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

3  
4 Plaintiff,

5 v. 03 Civ. 8845 (TPG)  
6 05 Civ. 2434 (TPG)  
7 06 Civ. 1910 (TPG)  
8 07 Civ. 1910 (TPG)  
9 07 Civ. 6563 (TPG)  
10 08 Civ. 2541 (TPG)  
11 08 Civ. 3302 (TPG)  
12 08 Civ. 6978 (TPG)  
13 09 Civ. 1707 (TPG)  
14 09 Civ. 1708 (TPG)

15 THE REPUBLIC OF ARGENTINA,  
16 Defendant.

17 -----x  
18 AURELIUS CAPITAL PARTNERS, LP  
19 and AURELIUS CAPITAL MASTER,  
20 LTD.,

21 Plaintiffs,

22 v. 07 Civ. 2715 (TPG)  
23 07 Civ. 11327 (TPG)

24 THE REPUBLIC OF ARGENTINA,  
25 Defendant.

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1 -----x

BLUE ANGEL CAPITAL I LLC,

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Plaintiff,

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v.

07 Civ. 2693 (TPG)

4

10 Civ. 4101 (TPG)

10 Civ. 4728 (TPG)

5

THE REPUBLIC OF ARGENTINA,

6

Defendant.

7 -----x

AURELIUS CAPITAL MASTER, LTD.

8

and ACP MASTER, LTD.,

9

Plaintiffs,

10

v.

09 Civ. 8757 (TPG)

09 Civ. 10620 (TPG)

11

THE REPUBLIC OF ARGENTINA,

12

Defendant.

13 -----x

AURELIUS OPPORTUNITIES FUND

14

II, LLC and AURELIUS CAPITAL

15

MASTER, LTD.,

16

Plaintiffs,

17

v.

10 Civ. 1602 (TPG)

10 Civ. 3507 (TPG)

18

THE REPUBLIC OF ARGENTINA,

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Defendant.

20 -----x

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1 -----x  
AURELIUS CAPITAL MASTER, LTD.  
2 and AURELIUS OPPORTUNITIES  
FUND II LLC,

3 Plaintiffs,

4 v.

10 Civ. 3970 (TPG)  
10 Civ. 8339 (TPG)

6 THE REPUBLIC OF ARGENTINA,

7 Defendant.

8 -----x

New York, N.Y.  
November 5, 2015  
11:45 a.m.

10 Before:

11 HON. THOMAS P. GRIESA,

District Judge

13 APPEARANCES

14 DECHERT LLP  
Attorneys for Plaintiff NML Capital

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25 EZEQUIEL SANCHEZ HERRERA

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1 (Case called)

2 THE COURT: I know that this is a busy day for at  
3 least some of you, so I want to let all of you know we will  
4 conclude no later than 1:30. Let's hear argument on the motion  
5 that is before the Court.

6 MR. COHEN: Good morning, your Honor. Robert Cohen  
7 from Dechert on behalf of NML Capital, and this morning  
8 speaking for the other moving parties, the Aurelius plaintiffs  
9 and Blue Angel plaintiffs.

10 On August 13, after years of dealing with Argentina's  
11 discovery failures, your Honor issued an order that did two  
12 things. It imposed an outright sanction on Argentina for  
13 failing to provide any information about its assets, which is  
14 still the case to this day, despite the imposition of the  
15 sanction, and your Honor held as follows:

16 The Court further holds that if the Republic is  
17 claiming a privilege as to any documents or information  
18 required to be produced under the discovery order of September  
19 25, 2013, it is directed to prepare and deliver within 10 days  
20 a privilege log on a document-by-document basis. Failure to do  
21 so will be deemed to be a waiver of the claim of privilege.

22 Argentina asked for an extension of the 10-day  
23 deadline and plaintiffs and the Court agreed to an additional  
24 week. Unfortunately, on August 31, Argentina produced a log  
25 that does not meet the requirements of the August 13 order and

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1 does not comply with the applicable federal and local rules.

2 Before explaining why that is so and why the orders we  
3 seek are not in any way extraordinary, there's one thing our  
4 motion seeks that I believe will not be controversial. We  
5 request an order determining that Argentina is precluded from  
6 claiming privilege with respect to any documents that it did  
7 not put on its log. Argentina says that its log is complete  
8 and there's nothing to add, so there should not be any problem  
9 with an order determining that the universe of privileged and  
10 potentially privileged documents is the 502 documents listed on  
11 the log.

12 THE COURT: Say that again.

13 MR. COHEN: Your Honor, one of the things we're asking  
14 for is an order that prohibits Argentina from claiming that  
15 there are privileged documents responsive to our document  
16 request beyond the 502 documents it listed on the log. They  
17 should not be able to now to claim that there are any more  
18 documents that they have that are privileged.

19 Let me go back, your Honor, to the deficiencies in the  
20 log. On September 14, soon after we received the log, we wrote  
21 to Cleary and pointed out our problems with it. They wrote  
22 back on September 25 and addressed some of our issues, but not  
23 all. We then brought this motion seeking a finding of waiver  
24 as the Court's August 13 order said would happen if an  
25 inadequate log was produced. We did that because the original

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1 issues and the unresolved issues, even after bringing them to  
2 Cleary's attention, are a lot more than mere technicalities.  
3 They are so serious that what Argentina produced to us was  
4 effectively no log at all.

5 In order to understand why the log is so deficient, it  
6 will help to start with the applicable rule. Local civil rule  
7 26.2 sets out what a privilege log must list. It must list the  
8 type of document; that is, it must list whether it's a letter  
9 or a memorandum, or whatever the type of document privilege is  
10 being claimed for. It must list the general subject matter of  
11 the document; the date of the document and the author of the  
12 document; the addressees of the document and any other  
13 recipients; and where not apparent, the relationship of the  
14 author, addressees, and recipients to each other. And the  
15 reason all of those things are required, your Honor, is so that  
16 the party receiving the log can make a determination whether  
17 there's a basis to challenge the appropriateness of the claim  
18 of privilege. Here, the log Argentina gave us fails to satisfy  
19 that rule in several key ways.

20 Your Honor, it may help if I hand up one page of the  
21 log. I shared a copy of it with my friends from Cleary, and  
22 they have no objection. Would that be all right?

23 THE COURT: Of course.

24 MR. COHEN: I apologize for the size of the print.  
25 This is the actual log as we received it. The highlighting,

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1 your Honor, is ours, and I will refer to the highlighted  
2 portions as I go through my presentation.

3 Your Honor, if you would look in the column that says  
4 document type on the left-hand side, you'll see that for every  
5 entry on the log that says email and attachment or attachment,  
6 and there are 300 --

7 THE COURT: Where are you pointing now?

8 MR. COHEN: It's the second column on the left.

9 THE COURT: Oh, second on the left.

10 MR. COHEN: It says document type at the top.

11 THE COURT: Right.

12 MR. COHEN: And then it says email, attachments, in  
13 the first box.

14 THE COURT: Right.

15 MR. COHEN: 300 of the 502 documents that are on this  
16 log list attachments in just that fashion. They have not  
17 provided separately any information about those attachments,  
18 and they certainly haven't provided the required information  
19 under the local rule. Saying there's an attachment to an email  
20 doesn't give us the type of document, for example, a letter or  
21 a memorandum or chart or some other kind of document. It  
22 doesn't tell us the date of the attachment, the subject matter  
23 of the attachment, the author of the attachment; nothing about  
24 the attachment.

25 The proper way to prepare a privilege log is to

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1 separately list and fully describe both the email and the  
2 attachments. And your Honor recognized that in the August 13  
3 order, which required a document-by-document log, but Argentina  
4 didn't do that. Instead, they grouped emails and attachments  
5 to the emails together and then gave us one general description  
6 for both. Providing information required by that local rule as  
7 to attachments is essential, because nonprivileged documents  
8 don't magically become privileged because they're attached to a  
9 communication to counsel. Instead, an independent basis for  
10 privilege must be established for each document, but as to the  
11 attachments here, Argentina has provided no information  
12 whatsoever. Any claim of privilege as to the attachments, we  
13 submit, is therefore waived.

