

**DEFRAUDING CHEVRON IN ECUADOR:
DOUG CASSEL'S REPLY TO THE PLAINTIFFS' LEGAL TEAM**

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My recent *Open Letter to the Human Rights Community* criticized an \$18.2 billion judgment awarded by an Ecuadorian court against Chevron. The Judgment purports to fund remediation for environmental harm allegedly caused decades ago by a Texaco subsidiary. As a career human rights lawyer and specialist in Latin American judicial systems,² I studied the 188-page judgment, and concluded in my *Open Letter* that this Ecuadorian “charade” is an affront to principles of rule of law, due process, and trial before independent, impartial and honest judges.³

My letter provoked a vitriolic response from plaintiffs’ “Legal Team.”⁴ Their fusillade, however, is almost entirely non-responsive. Aside from personal attacks on anyone who dares to question the probity of their conduct,⁵ their main themes are (1) Chevron lawyers also misbehaved, and (2) plaintiffs have a worthy cause.

Neither claim is responsive. Even if their charges of misconduct by Chevron lawyers were substantiated – and the nine examples I examined all proved to be “erroneous, tendentious

¹ Plaintiffs’ Legal Team charges that my letter “trades on the good name of Notre Dame.” *Response to Doug Cassel’s Apology for Chevron’s Human Rights Violations In Ecuador*, March 15, 2012, by the “Lago Agrio Legal Team” (hereafter “*Response*”), p. 2, n. 2. On the contrary, my letter (n. 1) expressly stated, “Views expressed herein are solely those of the author, and not necessarily those of Notre Dame Law School or any other entity.” Here, too, I express my own views, and not necessarily those of Notre Dame Law School or of any other entity with which I am affiliated.

² Plaintiffs’ Legal Team asserts that I remained silent on their case “until Chevron recently retained” me. *Response*, p. 1. In fact, eight months before Chevron first approached me to file an *amicus* brief, one of Plaintiffs’ lawyers inquired whether I would submit an expert affidavit attesting to the independence of Ecuador’s judicial system. I declined, because I could not truthfully attest to the independence of Ecuador’s judiciary. See also note 124 below.

³ *Open Letter*, March 1, 2012, accessible at <http://www.nd.edu/~ndlaw/faculty/cassel/Openletter3-1-12.pdf>.

⁴ *Response*, by the “Lago Agrio Legal Team.” Plaintiffs’ “Legal Team” identifies itself as led by Pablo Fajardo and including, among others, US lawyer Steven Donziger, described as a “human rights advocate.” *Response*, n. 13. Messrs. Fajardo and Donziger participated in the misconduct in the Ecuadorian litigation. In contrast, as my *Open Letter* (n. 2) stated, “References herein to plaintiffs’ lawyers, and to the misconduct specified herein, do not include the law firm of Patton Boggs or any of its lawyers who represent plaintiffs in various proceedings before U.S. courts, Forum Nobis PLLC or any of its lawyers, or other law firms and lawyers who began to represent plaintiffs only recently.” I likewise do not suggest that those law firms or lawyers participated in the misconduct described in this letter. In addition, since the *Response* (n. 13) mentions the law firm of Smyser, Kaplan and Veselka, I add that I also do not allege misconduct by that firm or its lawyers.

⁵ See p. 20 below.

or unsupported”⁶—such alleged misconduct by Chevron would not excuse gross violations of due process of law committed by self-proclaimed “human rights advocates.”⁷

Nor would their misconduct be justified by a worthy cause – *i.e.*, even if their wildly inflated claims of an ongoing environmental and “public health catastrophe”⁸ were supported (which they are not) by solid evidence.⁹ To be credible, human rights defenders must be consistent in our fidelity to international human rights standards. We cannot selectively vindicate one right (to reparation) by trashing another (to fair trial). The ends do not justify the means.

