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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 ESSO EXPLORATION AND  
4 PRODUCTION NIGERIA LIMITED, *et*  
*al.*,

5 Plaintiffs,

New York, N.Y.

6 v.

14 Civ. 8445 (WHP)

7 NIGERIAN NATIONAL PETROLEUM  
8 CORPORATION,

9 Defendant.

-----x

10 February 17, 2017  
11 10:45 a.m.

12 Before:

13 HON. WILLIAM H. PAULEY III,

14 District Judge

15  
16 APPEARANCES  
17 (via telephone)

18 FRESHFIELDS BRUCKHAUS DERINGER US LLP

19 Attorneys for Plaintiffs

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25 JOSHUA D. ANDERS

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1 (In the robing room)

2 THE COURT: Good morning. This is District Judge  
3 Pauley. You are on a speakerphone in my robing room and a  
4 court reporter is present, recording what's being said.

5 Would counsel for petitioner give his appearance.

6 MR. LIVSHIZ: Good morning, your Honor. David  
7 Livshiz, from Freshfields Bruckhaus Deringer U.S. LLP, for  
8 petitioners. With me are my colleagues Elliot Friedman and  
9 Shannon Leitner.

10 THE COURT: Good morning, Mr. Livshiz.

11 MR. LIVSHIZ: Good morning, your Honor.

12 THE COURT: Would counsel for the respondent give her  
13 appearance.

14 MS. MOSS: Good morning, your Honor. This is Cecilia  
15 Moss, from Chaffetz Lindsey, for NNPC, and with me are my  
16 colleagues Andreas Frischknecht and J.D. Anders.

17 THE COURT: Good morning, Ms. Moss.

18 I have received the parties' letters concerning the  
19 discovery dispute, including one that came over the transom  
20 very late last night.

21 Would one of you bring me up to speed as to whether  
22 any agreements have been reached by the parties with respect to  
23 the issues presented in these letters?

24 MR. LIVSHIZ: Good morning, your Honor. David Livshiz  
25 for the petitioners.

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1           No. Since our last letter last night, no agreements  
2 have been reached. We continue to be at an impasse in these  
3 three categories of documents.

4           THE COURT: Let me hear briefly first from you,  
5 Mr. Livshiz, with respect to the U.S.-based bank account  
6 documents.

7           MR. LIVSHIZ: Sure, your Honor.

8           Just it's been a while since we have been before you,  
9 so if I could take just a minute to set the table.

10           Petitioners have a relationship with the Nigerian  
11 National Petroleum Corporation, which I will refer to as  
12 "NNPC." A dispute arose and was subject to arbitration, and an  
13 arbitral tribunal rendered a judgment in roughly the amount of  
14 1.8 billion. Today that amount, with interest, your Honor, is  
15 about 2.5 billion. That judgment has been subject to  
16 litigation in Nigeria but, meanwhile, petitioners have brought  
17 this action here to confirm the arbitral award.

18           In 2015, when NNPC first appeared, it indicated its  
19 desire to make a dismissal motion, including on the basis of  
20 jurisdiction, and your Honor ordered jurisdictional discovery  
21 and set a briefing schedule.

22           Petitioners alleged four bases of jurisdiction, one of  
23 which, that the FSIA provides personal jurisdiction, is a  
24 purely legal matter, which your Honor will decide later on.

25           Of the remaining three, two concern the bank accounts

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1 at issue, specifically, that Nigeria, NNPC, rather, has minimal  
2 contacts with the forum, including through its purposeful and  
3 intentional use of bank accounts, and that your Honor has *in*  
4 *rem* jurisdiction over the accounts at issue.

5 Specifically, your Honor, we are looking for five  
6 categories of information in connection with any account that  
7 NNPC either uses in the United States or in which it has an  
8 interest and, specifically, that information is:

9 The identification of accounts;

10 Account opening documents;

11 Information demonstrating which entity controls the  
12 account;

13 Information demonstrating who is the beneficial owner  
14 of the account; and

15 Any agreements concerning the account between NNPC and  
16 the Central Bank of Nigeria. And the reason for that  
17 particular request, your Honor, is, as we understand it, under  
18 Nigerian law, NNPC is only permitted to hold accounts outside  
19 of Nigeria if they are held by the Central Bank on behalf of  
20 NNPC.

