

In The Matter Of:
CHEVRON CORPORATION, v
STEVEN R. DONZIGER, et al.,

CORRECTED
October 17, 2013

SOUTHERN DISTRICT REPORTERS
500 PEARL STREET
NEW YORK, NY 10007
212 805-0330

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1 THE COURT: And therefore?
2 MS. LITTLEPAGE: Therefore, it is some evidence that
3 you can identify pits from aerial photographs.
4 THE COURT: It's for that purpose?
5 MS. LITTLEPAGE: Yes, sir.
6 MS. NEUMAN: No objection for that purpose.
7 THE COURT: Received for that limited purpose.
8 (Defendants' Exhibit 591 received in evidence)
9 Q. Ms. McMillen, when you were talking about judicial
10 inspections, did Chevron have a policy of pre-inspections?
11 A. The technical team for Chevron did conduct pre-inspections.
12 Q. Can you describe for the Court what a pre-inspection is?
13 A. It changed or varied over time and for different purposes.
14 I know I went on some pre-inspections before the judicial
15 inspections started because I had never been to Ecuador. I
16 never worked for Texaco. I hadn't seen any of the sites so we
17 went down and looked at several of the sites that were on the
18 judicial inspection requested site list.
19 Q. Would Chevron know ahead of time which was the next site
20 that was going to be visited by the judge?
21 A. I believe generally the court would order -- went in
22 basically the order that they were listed, unless there was
23 some reason not to, and I can't recall. And the judge would
24 notify the legal team ahead of time, he would schedule a
25 judicial inspection, and so there was some notice, some amount

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1 of time before we knew we would be there.
2 Q. If you turn to tab 23, Defendants' Exhibit 592.
3 Can you confirm that this is a document discussing
4 judicial inspections and a layout for judicial inspections?
5 THE COURT: Why don't we start with this.
6 Have you seen this before, Ms. McMillen?
7 THE WITNESS: I have seen this before.
8 THE COURT: All right. What is it?
9 THE WITNESS: This is a table for the summary of
10 sampling and testing program for the Sacha Norte production
11 station.
12 THE COURT: Prepared by who?
13 THE WITNESS: That was prepared by Bjorn Bjorkman, who
14 was a Chevron nominated judicial inspection expert.
15 MS. LITTLEPAGE: We move to admit Defendants' Exhibit
16 592.
17 MS. NEUMAN: No objection.
18 THE COURT: Received.
19 (Defendants' Exhibit 592 received in evidence)
20 Q. If you turn to page 2, under sampling activities, the box
21 which starts, "Collect soil samples at four or more locations
22 surrounding the site using locations that the PI team has shown
23 to be clean." Can you tell me what the PI team is?
24 A. It's an abbreviation for pre-inspection.
25 Q. When Chevron conducted the pre-inspections, would Chevron

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1 take samples of the site ahead of the time for the official
2 judicial inspection?
3 MS. NEUMAN: Objection. Relevance.
4 THE COURT: Overruled.
5 A. Sometimes.
6 Q. And would Chevron have those samples analyzed?
7 A. Yes.
8 Q. Would Chevron look to see if the samples showed impact
9 versus clean?
10 A. I would look at all the pre-inspection data and just look
11 at what the results were in general.
12 Q. Would some of the results show impact and some of the
13 results show clean?
14 MS. NEUMAN: Objection. Vague.
15 THE COURT: Overruled.
16 A. Sometimes there would be hydrocarbons that would be
17 detected in samples or other compounds detected in samples.
18 Q. Was Chevron's judicial inspection protocol, as reflected in
19 Defendants' 592, that there would be a collection of soil
20 samples at four or more locations surrounding the site, using
21 locations that the pre-inspection team had shown to be clean?
22 MS. NEUMAN: Objection. It misstates the evidence.
23 THE COURT: It's a question. Overruled.
24 A. This was Mr. Bjorkman's plan for this particular site, and
25 what he is referring to here is taking perimeter samples. And