The plaintiffs’ Legal Team’s misconduct went far beyond technical violations of procedural niceties that might vary from one country to the next. Nowhere on the planet are lawyers, let alone those who profess to defend human rights, licensed to engage in litigation “fraud” – such as multiple US courts have found *prima facie* was committed by some (not all)¹⁰ members of plaintiffs’ Legal Team.¹¹ Nor are lawyers anywhere authorized to forge and falsify reports to a court, bribe court experts, or blackmail judges – as substantial evidence shows was committed by some (not all) members of the Legal Team.¹² No judgment procured by such chicanery is worthy of credit, let alone deserving of support by the human rights community.

The Legal Team questions the evidence of their fraud. This defense is singularly ill-advised. Proof of their misconduct is documented by their own words: filmed outtakes from their documentary, their internal emails, and deposition testimony by their lawyer Steven Donziger. Their protest that their words were taken out of context is rubbish: they indict themselves with emails admitting that if their correspondence becomes public, “all of us, your attorneys, might go to jail.”¹³

Before rebutting their specific claims, I reiterate my bottom line: this *Jarndyce v. Jarndyce* monstrosity¹⁴ should settle.¹⁵ Contrary to the taunt by plaintiffs’ Legal Team that

⁶ D. Cassel, *Chevron in Ecuador: Doug Cassel Responds to Kevin Jon Heller*, accessible at <http://opiniojuris.org/2012/03/27/doug-cassel-responds-to-kevin-jon-heller>. I did not select these nine allegations; they were selected by Mr. Heller, an avid supporter of the plaintiffs’ litigation, supposedly to exemplify alleged misconduct by Chevron lawyers. I simply looked into each allegation he chose (all taken from plaintiffs’ press releases). Several are repeated in the Legal Team’s *Response*. *E.g.*, Chevron’s allegedly lifting samples only from “clean” areas; its supposedly “secret lab”; its alleged offer to “bribe” the Ecuadorian government; and its alleged threat to “put judges in jail if they did not rule in its favor.” *Response*, pp. 6, 9. As detailed in my response to Mr. Heller, none of the nine allegations against Chevron is persuasive.

⁷ The *Response* by plaintiffs’ Legal Team (n. 13) describes Steven Donziger as a “human rights advocate.”

⁸ *Response*, p. 5.

⁹ See pp. 8-12 below.

¹⁰ See note 4 above.

¹¹ See pp. 5-6 below.

¹² See pp. 4-8 below; *Chevron v. Donziger*, 768 F. Supp. 2d 581, 606 (S.D.N.Y. 2011) (district court credits threat to blackmail Ecuadorian judge), *rev’d on other grounds*, 303 F.3d 470 (2d Cir. 2012).

¹³ Email from J. Prieto to S. Donziger, Mar. 30, 2010, accessible at <http://www.theamazonpost.com/wp-content/uploads/FAC-Ex.-11.pdf>.

¹⁴ See Charles Dickens, *BLEAK HOUSE*, chapters 1 and 65 (decades-long inheritance litigation consumes all the assets).

¹⁵ *Open Letter*, p.6.

settlement “makes no logical sense”¹⁶ if the trial was fraudulent – as it demonstrably was – settlement makes sense for both sides. The hundreds of millions of dollars spent on legal fees alone, amassed in two decades of litigation – with no end in sight – could do a great deal of good in the Amazon. The sooner the better. I harbor no illusions that settling this case will be easy: The litigation is hotly contested, the two parties are currently far apart, and each believes it has a strong hand in court. But a serious effort should be made, before even more resources are diverted from where they could do the most good.

Brief Background

Chevron has never drilled or pumped oil in Ecuador. In 2001 a Chevron subsidiary merged with Texaco and acquired its subsidiary, Texaco Petroleum Company (“TexPet”), which until 1990 had been operator and minority participant in a consortium with the Ecuadorian State oil company in the Amazon basin. In 1990 the State oil company took over as operator. In 1992 the consortium expired. Since 1990 the State oil company has been the sole operator (and since 1992 also sole owner) of the former consortium facilities in the area at issue.¹⁷

During 1995 to 1998, as agreed with Ecuador and the State oil company and in exchange for a release from liability for environmental claims, TexPet carried out an approximately \$40 million program of remediation and community development corresponding to its share of the former consortium’s oil operations.¹⁸ In 1998 Ecuador certified the adequacy of the remediation and confirmed TexPet’s release from liability.¹⁹ Whether the remediation was adequate, and whether the release now bars the plaintiffs’ lawsuit, are matters in dispute between Chevron and the plaintiffs.²⁰

Meanwhile in 1993 a group of plaintiffs brought class action suits for environmental and personal injuries against Texaco in federal court in New York. Arguing that the case should be heard in Ecuador, Texaco moved to dismiss on grounds of *forum non conveniens*. In 2001 the

¹⁶ *Response*, pp. 2-3.