14           What could these 300 attachments be, and why are we so  
15 concerned about them? Well, despite our pointing out to  
16 Argentina in our letter of September 14 that the log provides  
17 no information about the attachments, Argentina hasn't offered  
18 any information to describe them, but we can speculate about  
19 the types of documents Argentina may have sent to its counsel  
20 that would not be entitled to privilege. For example, if  
21 Argentina sent to Cleary a report listing its assets in a  
22 particular jurisdiction and that report was maintained in the  
23 ordinary course of Argentina's business, and they requested  
24 legal advice with respect to how they might protect those  
25 assets, the request for legal advice may well be privileged.

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1 But the asset report is not, and it is not given any privilege  
2 because it is attached to an email that asks for advice.

3 And, your Honor, if you'd look at the page on the log  
4 that I gave you, on the left-hand side, Nos. 496, 497, 498,  
5 those are communications from someone in Argentina to someone  
6 at Cleary requesting legal advice. We don't know what  
7 Argentina sent to Cleary with the email seeking legal advice.

8 THE COURT: Go a little slower. Where do you see  
9 that? Obviously there's a "from" and a "to."

10 MR. COHEN: Your Honor, we didn't know who those  
11 people were either, and that was a major defect in the log.  
12 They didn't disclose to us who these people were, but when we  
13 wrote to them on September 14 and pointed that out, they did  
14 provide us a list of who all these people are, who the  
15 Argentine people are, who the Cleary people are, so they  
16 attempted to fix that. But importantly, when they submitted  
17 this log on the deadline, they gave us a log without describing  
18 who these people are.

19 THE COURT: But had they told you in the letter who  
20 the people are?

21 MR. COHEN: When they responded to us, they included  
22 an index which did give us the identities of these people and  
23 they were from the Argentine government, they were from Cleary,  
24 or they were from some other place.

25 THE COURT: But those descriptions were not in the

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1 actual log.

2 MR. COHEN: That's correct, your Honor.

3 THE COURT: All right. Go ahead.

4 MR. COHEN: So you can see in the second column from  
5 the left that an email with attachments was sent by someone  
6 from Argentina -- and I know that now because I know the name  
7 listed in the "from" column was someone in Argentina; we  
8 learned that a month after we got the log -- to someone at  
9 Cleary. We learned that a month later.

10 THE COURT: Wait a minute. Wait a minute. Let's look  
11 at item 494, OK?

12 MR. COHEN: That one goes the other way. That's an  
13 email from someone at Cleary. I was focusing, your Honor, on  
14 the last four on that page, because they are emails from  
15 Argentina to their lawyers.

16 THE COURT: Just give me the number of one of those.

17 MR. COHEN: 496, your Honor.

18 THE COURT: 496?

19 MR. COHEN: Yes.

20 THE COURT: And that is from?

21 MR. COHEN: Isaías Losado Revol.

22 THE COURT: And is that person at the Republic or at  
23 Cleary?

24 MR. COHEN: At the Republic, your Honor.

25 THE COURT: What?

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1 MR. COHEN: At the Republic.

2 THE COURT: In other words, Mr. Revol is at the  
3 Republic, right?

4 MR. COHEN: Yes.

5 THE COURT: And it was sent to whom?

6 MR. COHEN: Carlos E. von der Heyde.

7 THE COURT: Is that person at Cleary?

8 MR. COHEN: Yes, your Honor.

9 THE COURT: You go ahead.

10 MR. COHEN: My point is, your Honor, there is no  
11 description of the attachment. We don't know what Mr. Revol  
12 sent to his lawyers at Cleary or why Argentina claims that  
13 these attachments are independently entitled to privilege. The  
14 point is had Argentina provided the required information  
15 separately for each attachment, we would know what documents  
16 Cleary received and would be able to analyze the privilege  
17 claim for each attachment. Argentina's log makes that  
18 impossible for us to do, and this defect is found in 300 of the  
19 entries on the log; 300 out of 502 entries, and because many of  
20 these entries, like No. 498 on the page your Honor has, refers  
21 to attachments plural, this deficiency in the log relates to  
22 well more than 300 documents. We submit that that kind of  
23 deficiency is sufficient to entitle us to a finding of waiver  
24 for a defective log and, at a minimum, a waiver with respect to  
25 the documents that are described as attachments. But equally

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1     troubling, your Honor, for over 100 entries on the log, all  
2     they tell us is that the potentially privileged document was  
3     sent to an email group they call a ListServ. According to the  
4     log, documents were sent to something called Republic of  
5     Argentina client ListServ.

6             THE COURT:   L-I-S-T-S-E-R-V-E?

7             MR. COHEN:   No E at the end.   S-E-R-V.

8             THE COURT:   L-I-S-T-S-E-R-V?

9             MR. COHEN:   That's correct.   And also to something  
10     called internal Cleary Gottlieb ListServ.

11            A ListServ, your Honor, is a way to send an email to a  
12     group of people without having to enter the email address of  
13     each individual. It's like a distribution list put together  
14     and given a name, and when you enter that ListServ name, you  
15     automatically send the email to everybody who's been put on  
16     that ListServ.

17            THE COURT:   I want to interrupt you.

18            MR. COHEN:   Yes, sir.

19            THE COURT:   What is the information that the  
20     plaintiffs are ultimately seeking to obtain? Obviously,  
21     they're not seeking to obtain information about insurance  
22     policies or all kinds of things. What is the kind of  
23     information you are seeking to obtain ultimately to this  
24     process?

25            MR. COHEN:   Your Honor, we go back to the September

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1 2013 order, which said Argentina must produce to us information  
2 about its assets and about its alter egos. Focusing on its  
3 assets, the 502 documents are documents that are responsive to  
4 the discovery about assets that Argentina claims are  
5 privileged. So if privilege is waived here and we see these  
6 documents, we will see documents relating to assets of  
7 Argentina. That is the universe of responsive documents,  
8 documents related to --

9 THE COURT: Now, that universe is defined, I'm sure  
10 you've said it, but say it again.

11 MR. COHEN: Yes.

12 THE COURT: That universe within the ambit of the  
13 privilege log is defined where?

14 MR. COHEN: In the scope of the discovery that we  
15 served, Argentina has said we have responsive documents to that  
16 discovery -- that is, asset-related documents -- but these  
17 documents are privileged.

18 THE COURT: In other words, they have admitted they  
19 have information about that subject, but they claim privilege  
20 as to that information. Am I correct?

21 MR. COHEN: Absolutely correct, your Honor.

22 THE COURT: All right. Go ahead. Go ahead, please.

23 MR. COHEN: We were talking about these ListServs,  
24 your Honor. These are ListServs created by Cleary that enable  
25 emails and other communications, I guess emails, to be sent to

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1 groups of people without having to identify each time who you  
2 want it to go to. It's a shorthand way of sending an email to  
3 a group of people. And while this may be a convenient way for  
4 Cleary and Argentina to communicate with each other, it  
5 obscures the identities of the document recipients. We have no  
6 way of knowing who is included in these groups and,  
7 importantly, whether anyone outside of the Argentine officials  
8 responsible for this case and whether this email group is  
9 broader than that.