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1 the reason I believe he was doing that was because of the
2 plaintiffs' claim that there was widespread contamination, and
3 so he was striving to delineate where there were impacts and
4 where there were not.
5 Q. The word clean would mean a sample that had been tested to
6 show no contamination or limited contamination?
7 Let me ask another question. Would clean mean no
8 contamination?
9 A. Mr. Bjorkman wrote this. I assume he probably means that
10 there was no or very little concentration of hydrocarbons
11 present.
12 Q. Was it Chevron's practice to use the pre-inspection data to
13 collect samples at sites during the judicial inspection that
14 Chevron already knew was clean from the pre-inspection?
15 A. Well, this document is specific to Sacha Norte 1. So this
16 document doesn't reflect what other nominated experts did at
17 different sites.
18 I'm sorry. I am trying to answer your question, but I
19 think your question is broader than this document perhaps.
20 Q. Yes. And then I was going to ask you a more specific
21 question about this document.
22 My broader question is, did Chevron have a protocol to
23 sample during the judicial inspection sites that Chevron
24 already knew was clean based on the pre-inspection analysis?
25 THE COURT: Chevron didn't pick the sites or did it?

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1 How were the sites determined?
2 I am asking the witness, not the lawyer.
3 THE WITNESS: The judicial inspection sites were
4 requested by both parties. So some were requested by Chevron
5 and some were requested by the Frente, and they would be well
6 sites or production sites.
7 Q. The sample locations, did the parties get to choose or at
8 least have some input into which locations in that site were
9 sampled during the judicial inspection?
10 A. The way I observed the judicial inspection process
11 occurring was that the attorneys for each side would discuss
12 with the judge or point out to the judge certain features of
13 the site, and would suggest sampling of certain features of the
14 site, and the judge would then order the experts to take
15 samples or he would kind of affirm the request from both legal
16 teams.
17 Q. Were the pre-inspections sample analysis submitted to the
18 court in Lago Agrio?
19 A. No. It was my understanding that they were inadmissible.
20 Q. Did the plaintiffs' group know that Chevron was conducting
21 pre-inspection sampling before the official judicial
22 inspections?
23 A. Yes.
24 Q. How did they know?
25 A. I know that we asked through the court for access to some

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1 sites, so that request would have been filed with the court.
2 And, also, I know that the technical teams would see each other
3 at sites.
4 Q. On the last column in the analysis column it indicates,
5 "Samples showing field evidence of contamination are sent to
6 new field for PAH analysis."
7 First of all, what is field evidence of contamination?
8 A. This is Mr. Bjorkman's document again, but I believe what
9 he would be referring to, if he saw visible evidence of
10 hydrocarbons, that it would be sent to new fields for this type
11 of analysis.
12 Q. Did Chevron take videotapes, video record the
13 pre-inspection process?
14 A. Sometimes.
15 Q. Were those video recordings submitted to the Lago Agrio
16 court?
17 A. I only recall one occasion where that was done, and that
18 was at Sacha 14 where there was a video showing Petroecuador
19 remediating a spill at the site.
20 Q. Other than the one occasion at Sacha 14, did Chevron submit
21 their pre-inspection video recordings to the court in Lago
22 Agrio?
23 A. Not to my knowledge.
24 Q. Were the pre-inspection videos provided to the plaintiffs'
25 group in the Lago Agrio case?

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1 MS. NEUMAN: Objection. Work product.
2 THE COURT: That's a question. It's a yes or no.
3 They either were or weren't. We are not talking about why.
4 THE WITNESS: Not to my knowledge.
5 THE COURT: How much longer with the witness, please?
6 MS. LITTLEPAGE: I am actually entering an area that I
7 need to approach the Court with. You told us there was some
8 issues that you wanted us to approach you on before we asked
9 questions, and I want to notify the Court of that now.
10 THE COURT: All right. And if that were to go
11 forward, how long? And if it were not, are you done?
12 MS. LITTLEPAGE: If it were not, I am done in about
13 five minutes. It's a distinct topic.
14 THE COURT: We will take a short break and I will see
15 counsel and the reporter in the robing room and we will deal
16 with this.
17 (In robing room)
18 THE COURT: What's up, Ms. Littlepage?
19 MS. LITTLEPAGE: There are two issues. I will
20 highlight them. The first is the pre-inspection videotapes.
21 THE COURT: Yes.
22 MS. LITTLEPAGE: The second is Chevron's lab results
23 from the judicial inspections.
24 Let me start with the first one. As I have
25 established with the witness, Chevron did pre-inspections,