21 And, finally, essentially bank account statements that  
22 would allow us to identify fund flows in and out of the  
23 account. We see this as a relatively narrow category of  
24 documents that should be easily identifiable and producible by  
25 NNPC and which is relevant to the petitioners' jurisdictional

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1 theory.

2 As the Court of Appeals, New York Court of Appeals  
3 held in *Licci*, if there is intentional, purposeful direction of  
4 funds to a bank account, that can provide a basis for minimum  
5 contact. Here -- and this is Exhibit 5 and Exhibit 6 to the  
6 letter that we filed on February 10, your Honor -- NNPC  
7 directs, when it sells its oil, including the oil that  
8 petitioners allege that NNPC improperly listed from the Erha  
9 oil field and which resulted in this dispute, those funds are  
10 directed to an account in the United States and we,  
11 accordingly, would like information concerning those accounts.

12 And, in addition, your Honor --

13 THE COURT: If I could interrupt for a moment,  
14 Mr. Livshiz, though, as I understand it, NNPC claims that it  
15 has provided information about these accounts in its  
16 interrogatory responses; and, if that is true, what more does  
17 Esso seek here?

18 MR. LIVSHIZ: Your Honor, so yesterday, for the first  
19 time, NNPC provided some information about a few accounts that  
20 petitioners have specifically identified. That information is  
21 not sufficient in the following way:

22 First of all, it is does not identify all of the  
23 accounts that NNPC potentially uses, including in connection  
24 with the Erha oil field.

25 Second of all, it does not identify the funds in the

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1 account, which is relevant to your Honor's exercise of *in rem*  
2 jurisdiction.

3 Third of all, the interrogatory responses, which were  
4 marked confidential, so we could not append them to our letter  
5 last night, assert essentially that NNPC has no interest in the  
6 account. But we are certainly entitled -- we would certainly  
7 like to test that.

8 In the *Solgas Energy* case, which also concerned  
9 Nigerian documents and which we cited in our letter last night,  
10 there was a similar situation where the government of Nigeria  
11 asserted that it did not have control over the account, and the  
12 court ordered production of documents, such as account control  
13 and deposit control documents, that would provide that  
14 information. None of that was included in the interrogatory  
15 responses we received yesterday, your Honor.

16 THE COURT: All right. Let me hear briefly from NNPC  
17 on this issue relating to the U.S. bank accounts, and then we  
18 will turn to the Pricewaterhouse documents and the alter ego  
19 documents.

20 MS. MOSS: Thank you, your Honor.

21 I think, in response to what Mr. Mr. Livshiz said, I  
22 should just make a couple of points with respect to the overall  
23 dispute.

24 As your Honor may recall, the underlying arbitration  
25 was a dispute between Nigerian parties regarding a contract

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1 that was subject to Nigerian law and related to the lifting of  
2 oil off of Nigerian water. The arbitration award has now been  
3 set aside, both by the Federal High Court of Nigeria and the  
4 Nigerian appellate court on the basis that the dispute was, at  
5 its essence, a tax dispute and not a contract dispute, and  
6 there is no question that the courts in Nigeria have the right  
7 to control tax disputes relating to Nigerian taxes and Nigerian  
8 law.

9 Our position with respect to the bank accounts, as  
10 your Honor pointed out, we have provided initial interrogatory  
11 responses, we have provided a declaration in support of our  
12 motion to dismiss, and we have provided supplemental  
13 interrogatory responses which outline what, if any, connection  
14 NNPC has with these bank accounts. Today is the first time, on  
15 this call, that I have heard petitioners ask for any specific  
16 categories of information relating to bank accounts. Instead,  
17 previously, we have heard requests for all documents relating  
18 to all bank accounts in the United States, which is clearly an  
19 improper request, particularly even under the cases that  
20 Mr. Livshiz is referring to.

21 With respect to the *Solgas* case, the *Solgas* case was a  
22 post-confirmation case, where the award had been confirmed.  
23 Here we have an award that's been set aside and *in rem*  
24 jurisdiction can't be based -- *in rem* jurisdiction, under  
25 *Shaffer v. Heitner*, that's the only way you get *in rem*

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1 jurisdiction under that case is if a case court of competent  
2 jurisdiction has issued an award. Here, the courts of  
3 competent jurisdiction have set aside the award. So there is  
4 no basis for *in rem* jurisdiction and under the *CME Media*  
5 *Enterprises* case, which I think both parties cited in their  
6 letters, it is clear that *in rem* jurisdiction cannot be based  
7 on speculation about the possible existence of property.

