

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ESSO EXPLORATION AND PRODUCTION	:	
NIGERIA LIMITED, <i>et ano.</i> ,	:	
	:	
Petitioners,	:	
	:	14cv8445
-against-	:	
	:	<u>MEMORANDUM & ORDER</u>
NIGERIAN NATIONAL PETROLEUM	:	
CORPORATION,	:	
	:	
Respondent.	:	
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WILLIAM H. PAULEY III, Senior United States District Judge:

The parties raise three new disputes in a seemingly endless succession of disagreements over jurisdictional discovery. Notably, the parties spent only 30 minutes attempting to resolve these disputes without judicial intervention. Petitioners ask this Court to compel the Nigerian National Petroleum Corporation (“NNPC”) to: (1) produce Mele Kyari for a deposition, (2) make one of its Rule 30(b)(6) witnesses available for a second, seven-hour deposition, and (3) produce three documents withheld for privilege. For the following reasons, Petitioners’ motion is granted.

With respect to the deposition of Kyari, this Court ordered NNPC to produce documents related to the work of the Presidential Investigation Committee on the review of the performance of the Bonga and Erha product sharing contract (the “Committee”) by September 28, 2018. (ECF No. 173.) To date, NNPC has produced only two of those documents. Accordingly, Petitioners seek to question Kyari—who was involved with the Committee’s work—to supplement the record. NNPC counters that his deposition will be cumulative of the

deposition of NNPC's corporate representatives and that producing Kyari will be burdensome. These arguments are meritless. NNPC is directed to produce Kyari for a deposition for up to five hours. "This decision takes into account the likelihood that [Kyari] has relevant information, the [b]illions of dollars at stake in this matter, the difficulty Plaintiffs have had accessing information in light of the fact that the Defendants have produced little-to-no documents concerning the [Committee], . . . and that [Kyari]'s deposition . . . will not delay resolution of the case given" the current discovery schedule. City of Almaty v. Ablyazov, 2018 WL 2148430, at *3 (S.D.N.Y. May 10, 2018); see also Scott v. Chipotle Mexican Grill, Inc., 306 F.R.D. 120, 122 (S.D.N.Y. 2015) ("Because [defendant] has been unable to produce documents responsive to many of the plaintiff's discovery requests . . . , the Court directs [defendant] to produce [the witness] for a four-hour deposition. Although his knowledge may not be unique, it is relevant and non-cumulative because of [defendant]'s own unwillingness or inability to be forthcoming with discovery on this matter.").

With respect to the Rule 30(b)(6) depositions, the parties have agreed to 18 topics to be covered in the depositions of NNPC's corporate representatives. NNPC offers two witnesses: Witness I, who will testify for up to seven hours in one day on four topics, and Witness II, who will testify for up to seven hours in one day on 14 topics. That leaves Petitioners with an average of 30 minutes to question Witness II about each topic. That is insufficient. As such, this Court directs NNPC to produce Witness II for up to ten hours, in addition to Witness I's seven hours. See Fed. R. Civ. P. 26(b)(2) ("By order, the court may alter the limits in these rules . . . on the length of depositions under Rule 30."); Fed. R. Civ. P. 30 Commentaries ("In general, courts consider a variety of factors in determining whether to extend a deposition, including the amount of information to be covered, whether the witness or the

defending lawyer obstructed the progress of the deposition, and whether progress was delayed by the witness's failure to review documents in advance. The court must extend the deposition, consistent with Rule 26(b)(2), if additional time is needed for a fair examination or where the examination has been impeded or otherwise delayed.”); Margel v. E.G.L. Gem Lab Ltd., 2008 WL 2224288, at *8 (S.D.N.Y. May 29, 2008) (“Rule 30(d)(2) established a presumptive time limit of seven hours for depositions, with the proviso that this period can be extended for good cause shown. The determination of whether good cause exists is fact specific.”).

Finally, with respect to the three documents withheld for privilege, Petitioners claim that NNPC's privilege log is insufficient because it fails to identify certain recipients of three emails withheld for privilege. “The burden of establishing attorney-client or work product privilege is on the party asserting the respective privilege.” Aurora Loan Servs., Inc. v. Posner, Posner & Assocs., P.C., 499 F. Supp. 2d 475, 479 (S.D.N.Y. 2007). Here, NNPC fails to cite any case law to support its position that its privilege log is sufficient, and offers no explanation for how it knows the documents are privileged, even though it cannot identify all of their recipients. NNPC asks this Court to accept its ipse dixit. But NNPC's conduct during this litigation does not engender confidence, and NNPC has done nothing to carry its burden of establishing that the documents are privileged. In addition, the fact that NNPC cannot identify certain email recipients suggests that they may not be NNPC employees or attorneys for NNPC, which calls into question whether the documents are in fact privileged. And the “[f]ailure to furnish an adequate privilege log is grounds for rejecting a claim of attorney client privilege.” Aurora Loan Servs., 499 F. Supp. 2d at 479; Wultz v. Bank of China Ltd., 979 F. Supp. 2d 479, 497 (S.D.N.Y. 2013) (same); OneBeacon Ins. Co. v. Forman Int'l, Ltd., 2006 WL 3771010, at *6 (S.D.N.Y. Dec. 15, 2006) (“Courts in this Circuit have refused to uphold a claim of privilege

where privilege log entries fail to provide adequate information to support the claim.”).

Therefore, NNPC is ordered to serve a revised privilege log that identifies all email recipients for entries P0001, P0003, and P0017 of its privilege log by October 17, 2018. If it cannot do so, it must produce the documents.

Accordingly, NNPC is ordered to (1) produce Kyari for one five-hour deposition, (2) produce Witness II for up to 10 hours of deposition (in addition to Witness I for seven hours), and (3) identify all email recipients for entries P0001, P0003, and P0017 of its privilege log by October 17, 2018, or produce those documents forthwith. The Clerk of Court is directed to terminate the motion pending at ECF No. 175.

Dated: October 12, 2018
New York, New York

SO ORDERED:


WILLIAM H. PAULEY III
U.S.D.J.