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1 recorded themselves, and those results were not filed in the
2 Lago Agrio record. We received copies of about 50 -- is that
3 right? A box of tapes was left at Amazon Watch anonymously.
4 We notified Chevron that we had received this box of tapes,
5 because when Amazon Watch watched them, it was clearly
6 videotapes of Chevron sampling the sites before the official
7 judicial inspection.
8 Several months went by. We did not hear from Chevron.
9 My understanding is those tapes were filed in some court
10 proceeding, and the day that they were filed in the court
11 proceeding there was a --
12 THE COURT: Filed by who?
13 MS. LITTLEPAGE: By the plaintiffs.
14 THE COURT: By your side.
15 MS. LITTLEPAGE: Yes. They were filed by our side in
16 a legal proceeding.
17 THE COURT: In this country?
18 MS. LITTLEPAGE: In this country. That same day or
19 very contemporaneously Chevron asserted a privilege over the
20 videotapes as a work product privilege.
21 That issue has come to the court peripherally, as I
22 understand it from looking at the record. We asked for a
23 30(b)(6) witness to question the witness about the inspection
24 videos. The court allowed us to do that and Ms. McMillen was
25 put up as the 30(b)(6) witness. She did identify that they are

<p>DAH8CHE6 McMillen - cross Page 491</p> <p>1 in fact pre-inspection videos, that she had seen them, and they 2 were Chevron employees, she recognized the people. It is in 3 fact the Chevron tapes. But the privilege issue has -- the 4 special master did not allow any substantive questions on the 5 issue, and I don't believe this Court has ever ruled 6 specifically on the work product privilege of the issue. And 7 because Ms. McMillen is here and would be the person through 8 which I would put the pre-inspection videos into the record. 9 THE COURT: Did the special master rule on the 10 privilege issue? 11 MR. MASTRO: Yes, your Honor. 12 MS. LITTLEPAGE: From my review of the deposition, 13 that is not what happened. My review of the deposition is 14 Chevron took the position. The court had already ruled on the 15 privilege. The defendants took the position that the fact that 16 the court had allowed us the deposition indicated that there 17 was some discovery permitted on the issue. But we were allowed 18 to ask authentication questions so that we could at least prove 19 that they weren't just dummy tapes, they are in fact what they 20 are. 21 THE COURT: Did you ask questions going beyond 22 authentication, objections to which were sustained? 23 MS. LITTLEPAGE: Yes, sir. 24 THE COURT: Did you appeal it? 25 MS. LITTLEPAGE: That I don't know.</p>	<p>DAH8CHE6 McMillen - cross Page 493</p> <p>1 Ms. Littlepage is new to the case so I would like to see what 2 notice we were given by Amazon Watch. The first we found out 3 that they had improperly obtained our work product was when it 4 ends up being filed in another case and we asserted work 5 product. 6 Then what happens? Despite your Honor's ruling, they 7 try and bring it in before Special Master Katz. And Special 8 Master Katz, after allowing them foundational type questions, 9 expressly ruled, "The videos clearly fall within the work 10 product privilege." That's McMillen deposition, page 196, 11 lines 1 and 2. And he further held expressly, same page, lines 12 3 through 5, that the videos "were made at the direction of an 13 attorney for the purposes of prelitigation investigation." 