10           Cleary has said in its letter to us that that's the  
11 extent of the ListServ, but they can't re-create the identities  
12 of the people who are on that ListServ. We don't know if there  
13 are five people on this ListServ at Argentina or 10 or 20 or  
14 100 people on the ListServ, and when we ask them to give us the  
15 actual names of people who received these privileged documents,  
16 they say they can't do that; they can't go back and reconstruct  
17 who was in these groups. And they say that even though they  
18 created them and even though this ListServ was used as recently  
19 as July, this past July, your Honor. If you'd look at document  
20 on the list 495, that's a communication from Elizabeth Block,  
21 your Honor, who is at Cleary, and in the next column, the "to"  
22 column, you'll see highlighted Republic of Argentina ListServ.

23           THE COURT: Where do you read that?

24           MR. COHEN: That's in the "to" column.

25           THE COURT: I see. Just a minute. Give me a chance

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1 to look at this.

2 MR. COHEN: Yes.

3 THE COURT: All right. Go ahead.

4 MR. COHEN: So Elizabeth Block is sending an allegedly  
5 privileged email with an attachment to all the people who are  
6 listed in that "to" column, and in addition to the ListServ,  
7 Republic of Argentina client ListServ. We don't understand how  
8 Cleary cannot determine who is included in these ListServes and  
9 particularly one that was used just a few months ago. And this  
10 failure, your Honor, affects more than 100 of the 500  
11 assertedly privileged documents.

12 MR. BLACKMAN: Your Honor, I'm very reluctant to  
13 interrupt my colleague here, but under the rule of  
14 completeness, this log is many, many pages, and it begins with  
15 2003, so it covers over a decade.

16 MR. COHEN: I'm sure Mr. Blackman will have a chance  
17 to argue.

18 MR. BLACKMAN: My point is that we have never told  
19 them that we cannot give them the current list.

20 THE COURT: Start again. I didn't hear you.

21 MR. BLACKMAN: I said, your Honor, Mr. Cohen has been  
22 rather misleading. He took a page from 2015. We have never  
23 told him that we cannot tell him who is on the 2015 ListServ.  
24 We cannot tell him who is on the 2003 ListServ. This log  
25 covers over a decade, and other than going through an

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1     incredibly expensive and totally needless forensic analysis to  
2     re-create things that don't exist anymore in cyberspace, we  
3     cannot tell him, if it mattered, who was on a 2003 ListServ.  
4     We can't tell him now.

5             THE COURT:   Mr. Blackman, wait until your argument.  
6     Let's have Mr. Cohen finish and then you'll have your chance,  
7     of course.

8             All right.   Go ahead.

9             MR. COHEN:   Thank you, your Honor.

10            This ListServ use affects, as I said, 100 of the 500  
11     documents, and as the court found in a case called Mauro v.  
12     Target Corp. found, it is a very serious defect.  In that case  
13     the log was found to be deficient and privilege to be waived  
14     because the log failed to identify all of the recipients of  
15     messages sent in distribution lists without identifying all of  
16     the people on those lists.  The court found, "This represents a  
17     serious defect in the privilege log.  Without the identities  
18     and job descriptions, there is no way for an opposing party to  
19     assess whether they are within the sphere of corporate  
20     privilege, as is required by Federal Rule of Civil Procedure  
21     26(b)(5)."  So this is not just a minor defect.  It is  
22     recognized as a serious defect not to be able to tell the other  
23     side who is actually receiving documents as to which a party  
24     claims privilege.

25            And just briefly to respond to Mr. Blackman's point,

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1 to the extent they are claiming privilege back to 2003 with  
2 respect to documents that were sent to some ListServ, the  
3 burden is on Argentina to establish that the recipients of  
4 those emails were within the privileged group. It's not for us  
5 to prove. It's for them to establish, and we don't have to  
6 take their word for it. They have a duty to come forward and  
7 establish how widely those emails or documents were  
8 distributed.

9 THE COURT: Now go over that last point again. I  
10 didn't understand the significance of that.

11 MR. COHEN: Your Honor, Mr. Blackman says that they  
12 never told us that they couldn't give us the identity of the  
13 individuals who are on these ListServes in 2015, and while  
14 they've never offered to do that, perhaps they can, but the  
15 point is this log goes back to 2003 and it includes  
16 communications to people on ListServ, as ListServ recipients.  
17 The burden is on Argentina to show that the communication was  
18 sent only to people who are entitled to get privileged  
19 communications. If that ListServ had people on it who were not  
20 involved in making decisions about the litigation, then there  
21 is no privilege, and we do not have to take Cleary's unsworn  
22 suggestion that those are the only people who would be on the  
23 ListServ. They are obligated to tell us who was on the  
24 ListServ. They've never provided an affidavit, a declaration;  
25 they've just said, Well, it's always only people who are

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1 involved in making decisions and it's only the lawyers at  
2 Cleary who are involved in giving the advice.

3           Your Honor, that's not how privilege logs work, and we  
4 don't have to accept their say-so. Your Honor, there are some  
5 issues with the log produced to us by Cleary that Cleary says  
6 should be overlooked because they've now fixed them, and as  
7 we've discussed, the log as originally provided did not  
8 identify any of the people as senders or recipients. It just  
9 has names. It didn't tell us who these people are or even  
10 which individuals are attorneys. It is true that a month  
11 later, after we pointed out the deficiencies, we received an  
12 appendix that gave us cross-references so that we now can  
13 determine who was at Argentina and who was at Cleary, but that  
14 doesn't change the fact that for 330 of the 502 documents  
15 listed on the log, we have serious defects. We have the  
16 attachment defect that I've described, where we have no  
17 information about it, and we have the ListServ defect, where we  
18 don't know the identities of the people who are included on  
19 those ListSers. And as to both, Argentina can't or won't fix  
20 those defects.

21           Your Honor, I'd like to describe one other portion of  
22 the relief that we are seeking. We are asking that the order  
23 require Cleary Gottlieb, as Argentina's agent and an officer of  
24 the court, to produce all of the documents listed on the log,  
25 as well as any other documents, privileged or not, that Cleary

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1 has in its possession that are responsive to plaintiffs'  
2 discovery requests. Now, Argentina is indignant that we would  
3 ask such a thing, but we suggest that to the extent that  
4 they're unhappy, they really only have themselves to blame. If  
5 Argentina had complied with its discovery obligations in the  
6 first place, we wouldn't need to make this request, but in this  
7 situation, where not just the threat but the imposition of  
8 sanctions hasn't caused Argentina to abide by this Court's  
9 orders, plaintiffs are left with no choice but to seek  
10 documents from third parties who we know have those documents.  
11 And I'd like to give your Honor some comfort that what we're  
12 asking for, waiver of privilege for failure to provide an  
13 adequate privilege log, is not an unusual or exceptional  
14 request. Even where the failure to produce an adequate  
15 privilege log doesn't follow an explicit direction, with known  
16 consequences, as is the case here, courts regularly issue  
17 orders finding privilege waived when a proper log is not  
18 produced.

19 In a case called *FG Hemisphere v. Congo*, a case in  
20 which Cleary represents Congo, Magistrate Judge Pitman,  
21 referred to by Judge Scheindlin, found that Congo, a sovereign  
22 country, had waived its privilege when it failed to provide a  
23 privilege log. He wrote, "As other judges in this district and  
24 I have repeatedly held, the unjustified failure to list  
25 privileged documents on the required log of withheld documents

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1 in a timely and proper manner operates as a waiver of any  
2 applicable privilege," and he cites over a dozen cases to  
3 support that finding, including, importantly, cases in which a  
4 log was provided but was found to be inadequate. And the  
5 Second Circuit has affirmed the finding of waiver numerous  
6 times. So what we are asking for today is what the Second  
7 Circuit, the dozen or so cases cited by Magistrate Pitman, and  
8 many cases since then, have found: that privileges have been  
9 waived for failure of providing an adequate privilege log.

10 Argentina, in response to all this, now says give us  
11 more time, let us meet and confer. Your Honor, those are just,  
12 we think, unhelpful suggestions. We all know that Argentina  
13 will not negotiate, will not discuss, will not compromise.  
14 Instead, they will string out discussions for as long as they  
15 can in an effort to delay, and when they can no longer do that,  
16 months will have passed and we'll be back where we are today.