8 What petitioners are seeking here is a fishing  
9 expedition into any possible connection with any possible bank  
10 accounts. It's far too broad a request, and there is no basis  
11 for that request at all.

12 And, importantly, with the verified interrogatory  
13 responses that NNPC provided yesterday, and NNPC has confirmed,  
14 that its sole authority with respect to the CBN bank account is  
15 to issue instructions to the Central Bank of Nigeria, to  
16 transfer from those accounts to accounts owned by or for the  
17 benefit of the government of the federation, the Nigerian  
18 government. NNPC has no authority whatsoever under Nigerian  
19 law to instruct the CBN to transfer funds from those accounts  
20 to any account in which NNPC has any legal ownership or  
21 property interest or to any other account that's not owned by  
22 or for the benefit of the government. So there --

23 THE COURT: But --

24 MS. MOSS: Go ahead. Sorry.

25 THE COURT: Here the discovery that's underway is



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1 really narrowly focused to the issue of determining whether  
2 jurisdiction is proper here in this court. I am having  
3 difficulty, given the very purpose of this focused discovery,  
4 which is jurisdictional, I am having difficulty understanding  
5 NNPC's resistance to simply producing that account  
6 information.

7 MS. MOSS: Well, your Honor, with respect to the  
8 question of jurisdiction, there is no argument in favor of  
9 general jurisdiction and there is no argument, in our opinion,  
10 in favor of specific jurisdiction. There is no connection  
11 between the underlying cause of action and the bank account.  
12 The cases that petitioners cite, there was a specific  
13 connection between the bank that were subject to discovery and  
14 the cause of action, because the cause of action in those cases  
15 arose out of the holdings or transfers in the bank account.  
16 Here, there is simply no connection to those bank accounts and  
17 there is no award, so there is no basis for *in rem*  
18 jurisdiction.

19 So I think that petitioners, in their second request  
20 for documents, ask about ten specific bank account -- 11, I'm  
21 corrected, 11 specific bank account numbers. We have  
22 explained, as I just explained to you, the relationship with  
23 two of those bank account numbers; and, with the other nine,  
24 NNPC has confirmed that it has no information, it has no  
25 connection and no information about those bank accounts in its

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1 files.

2 THE COURT: I guess here is where maybe you are losing  
3 me or I am not understanding:

4 Why are you making jurisdictional arguments when we  
5 are in a process at the moment that's designed to discover  
6 whether jurisdiction is proper? Shouldn't the argument you are  
7 making come after Esso has received the discovery that it  
8 believes it needs to weigh in on this issue?

9 MS. MOSS: Our position is they haven't made a *prima*  
10 *facie* case for personal jurisdiction here, and therefore we  
11 shouldn't have to provide more than we have already agreed to  
12 provide willingly and voluntarily.

13 THE COURT: All right. Let me --

14 MS. MOSS: And, quite frankly, I'm sorry, your Honor,  
15 if I might finish my sentence?

16 THE COURT: Yeah, I thought you had.

17 MS. MOSS: Yeah, I'm sorry.

18 I also wanted to add that, until today, as I said  
19 before, the requests were overly broad. The process of trying  
20 to search for every possible bank account number seemed unruly  
21 and unwieldy.

22 We have now heard something lightly more limited, and  
23 I wasn't able to jot it all down, but our concern was the  
24 extreme overbreadth of the request that we were trying to  
25 respond to.

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1 THE COURT: Right. I am thinking, listening to the  
2 two of you, that a further meet-and-confer on that issue might  
3 bear fruit.

4 I have another question, though, for you. When was  
5 the arbitral award vacated in Nigeria?

6 MS. MOSS: The award was vacated by the lower court  
7 prior to petitioners filing their petitioner here in the  
8 Southern District, and the appellate court affirmed the  
9 set-aside -- I am being handed -- the appellate court affirmed  
10 the set-aside decision of the monetary award on May 8, 2012.  
11 Is that right?

