted. They don't tell
14 you that ultimately the Supreme Court there reversed, after an
15 international law decision by the law of the sea tribunal under
16 an international treaty, and they lost.

17 Under his theory, if that ship sailed into New York
18 Harbor after your Honor's decision, he would be able to attach
19 it. He would say it belongs to Argentina, it certainly does,
20 and you found that that naval vessel is being used for
21 commercial activity. That's what he wants you to do, and
22 that's why these broadbrush abstract rulings can't be right
23 under the law. Let him go entity by entity. That's what they
24 have done. As he says, they are not bashful. Where they have
25 found property that appears to be colorably commercial, they

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1 have litigated that. More often than not, they have lost. But
2 where they win, they are entitled to attach, we don't deny
3 that. But he is not asking you to do that. He is asking to
4 you to sidestep the whole issue, overrule yourself and other
5 courts, and declare in advance that everything is being used
6 for commercial activity.

7 By the way, he has a list because he took discovery
8 years ago from BNA, which you held he wasn't an alterego, which
9 gave a list of all of Argentina's bank accounts. If you come
10 down with this ruling, he will attach every one of those
11 accounts tomorrow, and he didn't go after any of them except
12 this ANPCT. Why? Because they are all diplomatic or military,
13 and he will say, Judge Griesa has just ruled that these
14 accounts are being used for commercial activity because he
15 already has those. He doesn't need to ask us for a list. We
16 don't have any list different than what he's gotten in
17 discovery. That's what's going on here. This is an effort to
18 jump over all of the legal issues that have been litigated case
19 by case as cases are litigated for years before your Honor and
20 in the guise of discovery.

21 THE COURT: I very strongly disagree with your
22 characterization of the plaintiffs, very strongly. And I want
23 to go back to what I said, and that is this. The Republic of
24 Argentina has failed to pay its just obligation amounting to
25 billions of dollars. That's where we start.

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1 MR. BLACKMAN: I agree.

2 THE COURT: Just a minute.

3 Now, there are, in a sense, two phases of this motion.
4 One has to do with assets, bank accounts, outstanding loans,
5 letters of credit, other assets. Now, the other phase of the
6 motion is about the alterego problem involving certain entities
7 which you have named. Okay. I probably was premature in
8 trying to start giving a ruling, but what I started to say is
9 this.

10 There is no real dispute about the fact that there is
11 a discovery order of September 25, 2013 which was affirmed and
12 the Republic was obligated to answer that discovery order,
13 respond to that discovery order. It has not done so. That is
14 a given almost in the briefing. What is really before the
15 Court on this motion is not to have a repetition of a finding
16 of a failure to make discovery, but to have sanctions. Then we
17 have the alterego issues about certain entities. I was talking
18 to plaintiff's counsel about the issue of sanctions of the kind
19 I just mentioned. That's what I was talking about, what
20 sanctions are appropriate. And what he has proposed is what he
21 has said. What he proposes doesn't mean that some entity that
22 you are talking about is prejudiced. I don't read it that way.
23 So I would like now to talk about the issue of sanctions for
24 failure to respond to the discovery order, sanctions relating
25 to assets. Do you want to address that?

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1 MR. BLACKMAN: Yes, I do. Just to be clear, what I
2 was trying to say before was that the sanctions as to alterego
3 were way too broad, painted with way too broad a brush. But I
4 was also talking about assets. In the CONAE case that I
5 mentioned, the case in California that's now before the Ninth
6 Circuit, the issue is precisely the use of the satellite. So
7 it wasn't just limited to alterego. It was on precisely the
8 issue of commercial use or not. And I was giving that just as
9 an example of a situation where his sanction would overrule two
10 judicial findings. As far as assets goes --

11 THE COURT: Let me interrupt you. Nothing that I
12 would say here today, nothing that I've indicated in any way
13 would involve overruling the Courts in California. Not at all.
14 You don't have to argue that to me. If an issue came up in
15 connection with some particular asset and the Court of Appeals
16 has said this, it is up to the parties to make appropriate
17 objections.

18 MR. BLACKMAN: Exactly.

19 THE COURT: I'm not sitting here overruling some cases
20 in California or doing anything like that. I'm making general
21 findings which, obviously, if specific issues come up and the
22 Court of Appeals has said this, obviously the general findings
23 that I might make are subject to specific objections. Of
24 course they are.