17 To sum up, your Honor, what we are asking for is an  
18 order that is well within your Honor's discretion to give,  
19 finding, one, that Argentina may not claim privilege for  
20 documents responsive to our document requests that are not  
21 listed on the log; two, that Argentina waived privilege as to  
22 the documents listed on the log because the log as produced was  
23 so deficient as to amount to no log at all; three, at a  
24 minimum, that privilege is waived as to all attachments  
25 mentioned on the log, because of the failure to provide any of

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1 the required information about them, and as to all documents  
2 sent to a Republic of Argentina client ListServ, because  
3 Argentina failed to disclose the identities of the individuals  
4 included on those lists; and finally, an order requiring Cleary  
5 Gottlieb to produce all responsive documents in its possession.

6 Your Honor, what we are asking for today is not  
7 extraordinary or extreme. It is well within the Court's  
8 discretion to grant, and it is a logical and necessary next  
9 step following three years of litigation over this discovery,  
10 affirmance by the Second Circuit, the imposition of sanctions,  
11 and the direction of your Honor in the August 13 order. Thank  
12 you.

13 THE COURT: Let me ask you this. I guess this goes  
14 back to what I asked at the very beginning, and if I repeat, so  
15 be it. There is an ultimate issue here, and everything that is  
16 done should relate to that ultimate issue, and that is  
17 determining if there is property against which the plaintiffs  
18 can recover their judgments. Right?

19 MR. COHEN: Yes, your Honor.

20 THE COURT: OK. Those judgments have been outstanding  
21 in most cases for a dozen or so years, right?

22 MR. COHEN: Yes, your Honor.

23 THE COURT: Now, the plaintiffs have over these years  
24 sought to find assets to recover against and have been largely  
25 unsuccessful, right?

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1 MR. COHEN: Right, your Honor.

2 THE COURT: And the Republic has not paid those  
3 judgments, right?

4 MR. COHEN: That's certainly right, your Honor.

5 THE COURT: Now, as a judge, I have no interest in  
6 privilege logs or any of these issues from some scholarly or  
7 academic standpoint. It all relates to whether the exercise  
8 will assist in getting at assets. Now, you probably covered  
9 this, but I want you to cover it again. How does this relief  
10 that you're seeking here it assist in getting information about  
11 assets to be recovered against, because that is the object and  
12 there is no other object to be talked about?

13 MR. COHEN: Your Honor, our document requests ask for  
14 information about assets. They identified 502 documents that  
15 were responsive to that document request for which they claim  
16 privilege, so they have admitted that the 502 documents are  
17 responsive to the requests for asset-related discovery.

18 THE COURT: I think that essentially answers my  
19 question. I think you said that at the beginning. That really  
20 is the answer to my question. Thank you very much.

21 MR. COHEN: Thank you, your Honor.

22 THE COURT: All right.

23 MR. BLACKMAN: Good afternoon, your Honor. Jonathan  
24 Blackman, Cleary Gottlieb, representing Argentina.

25 THE COURT: Good afternoon.

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1           MR. BLACKMAN: I think there are a couple of key  
2 things that the Court needs to keep in mind. First of all,  
3 while we all appreciate that the plaintiffs would like to  
4 discover information about assets, their need or desire is not  
5 a basis for waiving privilege. If my client comes to me and  
6 asks me for legal advice about the attachability of assets,  
7 that's a privileged communication, and they're entitled to make  
8 that in the confidence that that communication will remain  
9 confidential and privileged. And I am likewise entitled to  
10 come back to them and give them my legal advice in the  
11 confidence that that will remain privileged. So the issue here  
12 is whether the attorney-client privilege has been waived, and  
13 the argument for waiver is entirely that this lengthy privilege  
14 log does not satisfy the rules.

15           The log is Exhibit H to the Hessny declaration. As I  
16 said earlier, it begins with the first document from 2003.

17           THE COURT: Let me see Exhibit H.

18           MR. BLACKMAN: Hessny declaration, Exhibit H.

19           THE COURT: Let me get that before me.

20           MR. BLACKMAN: Sure.

21           THE COURT: All right. Go ahead, please.

22           MR. BLACKMAN: As you'll see from the first page, your  
23 Honor, this begins in 2003 and it goes up basically to the  
24 present time. The most recent entry on page 59 is from August  
25 18, 2015, which was at the time of your Honor's order, and I

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1 will remind the Court again that although this discovery issue  
2 has been going on for a long time, the privilege log issue, as  
3 a separate issue, which is what we're talking about here today,  
4 stems from your Honor's order in August of this year, and  
5 within two weeks we had produced this quite lengthy privilege  
6 log.

7 In most civil litigation that's complex, it takes a  
8 lot longer to do that. I have a case now before Judge Peck,  
9 where Judge Berman is presiding, where the order provides that  
10 you don't even produce the privilege log until a month after  
11 the deadline for document production itself. So this was very  
12 expedited and we spent a lot of time and effort preparing this  
13 log, going back over a decade. And I'd just like to turn you,  
14 I'm obviously not going to go through the whole log, but the  
15 very first attachment comes from Roger Thomas. He was the  
16 senior partner in this case when it began. Your Honor met him  
17 in chambers the very first time there was an attachment effort.  
18 Plaintiffs know who he is.

19 Susana Casillas, they're all listed, in any event, in  
20 the attachment to our letter of September 25. Susana Casillas  
21 was someone in the Argentine finance ministry. Noemi LaGreca,  
22 as we pointed out in our letter to the Court yesterday, and the  
23 plaintiffs already know, is actually the person who signed the  
24 1994 fiscal agency agreement, which is what brings us here  
25 today. No mystery there. The next cc is Mr. Boccuzzi; Carmen

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1 Corrales, who is the other transactional partner; myself; and  
2 Wesley Kelman, who was an associate who is no longer at Cleary  
3 Gottlieb. Their names are all listed also on the attachment to  
4 the September 25 letter, and the subject is providing legal  
5 advice regarding U.S. and international law on attachment of  
6 property. No big surprise.

7 THE COURT: Where do you read that?

8 MR. BLACKMAN: That's in the final column. There is,  
9 in fact, a description for every document of what it is.

10 THE COURT: Oh, I see.

11 MR. BLACKMAN: And the basis for the privilege.

12 THE COURT: Under the last column.

13 MR. BLACKMAN: Description, exactly. And that's what  
14 we've been doing, and that raised another point, your Honor,  
15 which the Court should keep in mind. This is not a situation  
16 where privilege often arises as to predispute, prelitigation  
17 documents where questions are raised about whether it's a  
18 business communication or a legal communication. These are all  
19 postlitigation. If you go down the description, all of this is  
20 about advising Argentina regarding its legal position with  
21 respect to the plaintiffs' enforcement efforts.

22 If you go to the page that Mr. Cohen gave you,  
23 specifically the page with the highlighting on it, which is  
24 page 58, the second-to-last page of the log --

25 THE COURT: Just a minute. Item what?

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1           MR. COHEN: This is item 494, starting at the  
2 beginning of that page, and I just want to walk you through  
3 again and, in the course of doing that, explain why the things  
4 he said just really have no merit. This is from Kristin  
5 Bresnahan. She's an attorney at Cleary Gottlieb. Her name has  
6 appeared on brief after brief in this litigation. Mr. Cohen  
7 and his colleagues know who Ms. Bresnahan is. It is to the  
8 ListServ. We've heard about the ListServ.