12 MR. LIVSHIZ: Your Honor, if I may just interject?

13 MS. MOSS: I think it's July -- so July 22, 2016, the  
14 Court of Appeals affirmed the High Court set-aside decision  
15 with respect to the monetary award.

16 THE COURT: Thank you.

17 Go ahead, Mr. Livshiz.

18 MR. LIVSHIZ: Your Honor, thank you.

19 If I may just interject, initially the Nigerian courts  
20 had set aside the award in May 2012; however, the Court of  
21 Appeals' judgment, which was rendered on July 22, 2016,  
22 reinstated the award's contractual findings, including that the  
23 arbitral tribunal had jurisdiction to determine whether NNPC  
24 breached its contractual obligation. It did uphold the lower  
25 court's decision that the tribunal should not have awarded

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1 damages. But the award has partially been reinstated, your  
2 Honor. It is not a set-aside award as it has been  
3 characterized today.

4 MS. MOSS: I think I was clear, every time I  
5 referenced it, that the monetary -- the Court of Appeals  
6 affirmed the set-aside of the monetary award, and my  
7 understanding is that petitioners seek to enforce the  
8 monetary award here in the United States, which has been set  
9 aside, and that set-aside has been affirmed by the Court of  
10 Appeals.

11 THE COURT: Let me turn for a moment to the  
12 Pricewaterhouse documents.

13 Very briefly, Mr. Livshiz, I think understand your  
14 argument, but just very briefly state your position.

15 MR. LIVSHIZ: Absolutely. Thank you, your Honor.

16 The PWC audit was performed at the request of the  
17 government of Nigeria concerning NNPC -- concerning a number of  
18 issues, including NNPC's transfers of funds into the United  
19 States and the use of, among other things, U.S. bank accounts  
20 in the marketing of oil, including in the international  
21 markets.

22 This information is relevant to a number of  
23 petitioners' jurisdictional theories, including its contacts  
24 with the United States and also including the *in rem*  
25 jurisdiction. And, your Honor, the PWC report, which is

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1 Exhibit 6, identifies, for example, on page 36, that NNPC  
2 provided PWC with documents sufficient to demonstrate  
3 transfers in and out of certain U.S. bank accounts. We think  
4 that that information is, again, narrowly tailored, and it  
5 should be easy to reproduce to petitioners here; and it is  
6 certainly relevant to our jurisdictional theories, and it is  
7 certainly proportional, given that it is a discrete set of  
8 information.

9 THE COURT: Ms. Moss, what do you mean when you say or  
10 write that the PWC audit documents cannot be recreated?

11 MS. MOSS: What I think I said is that we have not yet  
12 been able to determine whether there exists a set of documents  
13 that were provided to NNPC that were retained as a discrete  
14 set. We continue to investigate and try to figure out who at  
15 NNPC may have been responsible for providing some of those  
16 documents.

17 If you look at the last couple of pages of the PWC  
18 report, it indicate that is PWC received documents -- reviewed  
19 documents from a variety of different sources, some of which  
20 were not NNPC; and, so, whether NNPC has those documents is not  
21 clear to us, and we don't know -- it's not as if it was a  
22 litigation, where they Bates stamped documents and put together  
23 a production, as we in the United States might be familiar  
24 with.

25 We are trying to, you know, on the issue of whether --

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1 petitioner has alleged there would be no burden because, of  
2 course, all of these documents were produced once before and  
3 could easily be produced again. We are investigating on the  
4 burden issue, whether that is the case, but our position is  
5 that, again, these documents are -- this request is overbroad,  
6 and there is no connection between the cause of action and any  
7 documents related to potential bank accounts. But as I said,  
8 we continue to investigate what documents were actually  
9 provided by NNPC to PWC and where those documents are.

10 THE COURT: All right.

11 MR. LIVSHIZ: Your Honor, may I respond briefly?

12 THE COURT: Very briefly, Mr. Livshiz.

13 MR. LIVSHIZ: Thank you, your Honor.

14 Just to specifically focus the request, we are not  
15 asking for documents produced to PWC by entities other than  
16 NNPC. We are asking for documents that NNPC produced, and that  
17 is the set of documents.

18 As for the fact that the documents -- that this was  
19 not a litigation, respectfully, your Honor, this was an audit  
20 performed at the behest of the Nigerian government, and  
21 presumably NNPC took it as seriously as it would take a  
22 litigation.