25 MR. BLACKMAN: With all respect, your Honor, the

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1 general findings then are just that. They are generalizations
2 that lack content except in the specific situation. And what
3 every Court has said, including your Honor, is that you look at
4 these issues of attachment and execution on a
5 property-by-property, case-by-case basis. That's why, unlike
6 with a nonsovereign, you are required, under Section 1610(c) of
7 the Sovereign Immunities Act, to specifically find that a given
8 piece of property is in the United States used for commercial
9 activity in the United States.

10 With all respect, what Mr. Cohen is telling you is,
11 you don't need to do that anymore. As an sanction you can
12 decide in advance that as long as it's in the United States
13 it's being used for commercial activity in the United States.
14 That's just totally backward to the law. It's backward to
15 common sense and it creates a catch 22. I don't mean to attack
16 the plaintiffs. They are doing their jobs.

17 THE COURT: I completely disagree with that and that's
18 contrary to what this Court has found as what the Court of
19 Appeals has found in affirming. There was the discovery
20 order --

21 MR. BLACKMAN: And I agree.

22 THE COURT: Please let me finish -- of September 25,
23 2013, and it specifically dealt with assets, bank accounts,
24 letters of credit, loans, other assets. That's in the
25 discovery order which was affirmed by the Court of Appeals, and

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1 there is no doubt at all that the plaintiff is entitled to
2 sanctions based on that discovery order. That's where we
3 start. What has been proposed are certain sanctions, certain
4 presumptions, everybody has heard that. Let's repeat that.
5 Mr. Cohen, just once more, repeat.

6 MR. COHEN: Waiver of privilege for failing to produce
7 a privilege log, finding that property in the United States is
8 used for commercial activity, and that the three entities are
9 alteregos of Argentina, and that Argentina is prohibited from
10 arguing the contrary on those last two points. Those are the
11 three sanctions.

12 THE COURT: If you have an argument against that,
13 please present that.

14 MR. BLACKMAN: Your Honor, I do.

15 As to the assets, you just read a list of specific
16 types of assets, bank accounts, letters of credit, and the
17 like. His sanction sweeps beyond that. His sanction, as I
18 said, would allow him to attach the satellite on the ground
19 that it would be deemed to be used for commercial activity, to
20 attach the naval vessel to the ground that it would be deemed
21 to be used for commercial activity. There has to be a limiting
22 principal here.

23 And the Second Circuit, which specifically said,
24 Mr. Boccuzzi read it to you, that Argentina is entitled to a
25 degree of grace and comity, particularly when it comes to

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1 diplomatic and material affairs. So if you are going to issue
2 a sanction, I think you ought to tailor it to take military and
3 diplomatic off the table, at least without some showing that
4 the particular piece of property in question is not being used,
5 as opposed to ruling in advance as to stripping this property
6 of the immunity that the Second Circuit says it has.

7 Similarly, with alterego, of the entities they
8 identify, here it was only three. As I said, in two cases
9 ENARSA was found not to be an alterego. In the third case,
10 BCRA, the issue is before the Court of Appeals now. And BCRA
11 produced thousands of pages of documents in the course of that.
12 And YPF was also found, again, in California, not to be an
13 alterego. If they have some fourth entity, let them raise it
14 and they can take discovery, which they have done in the past,
15 and we will see where that takes us.

16 The point is, you can't paint, just because somebody
17 is not paying a judgment, with a broad brush that has no
18 bounds. And that's the final point I wanted to make because it
19 goes to a theme that has been recurring in these cases in the
20 last five or six years.

21 I understand, because I've been here from day one with
22 your Honor, how frustrating this process is. It's frustrating
23 for everybody. But it is wrong to give into the plaintiff's
24 urges, some of them subliminal, and some of them, like today,
25 quite overt, that all the rules go out the window because you

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1 have a country which is not paying its debts. I could go on
2 and explain why and with the Court's permission I would like to
3 briefly do that because it's something that needs to be
4 explained.

5 Argentina made an agreement with 92 percent of its
6 creditors, which it would like very much to honor and is
7 ordered not to by the Court. It could not have made that
8 agreement if it had said, but we are just going to pay 100
9 cents on the dollar. I think the Court understands that and
10 that's why ultimately there needs to be a settlement. And the
11 minister of economy of Argentina has said that.

12 But the way to get to a settlement is not to impose
13 draconian, sweeping, boundless sanctions. That just makes it
14 harder. And so I think if the Court is minded to impose
15 sanctions, they ought to be tailored. They ought to be
16 tailored to the types of assets that have actually been
17 litigated. They ought to have clear exceptions for military
18 and diplomatic property. They ought to be, at best,
19 presumptions that can be litigated and overcome in a particular
20 case so as to be fair to third-party entities, like these
21 alleged alteregos. And they ought not to exacerbate a
22 situation which I think everyone in this room would like to see
23 resolved through an appropriate settlement.