9           As I said before, I apologize for not being able to  
10 restrain myself. There is no problem giving them the current  
11 ListServ. The ListServ changes over the period, not  
12 surprisingly, of more than a decade as people come and people  
13 go. As an officer of the court, I can tell the Court and am  
14 happy to put it in an affidavit, but I would hope that that  
15 doesn't add anything to what I'm saying right here at the  
16 podium, that everyone on the Argentina client ListServ is in  
17 fact the client. There aren't outsiders on that list.

18           THE COURT: You're looking at what column?

19           MR. BLACKMAN: I'm now looking at the "to" column,  
20 where it says Republic of Argentina client ListServ.

21           THE COURT: I see.

22           MR. BLACKMAN: It says client ListServ because that's  
23 the client. They prepared a list of the client people. We  
24 can't reconstruct anymore, as I said, who was on that  
25 long-superseded electronic list in 2003. We can provide it to

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1     them as of now and as of the time of these particular entries  
2     in the last few months.

3             THE COURT:   May I just interrupt you.

4             MR. BLACKMAN:  Yes.

5             THE COURT:  You explained it, but I wasn't quite up  
6     with you.  What does ListServ mean?

7             MR. BLACKMAN:  ListServ is a computer address list.  
8     I'm not an expert on this.  I'm old enough that this is all  
9     after my time, but my understanding is that instead of having  
10    to type in 20 names, you prepare a list.  So you hit on your  
11    computer the "send ListServ," and it will go to those 20  
12    people.  And we can go to our IT people and say, Who is on the  
13    Argentina client ListServ now, and I will tell the Court and  
14    put it in an affidavit that everyone on there is an Argentine  
15    government employee who is getting this information from their  
16    lawyers in confidence, just as the Cleary ListServ, which is  
17    the next column, internal Cleary Gottlieb ListServ.  That's  
18    pretty clear.  That means me and Mr. Boccuzzi and the other  
19    Cleary lawyers and paralegals working on this case.  And again,  
20    we can tell Mr. Cohen, who I'm sure has no interest in actually  
21    knowing the answer, who is on that list right now.  We can't go  
22    back and reconstruct who was on it in 2003, and it really has  
23    no bearing on anything.  We've given a list of all the names in  
24    case he purports not to know who these people are, and that  
25    really answers the question.

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1           So let's see what is actually required by local rule  
2 26.2, which he began with. It says for the document: type of  
3 document, general subject matter, which is what we've listed  
4 under description; date, which we've listed; author, which  
5 we've listed; addressee, which we've listed, and other  
6 recipients. Those are the cc's in the column entitled cc,  
7 which we've listed, and then most importantly, for present  
8 purposes, "and where not apparent, the relationship of the  
9 author, addressees, and recipients to each other." Well, here  
10 it is apparent. They're all client to lawyer or lawyer to  
11 client. There's nobody else. There's no third party involved.

12           THE COURT: And you're still talking about item 494?

13           MR. BLACKMAN: I was using that as an example, yes.

14           THE COURT: OK. Go ahead.

15           MR. BLACKMAN: The other point he raised about it was  
16 the question of attachments. Now, attachment is an issue in  
17 which one can find cases going both ways, but the practice is,  
18 particularly in a lengthy log, it becomes exponentially  
19 lengthier and more difficult to separately log attachments, is  
20 point 1, and we didn't have a lot of time, which is point 2.  
21 But most importantly, there are many cases, and we've cited  
22 them in our brief, where if you go into detail about the  
23 attachment, you start invading the privilege because you get  
24 into what the details are that the client is imparting or what  
25 you are imparting to the client. And you can't do that. The

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1 cases are clear. In fact, the local rule 26.2, subparagraph 2,  
2 says that you disclose this information "unless divulgence of  
3 such information would cause disclosure of the allegedly  
4 privileged information." So in other words, you can't, and I'm  
5 being totally hypothetical here. If the client is asking the  
6 lawyer:

7           There is this property in France, which is in fact the  
8 subject matter of 494. There's this property in France. It  
9 has the following characteristics, and here they are and I'm  
10 attaching that. And we're not talking here about some  
11 preexisting document prepared in the ordinary course of  
12 business that Mr. Cohen is referring to. We're talking about  
13 something the client has prepared as an attachment to lay out  
14 relevant facts to seek legal advice, you can't say, And the  
15 attachment sets forth the characteristics of this property in  
16 France, because then you're getting into the very subject of  
17 the privileged communication.

18           Finally, on this example, when you look at the actual  
19 description, "providing legal advice concerning enforcement  
20 attempts on diplomatic property in France," that's pretty  
21 clear. And guess what. Guess whose enforcement efforts they  
22 are. They're Mr. Cohen's enforcement efforts. He doesn't need  
23 to find that document to find out about that.

24           THE COURT: Say that again. I didn't hear that.

25           MR. BLACKMAN: The description is "providing legal

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1 advice regarding litigation concerning enforcement attempts on  
2 diplomatic property in France." Those enforcement efforts are  
3 Mr. Cohen's enforcement efforts. He's asking here for our  
4 advice from Ms. Bresnahan to our client regarding an ongoing  
5 legal proceeding in which he's trying to attach diplomatic  
6 property in France. So if we go back to where we began, with  
7 his need, even if need were relevant to invading the  
8 attorney-client privilege, which it's not, he knows about that  
9 property. He's trying to execute on it and it's being opposed.  
10 And I would suspect, I don't know, so here I'm hypothesizing,  
11 that since this is from Ms. Bresnahan to Argentina, I suspect  
12 what's being attached here is a draft brief prepared by my  
13 colleagues in France regarding the opposition to those  
14 enforcement efforts, which he's clearly not entitled to see.  
15 It's work product and attorney-client privilege.

16 I'm giving this as an example because I think it  
17 underscores what's really going on here, which is this is not  
18 an attempt to get information that is discoverable. This is an  
19 attempt to play gotcha. We did the best we could. Our log, as  
20 I said, complies with a lot of practice in this district and  
21 elsewhere.

22 Most importantly, on that point, he has simply ignored  
23 the rules on this subject. The rules could not be clearer.  
24 When you have an issue about discovery, you meet and confer.  
25 You talk about it, and then if you can't work it out, because

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1 that's always preferable and that's something the civil rules  
2 demand and it's something that the new version as of December 1  
3 will make even clearer, it's only when you can't work it out  
4 that you go to the next step. And the next step, again, under  
5 the rules of this court, is you write a premotion letter and  
6 say, We have some issues. You don't do what he did, which is,  
7 Here's a privilege log, it's very long, it has 502 entries and  
8 just say, Ha, gotcha, it left out something, let's move to  
9 waive the privilege wholesale.

10 I'll give an example from a recent case. It's not in  
11 the brief, but I had someone dig it out. It's called Symbol  
12 Technologies, and since there is a lot of complaining about my  
13 firm in these papers, this is a case that was decided on  
14 September 24 of this year by Magistrate Judge Tomlinson in this  
15 court, and it involved the Dechert firm, and the Dechert firm  
16 did not provide a privilege log at all. And the adversary  
17 party said there's a waiver of privilege and the court said,  
18 No, we should follow the cautious approach of the Second  
19 Circuit and what we should do is, first of all, ask for a  
20 privilege log. Secondly, the parties will meet and confer  
21 within 21 days with respect to those documents as to which the  
22 adversary claims the privilege should not apply. After the  
23 meet-and-confer, if the plaintiff still seeks to proceed, it  
24 can file its motion, and at that juncture, the Dechert client  
25 will be required to simultaneously provide the documents at

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1 issue to the court for an in camera review, and that's again  
2 how this is done.