¹⁷ The facts are summarized in *Chevron v. Donziger*, 768 F. Supp. 2d 581, 597-601 (S.D.N.Y. 2011), *rev’d on other grounds*, 303 F.3d 470 (2d Cir. 2002).

¹⁸ 1994 Memorandum of Understanding, accessible at <http://www.theamazonpost.com/wp-content/uploads/1994-Memorandum-of-Understanding.pdf>; 1995 Scope of Work, accessible at <http://www.theamazonpost.com/wp-content/uploads/1995-Scope-of-the-Work.pdf>; 1995 Remedial Action Plan, accessible at <http://www.theamazonpost.com/wp-content/uploads/1995-Remedial-Action-Plan.pdf>; 1995 Settlement Agreement, accessible at <http://www.theamazonpost.com/wp-content/uploads/1995-Settlement.pdf>; 1996 Municipal and Provincial Releases, accessible at <http://www.theamazonpost.com/wp-content/uploads/01-Release-with-Municipality-of-Joya-de-los-Sachas-May-2-1996.pdf>; <http://www.theamazonpost.com/wp-content/uploads/02-Release-with-Municipality-of-Shushufindi-May-2-1996.pdf>; <http://www.theamazonpost.com/wp-content/uploads/03-Release-with-Municipality-of-the-Canton-of-Francisco-de-Orellana-Coca-May-2-1996.pdf>; <http://www.theamazonpost.com/wp-content/uploads/04-Release-with-Municipality-of-Lago-Agrio-May-2-1996.pdf>; <http://www.theamazonpost.com/wp-content/uploads/05-Contract-of-Settlement-Release-btwn-Texaco-and-the-Provincial-Prefect-Office-of-Sucumbios.pdf>.

¹⁹ 1998 Final Release, accessible at <http://www.theamazonpost.com/wp-content/uploads/1998-Final-Release.pdf>.

²⁰ The Ecuadorian court ruled for plaintiffs on both issues. First Instance Judgment by the Lago Agrio Court, *Aguinda v. Chevron*, Feb. 14, 2011, at 8:37 a.m. (English translation; all citations to the Judgment herein are to this English translation), at 175-76, accessible at http://www.theamazonpost.com/wp-content/uploads/2011-02-14_Lago_Agrio_Judgment.PDF. Both issues are currently pending before an international arbitral tribunal.

district court granted Texaco's motion to dismiss, on condition that Texaco agree to submit to the jurisdiction of Ecuadorian courts.²¹ Later in 2001, a subsidiary of Chevron merged with Texaco, so that Chevron became an indirect shareholder of TexPet.²²

In 2003 plaintiffs' Legal Team sued Chevron (but not the State oil company) in Ecuador. Unlike the New York litigation, their Ecuador suit does not assert or prove individual claims of harm, but only collective claims to environmental redress.²³ An \$18.2 billion judgment ("Judgment") against Chevron (including \$8.6 billion in so-called "punitive" damages, which are not even allowed by Ecuadorian law²⁴) was awarded in 2011²⁵ and upheld on appeal in 2012.²⁶

Misconduct by Plaintiffs' Legal Team

The Legal Team defends its misconduct on the ground that "no trial is perfect."²⁷ The defects in the Ecuador trial, they say, "take place regularly in trials the world over" and were "minor and legally irrelevant deficiencies," inevitable in any contested, lengthy litigation.²⁸

Really? Then why did they admit to themselves that if their correspondence were revealed, they "might go to jail"?²⁹ Are fraud, forgery, bribery and blackmail "minor and legally irrelevant"? Ample evidence shows that the Legal Team resorted to these obstructions of justice:

(1) Fraud

Notably, the Legal Team's *Response* does not deny that they secretly wrote much or all of the report on the amount of damages for the Ecuadorian court's supposedly "impartial" expert (in English, no less, for an expert who does not speak English, before kindly translating it for him) and then passed it off as his "neutral" report.³⁰ They cannot deny these facts, because one

²¹ *Aguinda v. Texaco*, 142 F.Supp.2d 534, 538 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

²² The May 30, 2001 district court ruling, 142 F.Supp.2d 534, was issued four months before Chevron's merger with Texaco was completed. Although the boards of the two companies agreed in October 2000 to merge, the merger was not approved by stockholders until October 2001. A. Sorokin and N. Banerjee, *Chevron Agrees to Buy Texaco For Stock Valued at \$36 Billion*, NY TIMES, Oct. 16, 2000, p. A1; M. Davis, *Texaco sells off two joint ventures; Chevron merger now official*, HOUSTON CHRONICLE, October 10, 2001, Business p. 1.

²³ Lawsuit for Alleged Damages Filed before the President of the Superior Court of Nueva Loja, in Lago Agrio, Province of Sucumbíos, May 7, 2003, at 11:30 a.m., accessible at <http://www.theamazonpost.com/wp-content/uploads/Lago-Agrio-Complaint-May-7-2003.pdf>.

²⁴ See p. 16 below.

²⁵ First Instance Judgment by the Lago Agrio Court, *Aguinda v. Chevron*, Feb. 14, 2011, at 8:37 a.m., http://www.theamazonpost.com/wp-content/uploads/2011-02-14_Lago_Agrio_Judgment.PDF.

²⁶ First Instance Appellate Decision by the Lago Agrio Appeals Court, Jan. 3, 2012, at 4:45 p.m., accessible at [http://www.docstoc.com/docs/110401927/Ecuador-Appeals-Court-Judgment-\(English\)](http://www.docstoc.com/docs/110401927/Ecuador-Appeals-Court-Judgment-(English)).

²⁷ *Response*, p. 10.

²⁸ *Response*, pp. 1, 3.

²⁹ Email from J. Prieto to S. Donziger, Mar. 30, 2010, accessible at <http://www.theamazonpost.com/wp-content/uploads/FAC-Ex.-11.pdf>.

³⁰ Email from D. Beltman, Subject: Big Report with Attachment Titled Peritaje Global Summary Report, Mar. 12, 2008, accessible at <http://www.theamazonpost.com/wp-content/uploads/Email-from-D.-Beltman-to-Translating-Spanish-Mar.-12-2008.pdf>; Email from D. Beltman to B. Lazar and D. Mills, Subject: Re: "English translations," July 28, 2008, accessible at <http://www.theamazonpost.com/wp-content/uploads/STRATUS-NATIVE044716.pdf>; Email

of their attorneys, in an email produced under court order, admitted that “we authored the [expert’s] report.”³¹

To defend this fraud, their *Response* recites that in Ecuador, both parties lobby for the court to appoint “qualified experts” and that this is “standard process” in many legal systems.³² But in private plaintiffs’ attorney Steven Donziger specified the “qualifications” of the expert they foisted on the court: He would “totally play ball with us and let us take the lead while projecting the image that he is working for the court.”³³

Once this expert (Cabrera) was discredited, the Legal Team recruited others to “cleanse” his fraud. But this only generated another round of fraud. As Judge Kaplan of the federal court in New York explained:

There is ample evidence of fraud in the Ecuadorian proceedings. ... [Plaintiffs’] counsel orchestrated a scheme in which [their consulting firm] Stratus ghost-wrote much or all of Cabrera’s supposedly independent damages assessment When it became evident that the improper contacts with Cabrera, including the pre-appointment meetings, ghost-writing, and illicit payments, would be revealed . . . , [plaintiffs’] representatives undertook a scheme to “cleanse” the Cabrera report. They hired new consultants who, without visiting Ecuador or conducting new site inspections and relying heavily on the initial Cabrera report, submitted opinions that increased the damages assessment ...³⁴