23 THE COURT: All right. Let's turn to the third issue,  
24 the alter ego documents.

25 Briefly, Mr. Livshiz, do you want to be heard?

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1 MR. LIVSHIZ: Yes, your Honor.

2 Very briefly, the allegation in the petition is that  
3 NNPC is the alter ego of Nigeria, and that is based on a number  
4 of things, including that the government of Nigeria dominates  
5 NNPC's discretion in the sense that it is effectively an alter  
6 ego. And one way in which that showing can be made, as  
7 demonstrated in the *McKesson* case, to the extent that NNPC is  
8 implementing a policy of the government, that would be  
9 sufficient to establish the control required to satisfy the  
10 test.

11 We are looking for documents, including -- we have  
12 shown in Exhibit 12, your Honor, that the very conduct that  
13 resulted in the arbitration was ordered by the President of  
14 Nigeria, and we are looking for documents to continue  
15 developing that theme.

16 NNPC's arguments to the contrary is based purely on  
17 the *Banco National* case in the Second Circuit, your Honor.  
18 That case sets a standard, and it is essentially that we would  
19 need to show that the government controls NNPC. It is does not  
20 consider what would satisfy that standard. The D.C. Circuit  
21 did that in the *McKesson* case, which applies the same standard,  
22 just had a different way of establishing it, your Honor. And  
23 the documents that we seek would be essentially correspondence  
24 between NNPC and its various -- the Nigerian government,  
25 including its Department of Petroleum Resources, concerning the

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1 conduct -- the listing misconduct and the conduct in this  
2 litigation and arbitration, your Honor, where the various  
3 agencies of Nigeria have been acting as one at the direction of  
4 the Nigerian government.

5 THE COURT: Ms. Moss.

6 MS. MOSS: Thank you, your Honor.

7 With respect to the request for alter ego documents,  
8 first of all, the requests are far too broad. They have asked,  
9 not only for documents relating to NNPC's purported  
10 relationship with the government of Nigeria, but also all  
11 documents relating to its relationship with the Central Bank of  
12 Nigeria, FITR, which is the Federal Inland Tax Revenue, as well  
13 as another, so those are all three coequal instrumentalities of  
14 NNPC. They are not the Nigerian government.

15 But the bottom line is the facts alleged in the second  
16 amended petition, even if taken as true, do not establish a  
17 *prima facie* case for alter ego. The only one that might have  
18 was their allegation that the Nigerian government has some  
19 control over contracts with which NNPC entered into below a  
20 certain threshold. But their allegation is incorrect with  
21 respect to the threshold, and NNPC has the internal authority  
22 to enter into a host of day-to-day transactions in amounts up  
23 to \$20 million without the intervention of the Nigerian  
24 government.

25 The standard in the Second Circuit with respect alter



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1 ego is whether the government exercises day-to-day control over  
2 the instrumentality. There are no allegations that suggest  
3 day-to-day control over the instrumentality, and their document  
4 requests are not at all tailored to solicit information with  
5 respect to day-to-day control. The alter ego allegation is an  
6 exceptional circumstance and would only establish that it would  
7 deprive NNPC of its due process rights. They just have not  
8 established a *prima facie* case of alter ego, and they have not  
9 narrowly tailored their request to get anywhere close to the  
10 Second Circuit standard of day-to-day control.

11 MR. LIVSHIZ: Your Honor, if I may respond very  
12 briefly?

13 THE COURT: Go ahead.

14 MR. LIVSHIZ: As your Honor indicated when we were  
15 discussing bank accounts, the question at this point is not  
16 whether we will be able to establish jurisdiction but, in the  
17 standard in the Southern District, whether we have made a  
18 sufficient start. That's the *International Diamonds* case, 2016  
19 WL 1717217. And we submit that our allegations do that,  
20 particularly in light of the exhibit that we have put in with  
21 our letter.

22 As to the standard in the Second Circuit in the *Banco*  
23 *National* case, the Second Circuit was not asked to opine, and  
24 did not opine, on whether jurisdiction would be -- on whether  
25 alter ego relationship would be found where the agency of a

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1 government was induced to implement a governmental policy. And  
2 finally, your Honor, it is a little bit of a cart before the  
3 horse. How can we possibly show day-to-day control without  
4 getting the discovery that we are seeking?