24 MR. COHEN: Your Honor, there is so much wrong with
25 what Mr. Blackman said that I hardly know where to start.

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1 Maybe I'll start at the end, which is, willingness to
2 negotiate. That distracted us for a long, long time, your
3 Honor, promises that they wished to negotiate. We deferred
4 action. We put off rulings. We appointed a special master;
5 that is, your Honor did. I would urge the Court not to be
6 influenced in its ruling today by some suggestion that
7 Argentina is interested in negotiating. We certainly hope they
8 are, but we cannot take that as a given.

9 Your Honor, Mr. Blackman talked about the fact that we
10 have discovered assets. He talked about the actions in
11 California. We discovered those assets. Argentina didn't
12 disclose it to us. Argentina should have disclosed it to us.
13 It's not our burden to go find all of its assets. This is
14 postjudgment discovery. They are the debtor. They have an
15 obligation to disclose to us all of their assets. He says, we
16 find out about it and we take these actions. That's true, but
17 that doesn't satisfy Argentina's burden to comply with your
18 Honor's order.

19 And the big issue in the California cases has been,
20 what is the property used for. We don't even have the contract
21 that underlies that situation because Argentina has refused to
22 give it to us. It's very difficult to prove use when Argentina
23 refuses to provide us the information that would allow us to
24 make the case. That's a continuing theme, your Honor. These
25 people can find the assets on their own. They don't need our

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1 help. And, therefore, no sanctions should be imposed or they
2 should be tailored.

3 He talks about not imposing a burden on third parties.
4 The relief that we ask for does not impose any burden on any
5 third party. If Argentina is found to have these entities as
6 their alteregos, those alteregos are still free to claim that
7 they are not. If we find an asset in the name --

8 THE COURT: Say the latter again.

9 MR. COHEN: The alteregos, YPF or BCRA, if we find an
10 asset that we think belongs to Argentina, because it's in the
11 alterego's name, Argentina can't contest that, but the alterego
12 can. YPF can come to the Court and say, NML may not have that
13 asset because we are not Argentina's alterego. Your ruling
14 only bound Argentina. It does not bind us. And they would be
15 right. We don't dispute that. So the idea that the orders
16 that we are seeking somehow will put a burden on third parties
17 is simply incorrect.

18 Your Honor, it's almost as if we are rearguing the
19 motion to compel. We heard all of these arguments back in
20 September of 2013, all the reasons why diplomatic property and
21 military property ought to be excluded. The Second Circuit
22 alludes to military and diplomatic property. They have done
23 nothing to comply with that order. They have not produced a
24 privilege log with respect to diplomatic or military property
25 that we could then look at and find a way to deal with. We are

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1 perfectly prepared to do that. They haven't done that. They
2 have given us no asset information.

3 And they suggest that this is all about diplomatic and
4 military property. That's not what it's about. It's about
5 other typically commercial property they have refused to
6 provide us information about. The sanctions should be going
7 forward. Anything we find will be deemed to be used for
8 commercial activity. That doesn't mean we get to take it. We
9 still have to come to your Honor and prove that it belongs to
10 Argentina and that it's in the United States. They just don't
11 get to have the benefit of arguing that it is not used for a
12 commercial activity when they refuse to give us any documents
13 about those properties.

14 So it would be like where we are today. If we find an
15 asset, we come to your Honor and say, we believe this belongs
16 to Argentina. We don't get discovery. But they can come back
17 with whatever proof they want to provide to show that it's not
18 being used for commercial activity. We don't want to be in
19 that place, your Honor. We were there three years ago.

20 THE COURT: We will take a short break.

21 (Recess)

22 THE COURT: I want to make a statement that will
23 conclude today's proceedings. The Court finds that the
24 Republic of Argentina has failed to comply with the September
25 25, 2013 discovery order as it relates to assets of the

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1 Republic. The Court further imposes the following sanction for
2 such failure. The following is the sanction: Any property of
3 the Republic in the United States except diplomatic or military
4 property is deemed to be used for commercial activity. The
5 Court further holds that if the Republic is claiming a
6 privilege as to any documents or information required to be
7 produced under the discovery order of September 25, 2013, it is
8 directed to prepare and deliver within 10 days of today a
9 privilege log on a document-by-document basis. Failure to do
10 so will be deemed to be a waiver of the claim of privilege.
11 The Court makes no determination at this time as to sanctions,
12 if any, with respect to the alterego issue.

13 With that, the Court is adjourned. Thank you.

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