14 And then there was no appeal, end of story. 15 We have demanded these videos back time and time again 16 after your Honor's ruling and after Special Master Katz's 17 ruling. They have refused even though they have obtained them. 18 We don't know how they obtained them, but obviously in some 19 surreptitious means, and now they are trying to introduce them 20 here. I hope the Court will have none of it. They are beyond 21 the point where they can possibly raise this issue. 22 THE COURT: Let me go to the next point. Assuming I 23 were to disagree so far, what do you say these prove? 24 MS. LITTLEPAGE: There is assertions in Ms. McMillen's 25 witness statement that the plaintiffs -- I don't have her</p>
<p>DAH8CHE6 McMillen - cross Page 492</p> <p>1 MR. MASTRO: No, your Honor. I was actually at the 2 deposition. 3 MS. LITTLEPAGE: I think Mr. Gomez was there. 4 MR. DONZIGER: I was there too. This a little 5 challenging because counsel is so new. But my recollection is 6 we never actually showed the videos. Special Master Katz 7 determined that threshold issue, I believe, that it was work 8 product and prevented us from showing the videos. 9 We had copies of the videos. We had edited them down 10 to coherent short versions that we felt could be appropriately 11 shown to the witness for various reasons, and we were told we 12 were not allowed to do that. We never showed them. 13 THE COURT: Did you appeal Judge Katz's ruling? 14 MR. GOMEZ: No, we did not. 15 THE COURT: Mr. Mastro, what is your side of it? 16 MR. MASTRO: Your Honor, I will be very brief. This 17 isn't a new issue to your Honor. Your Honor ruled back on 18 March 13 that -- 19 THE COURT: It seems like a lifetime ago. 20 MR. MASTRO: It does to all of us, your Honor, except 21 the new folks who are here. Your Honor ruled, in view of the 22 fact that the Ecuador pollution case is not to be retried here, 23 these videos are not relevant. That's docket entry 901 at 24 pages 2 and 3. 25 Then, of course, this issue was broached. And I know</p>	<p>DAH8CHE6 McMillen - cross Page 494</p> <p>1 statement in front of her, but basically she discusses the 2 conduct of the parties at the judicial inspections, and one of 3 the things she talks about is her perception that the 4 plaintiffs would tap their foot at a certain area and make sure 5 that the judicial samples happened at that area. 6 So for the full context, and we are here on the state 7 of mind of Mr. Donziger and what was or was not his state of 8 mind as to the appropriate conduct at the judicial inspections, 9 I think it's important for the Court to understand the context 10 that the defendants were at the judicial inspections with 11 pre-inspection sample data, that they knew where was impacted 12 and where was clean, and that they requested site samples at 13 the judicial inspection process of areas that they knew to be 14 clean. 15 THE COURT: What is the evidence of that? 16 MS. LITTLEPAGE: The document I just discussed with 17 Ms. McMillen. 18 THE COURT: Really? 19 MS. LITTLEPAGE: I think it is some evidence that 20 their expert, in his own judicial inspection report -- 21 MS. NEUMAN: I think we are confusing Ms. McMillen's 22 statement. 23 THE COURT: One thing at a time. 24 Continue with what you think they prove and why. 25 MS. LITTLEPAGE: I think that they put a full context</p>