5 THE COURT: All right.

6 MR. LIVSHIZ: Discovery would establish that.

7 THE COURT: Look, in view of the discussion that we  
8 have had on these three issues, do the parties believe that  
9 another meet-and-confer might lead to narrowing the scope of  
10 the requests in resolving any of these three issues?

11 MS. MOSS: Your Honor --

12 MR. LIVSHIZ: Your Honor --

13 MS. MOSS: Go ahead.

14 MR. LIVSHIZ: Go ahead, Ms. Moss.

15 MS. MOSS: I was going to say that if petitioners were  
16 going to narrow their requests, we would certainly consider  
17 narrowed requests.

18 MR. LIVSHIZ: Your Honor, from petitioner's  
19 perspective we are certainly happy to meet and confer, but that  
20 presumes that NNPC is willing to budge off its flat no position  
21 that it has adopted until now. Otherwise the concern is --  
22 otherwise our concern is that, frankly, the bank account  
23 information we seek is already very narrow, and the time is  
24 running and we would like to keep the process moving.

25 That said, if NNPC is committed to considering moving

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1 off the position of no without any other considerations, we  
2 would be happy to meet and confer.

3 THE COURT: Why don't you, in the next week or so,  
4 meet and confer and see, by the end of next week, whether you  
5 can resolve any of these issues.

6 My second question to both of you is whether, in view  
7 of your letters and the discussion that we have just had,  
8 either of you believe that further briefing or submissions are  
9 necessary on these issues?

10 Mr. Livshiz?

11 MR. LIVSHIZ: Your Honor, we are certainly happy to  
12 brief that issue further, but I think the position in our  
13 letters establishes it.

14 THE COURT: Ms. Moss?

15 MS. MOSS: Well, it is their motion, and so I think  
16 it is hard to respond to anything more than what they have said  
17 so far; and we think that if they narrow their requests, it  
18 would lead to some fruitful conversations and hopefully a  
19 resolution.

20 THE COURT: All I was asking is whether or not the  
21 parties want to submit further briefing. I am taking from the  
22 colloquy that the answer is largely no.

23 Why don't you see if you can meet and confer, as I  
24 have said, within the next week; and then, if you can and you  
25 have succeeded and there is still some issue that remains to be

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1 resolved, why don't you send me a letter, a short letter, as to  
2 what that issue is by March 1, and then I will take this  
3 dispute and resolve it based upon what I have before me.

4 And, in that regard, I am going to direct the parties  
5 to make arrangements to obtain a copy of this transcript from  
6 the court reporter so that it can be docketed in the case.

7 Is there anything further at this time?

8 MR. LIVSHIZ: No, your Honor. Thank you.

9 Just one second. No, your Honor, nothing at the  
10 moment. No. Thank you very much.

11 We would like to say that, depending on how the  
12 meet-and-confer process goes, we would request the right to, in  
13 our March 1 letter, request additional briefing if that becomes  
14 necessary.

15 THE COURT: That's fine. That's fine.

16 Anything further, Ms. Moss?

17 MS. MOSS: One thing that we wanted to mention, your  
18 Honor, is that the third-party subpoenas that petitioners have  
19 served on ten banks here in New York contain the same broad  
20 request for all documents relating to both NNPC and the other  
21 instrumentalities, and we find those requests to those banks to  
22 be overbroad on the same basis that we discussed today.

23 To the extent that we can reach an agreement on  
24 narrowing the document requests to NNPC, I would hope we could  
25 also reach an agreement with petitioners that they would narrow

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1 their subpoenas. But we may, if petitioners are unwilling to  
2 do that, we may need to seek your assistance in quashing the  
3 subpoenas or at least narrowing their scope.

4 THE COURT: I appreciate the heads up on that. Let's  
5 wait to see what develops. All right?

6 MS. MOSS: Thank you, your Honor.

7 THE COURT: I am going to live in hope that you reach  
8 an agreement in the next week. All right? Otherwise I will --

9 MS. MOSS: Thank you, your Honor.

10 MR. LIVSHIZ: Thank you.

11 THE COURT: Otherwise I will decide the issue, because  
12 that's what judges do. All right?

13 Thank you.

14 COUNSEL: Thank you, your Honor.

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