3 If the Court wants to see these documents, a lot of  
4 them, we can provide them. We can provide selected ones.  
5 Mr. Cohen can ask for which ones we should provide; we're happy  
6 to do that. We're not hiding the ball here. Cleary Gottlieb  
7 has no independent knowledge of Argentina's assets. Everything  
8 on this log is in connection with legal advice given or  
9 requests for legal advice received regarding those matters, and  
10 that is privileged. And his tattles about the privilege log  
11 don't destroy or waive that privilege. But again, the bottom  
12 line on that issue is we're happy to talk to them. They said  
13 they didn't know who people were whom they've been dealing with  
14 for a decade, we gave them a list of who those people are. If  
15 they want to talk about specific entries and get more detail  
16 about attachments, we're happy to do that too, but this jumping  
17 in without a conference, without a meet-and-confer, without a  
18 request for a pre-motion conference is gotcha, and they're  
19 trying to persuade you to disregard the rules and practices in  
20 this area by saying Argentina is uncooperative.

21 We're not talking about Argentina here and the  
22 big-picture issues of settlement. We're talking about lawyers.  
23 Lawyers are supposed to cooperate with each other, and I  
24 believe in this highly contentious case we've always tried to  
25 do that, and we're happy to try to continue doing it. I know

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1 the Court's preference has always been, from the day discovery  
2 started, You are capable, responsible lawyers, work it out  
3 among yourselves, and that's what we're more than happy to do.  
4 We, I think, did a good job and a legally compliant job on our  
5 privilege log, but we're happy to talk to them further if they  
6 have any specific issues.

7 THE COURT: Let me interrupt you.

8 MR. BLACKMAN: Yes.

9 THE COURT: It's the same kind of thing I asked the  
10 plaintiffs' attorney. Maybe it's a little more, but the  
11 existence of some asset in England or France or wherever, or  
12 the United States, obviously, and I don't mean to say this to  
13 be ridiculous, but obviously that is not privileged. The  
14 existence of an asset is not privileged.

15 MR. BLACKMAN: Of course not. A fact is not  
16 privileged.

17 THE COURT: That's right. Nobody claims it is. Now,  
18 I've said this over the years many times, but the effort to  
19 recover legitimate judgment debts against the Republic of  
20 Argentina has been met with a total refusal to pay the  
21 legitimate obligations. Now, what that has led to is efforts  
22 to do things that are very difficult. It wouldn't be difficult  
23 if Argentina would simply pay its obligations. It wouldn't be  
24 difficult at all, at least on the receiving end, of course.  
25 But to try to figure out a way to recover when Argentina won't

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1 pay its legitimate debts leads, and has led over all these  
2 years, to difficult attempts to do difficult things. In my  
3 view, this is an example, trying to deal with a privilege log.

4 Now, there are legal rules about privilege logs and  
5 the protection of such logs, and that's what this hearing  
6 really is about. I said we would finish by 1:30 because people  
7 have court commitments. I want to do something. I want to  
8 interrupt you momentarily and I'll come back to you, but I'd  
9 like Mr. Cohen to stand up again.

10 Would you explain again to me, obviously as briefly as  
11 you can because we're running close to our time, why is it that  
12 the privilege log, which is in evidence, part of the record,  
13 can that be broken open or whatever more artful way you want to  
14 talk about it? I'm sure you said it once, but I would like to  
15 hear it again, because I want to be absolutely clear on the  
16 answer to my question.

17 MR. COHEN: Yes, your Honor. Our initial ask is that  
18 the Court find that all the documents on the privilege log,  
19 privilege as to all the documents on the log has been waived  
20 because the log is so totally deficient.

21 THE COURT: Is what?

22 MR. COHEN: Is deficient, in the way it describes the  
23 entries on the log. But, your Honor, if you choose to break  
24 open the log, as you suggested, and find that only some subset  
25 of the documents --

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1 THE COURT: Go back to the answer that you gave.

2 MR. COHEN: Yes.

3 THE COURT: Are you saying that the reason the  
4 privilege log cannot be maintained as a privilege log is  
5 because the descriptions there are not proper? Is that your  
6 argument?

7 MR. COHEN: Essentially so, your Honor. They haven't  
8 provided sufficient information to justify the claim of  
9 privilege.

10 THE COURT: I know you've said this, but this is not  
11 an easy issue for anybody in this courtroom, including me. Why  
12 is the description so bad that it would mean that the privilege  
13 is waived? And that's what you're saying, right?

14 MR. COHEN: Yes, your Honor.

15 THE COURT: Why, again?

16 MR. COHEN: Remember how we got here, and I want to  
17 distinguish how we got here from what Mr. Blackman is  
18 suggesting ought to happen here. Three years ago, we had  
19 meet-and-confers about the discovery. We narrowed the  
20 discovery. We asked for privilege logs. We went through all  
21 of this kind of thing. Your Honor, in September of 2013, said,  
22 Produce the documents in 30 days, which meant produce the  
23 documents, and if you withhold documents, produce a privilege  
24 log. We got nothing. We got nothing in 2013.

25 We moved for sanctions. Your Honor imposed sanctions

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1 for Cleary's behavior. One of the sanctions we wanted was a  
2 waiver of privilege because we didn't have a privilege log,  
3 your Honor.

4 THE COURT: Was there no privilege log?

5 MR. COHEN: No privilege log.

6 THE COURT: OK.

7 MR. COHEN: Your Honor said, I'll give you 10 days to  
8 provide a privilege log or privilege will be waived. That's  
9 what your Honor's August 13 order said, Produce a log in 10  
10 days or privilege will be waived. Now, if they had produced no  
11 log, there would be no question. What they did instead was  
12 produce a totally deficient log.

13 THE COURT: Why is it deficient?

14 MR. COHEN: OK. It's deficient because it lists 300  
15 of the 500 items as including attachments without telling us  
16 anything about the attachments. Now, Mr. Blackman says it  
17 might be a draft brief that someone from Cleary was sending to  
18 someone. I pointed out to your Honor four entries on the log  
19 where Argentina was sending attachments to its lawyers. Who  
20 knows what those attachments are and whether they are lists of  
21 assets in France or Belgium that everyone agrees is not  
22 privileged? They didn't tell us anything about 300 items on  
23 the log.

24 THE COURT: Wait a minute. Now, when you say they  
25 didn't tell us anything about 300 items, point out some

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1 examples, please.

2 MR. COHEN: On the sheet that I handed up, your Honor,  
3 it's page 58 in the bottom right-hand corner.

4 THE COURT: Just a minute. I've got 58. OK.

5 MR. COHEN: The last four items on that page, Nos. 496  
6 through 499, and let's just look at the columns going across.  
7 It says document type. It says for all four of those email and  
8 then some attachment. It doesn't say what. Attachment is not  
9 a document type. It is what happens to a document. It's not a  
10 memo, it's not a draft brief, it's not a list of assets. It's  
11 nothing, it's just something is attached to this email, and  
12 it's from the client to the lawyer, asking for legal advice.  
13 You can't disguise factual information and withhold it from  
14 your adversary by attaching it to an email to your lawyer  
15 seeking legal advice.

16 THE COURT: Wait a minute. Wait a minute. Wait a  
17 minute. Let me follow you carefully. Can we take an example  
18 of what, 495?

19 MR. COHEN: 496, your Honor.

20 THE COURT: 496. I've got 496.

21 MR. COHEN: OK. That's an email with an attachment.  
22 Right? In the next column to the right, and it's from a person  
23 who is in the client, an Argentine person who is involved in  
24 this litigation, we're told.

25 THE COURT: Revol is an employee of the Republic?

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1           MR. COHEN: Yes. And it's to a lawyer at Cleary  
2 Gottlieb. That's Mr. von der Heyde.

3           THE COURT: All right.

4           MR. COHEN: And it's copied to a number of other  
5 people, and there's a date, which presumably is the date of the  
6 email. The privilege claim for it is attorney-client, and then  
7 it says, "requesting legal advice regarding steps in loan  
8 transaction." We don't know what the Argentine client --

9           THE COURT: Let's pause on that description.  
10 "Requesting legal advice concerning litigations regarding  
11 attachment of property"?