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1 on the assertions and allegations raised as to the conduct --
2 THE COURT: That may be, but so does the
3 constitutional history of Ecuador put a full context on it.
4 What do you think it proves that is material to this
5 case?
6 MS. LITTLEPAGE: I think it proves two things, and we
7 are going to get to the second part in just a minute, but I
8 think it proves that those pre-inspection sample results were
9 not submitted to the court.
10 THE COURT: Are you suggesting there was any
11 requirement that that be done?
12 MS. LITTLEPAGE: No.
13 MR. FRIEDMAN: May I speak?
14 THE COURT: Sure. Go ahead.
15 MR. FRIEDMAN: In my view, there are two ways to look
16 at this information. One would be that Chevron is going ahead
17 to the sites that it knows are going to be inspected. It's
18 taking samples ahead of time so that, to use a euphemism, it
19 can cheat.
20 THE COURT: That's your argument. But in a minute we
21 are going to see why that is at best a stretch.
22 MR. FRIEDMAN: It might be a stretch. I acknowledge
23 that.
24 The other way to look at this evidence is to say there
25 is nothing improper about doing that. If the parties have

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1 knowledge ahead of time that there are areas that are clean,
2 and therefore indicate to the judge ahead of time, it's OK,
3 we'd like you to do here or sort of signal we want you to do
4 here or there, that that's perfectly appropriate.
5 Either one of those helps our case because Chevron's
6 position is that we had ahead knowledge of where the
7 contaminated areas were, and we were signaling for people to do
8 samples there, and that that was improper. So it's either
9 improper or it's cheating. I mean, it's either improper or
10 it's OK, and whichever one it is helps us, and this evidence
11 shows that, in essence, both sides were doing the same thing.
12 MS. LITTLEPAGE: May I add one thing? The
13 pre-inspection videotapes do indicate that Chevron is finding
14 impacted areas, to use Ms. McMillen's words. You do see on the
15 videotape, as they take the samples, there is a discussion of
16 the smell of the oil in the soil and the texture of the soil.
17 There is a closeup of the mud where you can see sort of a
18 viscous fluid to the mud. The pre-inspection videos do show
19 that there is at least advance knowledge on Chevron's part of
20 areas that are potentially impacted and areas that are
21 potentially clean. And then they confirm it with their lab
22 testing.
23 THE COURT: So you're telling me that if you look at
24 the film, you see the dirty areas, and Chevron needed this in
25 order to determine where the dirty areas were?

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1 MR. FRIEDMAN: When you stick the core in.
2 MS. LITTLEPAGE: They go down like ten --
3 THE COURT: I appreciate all the advocacy, but let me
4 as to this first issue, the pre-inspection videos, say the
5 following.
6 Number one, you had your chance with the special
7 master. You argued the issue. You lost. You had the right to
8 appeal. You didn't. It's over on that basis.
9 Secondly, even if you hadn't lost on that basis, which
10 effectively amounts to law of the case, and I were to consider
11 the matter de novo, my view would be that it's obviously work
12 product and you don't get it anyway.
13 Third, I appreciate Mr. Friedman's candid
14 acknowledgement that the argument may be a bit of a stretch
15 with respect to this pre-inspection inspection I guess, right?
16 Actually, I read the whole document you were examining the
17 witness about, not just the parts you highlighted. It's
18 Defendants' Exhibit 592 for the record, the Bjorkman document
19 relating to Sacha Norte 1.
20 Now, you focused on line number 3 on the first page of
21 the table, and you completely ignored the very first thing that
22 is stated there. That the point here was to draw a clean line
23 around the site to show no widespread impacts. And this part
24 you did emphasize. "Locations for perimeter sampling should be
25 chosen to emphasize clean points around the pits when

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1 possible." And then adjacent to that, under sampling
2 activities, it says, To collect soil samples at four or more
3 locations around the sites using locations that the preliminary
4 inspection team has shown to be clean.
5 Now, to me it's crystal clear that the point made in
6 that line is perfectly analogous to what happens when a surgeon
7 operates on a malignant or suspected malignant tumor. There is
8 a tumor. You want to know if it is malignant, and if it is
9 malignant, you want to know how far out, from what is
10 observable with the naked eye and then confirmable
11 pathologically, the tumor extends. And so the surgeon causes
12 the pathologist to test not only the heart of the tumor, which
13 is of course essential to identify the pathology, but what
14 appeared to be clean areas around it to ensure that when the
15 surgeon cuts -- the analogy here being remediates -- you get
16 the whole cancer. The presupposition is here we are testing
17 pits that are, to one degree or another, in colloquial terms,
18 dirty, cancerous using my metaphor. And what this line is
19 talking about is, don't assume that it spreads outward from the
20 pit infinitely. What are the limits?
21 Now, that's very important. It's important to what
22 damage there may have been. It's important to what, if any,
23 remediation there ought to be. It's important to what that
24 remediation might cause. But that's not all that is in this
25 document. Because on the last page of the table, in line

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1 number 7, in sampling activities, it talks about collecting
2 representative samples from within the pit spill area or other
3 potential area of concerns. If plaintiff sample is not a
4 representative sample of pit area conditions, do not take a
5 split of the sample but collect an independent representative
6 sample. And then a little later down it talks again about
7 perimeter sampling.

8 So the suggestion that I took -- maybe it's not what
9 you intended, but that I took -- was that you were suggesting
10 something nefarious about perimeter sampling, the implication
11 being that there was an attempt by perimeter sampling to get a
12 dirty location to test clean, when in fact the thrust of the
13 document on its face is to define what the area of dirt, if
14 there is one, is and beyond which it doesn't extend any
15 further.

16 So, look, you will argue what you're going to argue
17 about it, but it's to me, at least at first blush, and maybe
18 there will be more evidence, just not quite what I at least
19 took the implication of the line of examination to be, perhaps
20 wrongly. But the bottom line of it all is no pre-inspection
21 videos.

22 Now, let's go to your second issue.

23 MS. LITTLEPAGE: My second issue, Judge, is tab 27.
24 It is a collection of --
25 THE COURT: So this is Plaintiff's Exhibit?

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1 MS. LITTLEPAGE: Defendants' Exhibit 1425.
2 THE COURT: Defendants' Exhibit.
3 MS. LITTLEPAGE: Yes, sir.
4 THE COURT: I'm sorry. You're right. We all get
5 conflicted and mixed up on this.

6 MS. LITTLEPAGE: Defendants' Exhibit 1425 is a few, I
7 think I chose 12 or 13, lab results of various different
8 judicial inspection sites. These are all lab results from
9 Chevron's expert's judicial inspections.

10 MS. NEUMAN: Do you mean filed in the record with
11 their report?
12 MS. LITTLEPAGE: Yes. But it's not the report; it's
13 just the lab data.
14 THE COURT: And so?
15 MS. LITTLEPAGE: Judge, I know you heard Mr. Friedman
16 talk about this in opening statement. From reviewing the
17 record, it appears that the Court and Chevron was clear earlier
18 this year of narrowing the focus of this trial. The language
19 being the discrete inquiry was whether there were findings
20 untainted by fraud in the Ecuadorian record that supported the
21 verdict. And having read the Court's order, we have tried to
22 tailor our case to the discrete inquiry that was reflected in
23 that order. And this is Chevron's evidence, and there is no
24 allegation Chevron's experts were tainted by fraud.
25 THE COURT: Not that we have heard so far.

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1 MS. LITTLEPAGE: No allegations in the complaint on
2 that issue.
3 THE COURT: Or the answers.
4 MS. LITTLEPAGE: Or the answers. And this is a series
5 of lab results from Chevron's experts that show elevated levels
6 of various chemicals and products, at various different sites,
7 that is some evidence untainted by fraud in the Ecuadorian
8 record to support the verdict.

9 So narrowing our case according to that inquiry, I
10 would like to move to admit Defendants' Exhibit 1425 to address
11 that specific part of the discrete inquiry.

12 THE COURT: What does Chevron have to say?
13 MR. MASTRO: Your Honor, it seems to me that this goes
14 to the very heart of the line that has been drawn in this case.
15 This is an attempt to cherry pick a few test results and put
16 them into the record. We don't know whether these are sites
17 that Petroecuador continued to work at afterwards, what the
18 sources of the pollution are. This really is just an attempt
19 to cherry pick to litigate the merits at certain sites.

20 We are talking about fraud on a massive scale and the
21 ghostwriting of a court expert's report and then the judgment
22 itself. We are not talking about cherry picking a few data
23 results. Now we are going to have to go back and litigate the
24 dozen results here, and I am going to have to go back and point
25 out how that test result happened to have been a Petroecuador

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1 subsequent pit or the levels were not high enough to constitute
2 something. That is going right to the merits. It's not what
3 we are supposed to be doing and there is not evidence in the
4 record to support an \$18.2 billion judgment. So if we get into
5 these kind of weeds, we are going down a path that both your
6 Honor and we committed not to go.

7 THE COURT: This exhibit is part of the Lago Agrio
8 record, is that right?
9 MS. LITTLEPAGE: Yes, sir.
10 THE COURT: Now, is it being represented to me that
11 this is all there is in that record on that subject?
12 MS. LITTLEPAGE: No, sir. No. But the discrete
13 inquiry in the Court's order says any findings untainted by
14 fraud. I was bringing the Court some findings, certainly not
15 all findings.

16 MR. MASTRO: This isn't a finding.
17 THE COURT: This is a joke, OK. Please understand
18 it's a joke. You're going over to that record and you're
19 tapping your foot by the judge about which part of it you want
20 me to look at. Is that about it?
21 MS. LITTLEPAGE: No, sir. But I don't think there is
22 any allegation that these records are tainted by fraud.
23 THE COURT: I understand. But what about others that
24 may not be tainted by fraud?
25 MR. MASTRO: This isn't a finding at all. This is