12           MR. COHEN: It's the one just below that, your Honor,  
13 "requesting legal advice regarding steps in loan transaction."

14           THE COURT: Which number are you on now, please?

15           MR. COHEN: 496.

16           THE COURT: Let me make sure I'm on 496. All right,  
17 496, "requesting legal advice regarding steps in loan  
18 transaction." Now what's the problem there?

19           MR. COHEN: Your Honor, the problem is we have no way  
20 of knowing what the Argentine client attached to the email that  
21 it sent to its lawyer seeking legal advice. If it sent to its  
22 lawyer an attachment that independently is a document that  
23 discloses something about Argentina's assets, it's not  
24 privileged.

25           THE COURT: Say that again.

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1           MR. COHEN:  If the attachment to this email, and all  
2   it says is email and attachment, doesn't describe what the  
3   attachment is, but the Argentine client apparently sent an  
4   email with something attached.  We don't know what that is.

5           THE COURT:  Are we still on 496?

6           MR. COHEN:  496.

7           THE COURT:  I guess I lost 496.  Let me go back to  
8   that.

9           MR. COHEN:  Sure.

10          THE COURT:  "Requesting legal advice regarding steps  
11   in loan transaction."

12          MR. COHEN:  Right.

13          THE COURT:  Now what's the problem there?

14          MR. COHEN:  If you go all the way back to the  
15   left-hand column, all the way to the left, where it says  
16   "email, attachment," that's what they claim is a type of  
17   document.  An attachment is not a type of document.  We don't  
18   know what was attached to that email seeking legal advice.  If  
19   it was a list of assets, it's not privileged.  If it was some  
20   other document that wasn't created simply for the purpose of  
21   seeking legal advice, it's not privileged.

22          Now, Mr. Blackman says one document might have been a  
23   draft brief that went from Cleary to its client.  Well, you  
24   list draft brief.  You don't just say attachment.  Here it's  
25   the client sending something to its lawyer, and they won't tell

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1 us, even describe what it is. It could be annual report. It  
2 could be draft prospectus. It could be anything, but it's not  
3 protected by the privilege simply because it's sent by  
4 Argentina to Cleary. They have to describe what the document  
5 that was attached is so we can determine if it's entitled to  
6 the privilege.

7 THE COURT: Now let me ask you this. There are a  
8 total of about 500 items here, right?

9 MR. COHEN: Yes, your Honor.

10 THE COURT: Now, you've said this, but I'm going to  
11 ask you to repeat it. This, what you call the inadequate  
12 description, pertains to how many; all of them or 300 of them,  
13 or what?

14 MR. COHEN: 300 of them have this defect, the failure  
15 to describe what an attachment is. Another 100 of them have  
16 the defect of the ListServ; that is, they don't tell us who is  
17 on the list. They just say we sent it to this distribution  
18 list, but they can't tell us who those people were. And I  
19 should say in some cases both of those defects apply to a  
20 single document; that is, it has an attachment undescribed and  
21 it was sent to some ListServ and we don't know who they are.  
22 And, your Honor, the pervasive defect, which they have now  
23 cured, was that they gave us a log that didn't describe who  
24 these people are. They gave us a list of to's and from's, and  
25 the explanation for why that was adequate is Mr. Cohen knows

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1 who these people are. Well, quite frankly, I didn't know who a  
2 lot of these people are, and that's not how a privilege log is  
3 done. You do a privilege log so that the log can be given to  
4 someone who can look at it and, on its face, determine whether  
5 the privileges apply. You're not supposed to bring your own  
6 knowledge to a privilege log, say, Oh, yeah, I remember that  
7 guy, he's a Cleary lawyer.

8 THE COURT: Let's stick to 496 for a moment. How do  
9 you believe 496 should have been worded? What description  
10 should have been there, in your view?

11 MR. COHEN: It should say attachment.

12 THE COURT: The reason I ask is to me this is the  
13 essential question. If you're objecting to this as being  
14 inadequate, what do you say would be adequate?

15 MR. COHEN: Yes. What would be adequate would be  
16 compliance with the local rule with respect to the attachment,  
17 so whatever that attachment is needs to be described; that is,  
18 the type of document. So is it a memo? Is it a prospectus?  
19 Is it a letter? Whatever it is must be described by its  
20 nature. The date must be given. If it's a communication from  
21 someone to someone, that must be given. Mr. Blackman is  
22 exactly right; it has to be done in a way that doesn't disclose  
23 privileged information, but that's done all the time. You  
24 describe a document by its objective characteristics and you  
25 don't give any of the privileged information.

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1           THE COURT:  OK.  Just a minute.  I have before me the  
2 rule and I can't put my hands on it at the moment, but you're  
3 really saying that we have a local rule and this didn't comply  
4 with the rule.  That is not just a matter of your thinking  
5 process; this is a rule.

6           MR. COHEN:  Right.  It's a rule.  It wasn't complied  
7 with, and the rule's purpose is to allow the party receiving  
8 the privilege log to be able to determine if all of the  
9 documents on the log are entitled to privilege.  And without  
10 the description of this document, who saw this document, I'm  
11 talking about the attachment, the attachment to the email, I  
12 have no way of knowing.

13           THE COURT:  Let me interrupt you.

14           MR. COHEN:  Yes.

15           THE COURT:  When you were talking a moment ago, I  
16 didn't have the rule before me.  I have the rule before me.  
17 Why does this not comply with the rule, rule 26.2, or whatever  
18 it is?

19           MR. COHEN:  Because an attachment is not a type of  
20 document that is required to be described.  You must say  
21 memorandum or letter, as the rule says.  An attachment is just  
22 what has happened to some document.  It doesn't tell us the  
23 author of the document.

24           THE COURT:  Let's go slowly through it.

25           MR. COHEN:  Sure.

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1           THE COURT: The general subject matter of the document  
2 is stated, isn't it?

3           MR. COHEN: No, we don't know that.

4           THE COURT: Isn't that in the last column?

5           MR. COHEN: We suspect that's in the cover letter or  
6 email. The email says, We would like legal advice about X and  
7 enclosed is Y. We don't know what Y is. Maybe Y is also a  
8 request for legal advice, in which case you should describe the  
9 attachment as being a request for legal advice, but if it's a  
10 list of assets --

11          THE COURT: I want to get into very specifics.

12          MR. COHEN: Absolutely, your Honor.

13          THE COURT: OK. We've got the rule, 26.2. We've got  
14 this group of items, including 496. Now why does not 496, item  
15 496 on the privilege log, comply with the rule?

16          MR. COHEN: Because what we have been told in item 496  
17 is that an email was sent on August 10 from this person at  
18 Argentina to Cleary.

19          THE COURT: All right. Just a minute. Just a minute.  
20 I'd like to go down the rule. Doesn't 496 say the type of  
21 document; that is, whether it's a letter or memorandum? Does  
22 it not do that?

23          MR. COHEN: No, it does not, your Honor. It does not  
24 tell you what the attachment is. You have an email and you  
25 have something attached to it, and we don't know what was

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1 attached to that email.

2 THE COURT: All right. Wait a minute. In other  
3 words, the rule says there must be a description of the type of  
4 document, and you say to simply say email with attachment is  
5 not such a description of the type of document.

6 MR. COHEN: Exactly. Those are two separate  
7 documents.

8 THE COURT: Let's go on down.

9 MR. COHEN: Yes.

10 THE COURT: The rule says there must be a description  
11 of the general subject matter of the document. Is that not in  
12 the last column on the right?

13 MR. COHEN: It may be as to the email, your Honor.

14 THE COURT: What?

15 MR. COHEN: It may be as to the email. The email may  
16 have asked for legal advice, but we don't know what the  
17 attachment is.

18 THE COURT: All right. Just a minute. Just a minute.  
19 I want to look at 496. Under the heading of description, it  
20 says, I'm getting out of the light. Sorry. Just read that to  
21 me. I got out of the light.

22 MR. COHEN: "Requesting legal advice regarding steps  
23 in loan transaction." If I may, your Honor, let me give you an  
24 example.

25 THE COURT: Isn't that a sufficient description?

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1           MR. COHEN: Of the email, perhaps, but not necessarily  
2 the attachment. Let me give you an example, if I might.

3           THE COURT: Yes.

4           MR. COHEN: Argentina writes to Cleary and says, We  
5 need advice.

6           THE COURT: Let me interrupt you.

7           MR. COHEN: Yes, sir.

8           THE COURT: Am I to assume, and of course I can ask  
9 Mr. Blackman, but I'll stick with you for the moment. Am I to  
10 assume that the description at the end "requesting legal advice  
11 regarding steps in loan transaction," am I to assume that that  
12 only refers to the email and not to the attachment? What's the  
13 basis for that assumption?

14           MR. COHEN: We have no way of knowing. You're  
15 supposed to describe separately every document on the log, and  
16 if Argentina sends an email to its lawyer and says, We need  
17 advice with respect to a loan transaction and I'm attaching a  
18 list of our assets in Belgium, that list of assets is not  
19 protected by the privilege.

20           THE COURT: Let me switch to Mr. Blackman.

21           MR. BLACKMAN: Thank you, your Honor.

22           THE COURT: I want to ask you a very specific  
23 question.

24           MR. BLACKMAN: Yes, sir.

25           THE COURT: In the last column on the right, where it

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1 says description, and let's continue to focus on item 496,  
2 where it says "requesting legal advice regarding steps in loan  
3 transaction," does that refer only to the email or to the email  
4 and the attachment? Do you know the answer?

5 MR. BLACKMAN: I do, and the answer is both, and we  
6 said that to Mr. Cohen on page 3 of our September 25 letter,  
7 which the Court has. It's Exhibit J to the Bresnahan  
8 declaration. No, I take that back. It's Exhibit J to the  
9 Hessny declaration, their declaration. What we said on page 3  
10 of that letter of September 25, "The log's descriptions set out  
11 the subject matter of these communications, including the  
12 substance of any attachments, and thus provides you with the  
13 information necessary to determine the basis for the  
14 privilege," citing federal Rule 25(b)(5), so we told them that  
15 on September 25. This is a completely contrived issue, and  
16 what Mr. Cohen said to your Honor was quite revealing. He says  
17 we would have cured the alleged, and I would submit,  
18 nonexistent --

19 THE COURT: Repeat the latter.

20 MR. BLACKMAN: What Mr. Cohen told you in his colloquy  
21 with your Honor right now is very revealing because he said  
22 that we would have cured the alleged defect if we had only  
23 added another word saying "memo." I submit that that would  
24 have added nothing of value, and we had already told him that  
25 the description, which is required, which is the important

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1 thing in these logs, "including the substance of any  
2 attachment." So we told him that and he just overlooked that  
3 in his effort to play the game of gotcha.

4 THE COURT: Wait a minute. Where do you read that?

5 MR. BLACKMAN: This is in our letter to Mr. Cohen, my  
6 partner Mr. Boccuzzi's letter of September 25, 2015, page 3,  
7 which is Exhibit J to the declaration of Collin Hessny in  
8 support of the plaintiffs' motion, and I'll repeat again, we  
9 told him, "the log's description set out the subject matter of  
10 these communications, including the substance of any  
11 attachments."

12 We told him that. If he had wanted to follow up  
13 instead of running to court, he could have done that, and I  
14 said earlier we are more than open to doing that. And if he  
15 wants to we can add for each of these references to attachments  
16 memo dated so-and-so, but it won't change the substance,  
17 because the description's already there. It will take a lot  
18 more work, and we were doing this in a period of two weeks in  
19 the end of the summer. So I think that really should put that  
20 issue to bed, your Honor.

21 THE COURT: What you're saying is if there is a desire  
22 on the plaintiffs' part for more specifics, you're willing to  
23 discuss such a request, right?

24 MR. BLACKMAN: Absolutely, yes, your Honor.

25 I just wanted to say a couple of other things, because

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1 I'm cognizant of the clock. Mr. Cohen again, I think,  
2 seriously misdescribed the reality when he said this has been  
3 going on since September 13, 2013. That's when your Honor  
4 ordered the discovery. The Court will recall that there was an  
5 appeal after that, and we went all the way up to the Supreme  
6 Court. We lost, but all of that was about the substance of the  
7 discovery. The issue of privilege log was never raised until  
8 after your Honor's order in August of this year. We promptly,  
9 in two weeks, provided a privilege log. They waited two weeks  
10 to complain about it. We responded in this letter of September  
11 25, and that's what we're here about today, so it's completely  
12 wrong to say this issue of the privilege log has somehow been  
13 at issue for years. It's been at issue for two months. OK?

14 And as I said earlier, and they haven't disagreed, in  
15 this case, the practice has not been to provide privilege logs.  
16 Aurelius gave us discovery in 2011, when we were discussing the  
17 patent issue, the Court may recall. They didn't give us a  
18 privilege log. We didn't run in and say they've waived their  
19 privilege. They simply said we're not providing privileged  
20 documents. That was fine. Mr. Cohen, the clients, NML and  
21 Aurelius, provided some limited discovery on the famous issue  
22 of DFICI, domestic foreign currency indebtedness, which is still  
23 before the Court. They didn't give us a privilege log. We  
24 didn't run to court screaming that they'd waived their  
25 privilege. This privilege loge issue, which has been around

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1 for two months, is, I respectfully submit, a contrivance and as  
2 I said and I repeat, we are happy to work with them. If they  
3 have an issue about any specific description here about the  
4 attachment, we can deal with it. We've already dealt with the  
5 issue of who is who, which they already knew, but the point is  
6 this is how this is dealt with in case after case, including  
7 the Symbol Technologies case involving Mr. Cohen's own law  
8 firm.

9 Judges are fair people and your Honor certainly is,  
10 and they don't play gotcha because there's some issue about a  
11 privilege log. These cases that have deemed waivers occur when  
12 there's been massive noncompliance: no log after orders to  
13 produce a log; logs that don't give any information about the  
14 document. We're hundreds of miles away from that situation  
15 here, and since it's 1:30, unless the Court has any questions,  
16 I will end there.

17 THE COURT: We're going to adjourn in just a minute,  
18 because I know people have commitments. The thing is that I am  
19 reserving decision on any motions that are now before me and I  
20 will not attempt to dictate from the bench any decision.  
21 Decision is reserved. But as long as we are here, I think you  
22 undoubtedly know my view of what I'm going to talk about now,  
23 and that is, there are issues and there are points on both  
24 sides on the privilege log and I'll take those into account in  
25 deciding that.

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1           The bigger, bigger issue is getting the entire  
2 litigation disposed of, and I certainly, under no  
3 circumstances, can get into a commentary on the political  
4 situation in the Republic of Argentina, but there are  
5 developments, and the thing is that I appointed, in a formal  
6 appointment, Daniel Pollack to assist in negotiating a  
7 settlement. It is my information that there was no willingness  
8 on the part of the Republic to negotiate during the last  
9 several months. I earnestly hope that that unwillingness can  
10 be put behind everybody and that there can be, with  
11 Mr. Pollack's assistance, a negotiation of a settlement. It is  
12 the only way this case will be terminated and disposed of. It  
13 is the only way, and so what's been discussed today has been of  
14 interest and of importance and needs to be decided. All the  
15 issues need to be decided, but what must be understood beyond  
16 all of that is the need to negotiate a settlement of the  
17 overall litigation, and let us hope that that can go forward.

18           With that, we are adjourned.

19           MR. BLACKMAN: Thank you, your Honor.

20           (Adjourned)

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