Plaintiffs’ Legal Team claims that the court of appeals “sharply rebuked” Judge Kaplan.³⁵ But while the court of appeals reversed on legal grounds his injunction against enforcement of the Ecuadorian Judgment outside of Ecuador, it did not disturb his findings of fact.³⁶ It denied plaintiffs’ request to remove him from the case,³⁷ and left issues of the independence of Ecuador’s legal system and the conduct of the trial to be “addressed as relevant in other litigation before the district court or elsewhere.”³⁸

If Judge Kaplan were the only judge to spot their fraud, plaintiffs might plausibly cast him as an outlier. But he is in good company. Even while deeming Judge Kaplan’s *prima facie* findings as binding, one Magistrate Judge in another district was moved to add that “if the question were an open one, I would find that the evidence marshaled by Judge Kaplan ...

from Enlaso Enterprise Language Solutions to D. Beltman, Subject: Re: “Confidentiality agreements,” Mar. 13, 2008, accessible at <http://www.theamazonpost.com/wp-content/uploads/STRATUS-NATIVE065206.pdf>.

³¹ Email from S. Donziger to J. Abady, and others, June 15, 2000 [DONZ00031368 Page 1 of 6], accessible at <http://www.theamazonpost.com/wp-content/uploads/DONZ00031368.pdf>.

³² *Response*, p. 12.

³³ Diary of Steven Donziger, Mar. 1, 2007, at 10, 11, 18, and 30 [DONZ00027256], accessible at <http://amlawdaily.typepad.com/chevronexhibit1.pdf>.

³⁴ *Chevron v. Donziger*, 768 F. Supp. 2d 581, 636 (S.D.N.Y. 2011) (emphasis added), *rev’d on other grounds*, 667 F.3d 232 (2nd Cir. 2012).

³⁵ *Response*, p. 10.

³⁶ 667 F. 3d 232.

³⁷ 667 F. 3d at n. 11.

³⁸ *Id.* at n. 17.

convinces me that there is more than sufficient evidence of a prima face case that [plaintiffs' consultant] the Weinberg Group's work was part of a fraud upon the Ecuadorian court."³⁹

Other US federal courts have similarly found as follows:⁴⁰

- "... [W]hat has blatantly occurred in this matter would in fact be **considered fraud by any court.**"⁴¹
- The "footage [from outtakes] shows, with unflattering frankness, **inappropriate, unethical and perhaps illegal conduct.**"⁴²
- "There is **ample evidence**... that the Ecuadorian Plaintiffs secretly provided information to Mr. Cabrera, who was supposedly a neutral court-appointed expert, and colluded with Mr. Cabrera to make it look like the opinions were his own. Thus, any privilege which existed was waived;"⁴³
- "[T]here is **more than a little evidence** that Donziger's activities – as several courts already have held ... come within the **crime-fraud exception** to ... the privilege ..."⁴⁴
- "Though we recognize that the [Ecuadorian] Court may view ... a conflict of interest differently than we do, we believe that this showing of [plaintiffs' consultant] Villao's dual employment is sufficient to make a **prima facie showing of a fraud**... ."⁴⁵

In 2010 even one of *plaintiffs'* attorneys, who had not been involved in the fraud, advised Donziger and others that, unless Chevron knew of the ghost writing at the time (it did not), "it appears not only that Cabrera and the plaintiffs can be charged with a 'fraud' respecting the former's report, but that [plaintiffs' consultant] Stratus was an active conspirator."⁴⁶

Moreover, it seems that Cabrera's report was not the only document the Legal Team wrote for him. By comparing format, structure, capitalization, dropped accents, misspellings, punctuation and syntax, a forensic expert concluded that plaintiffs' lead Ecuadorian attorney,

³⁹ *Chevron v. The Weinberg Group*, D.D.C., Misc. No. 11-409, Memorandum and Order (Magistrate Judge Facciola), Sept. 8, 2011, p. 8.

⁴⁰ See also *Chevron Corp. v. Salazar*, 275 F.R.D. 437, 442 (S.D.N.Y.) (following Judge Kaplan); *Chevron Corp. v. Page*, No. RWT-11-1942, Oral Arg. Tr. at 73:14-18, 74:17-21 (D. Md. Aug. 31, 2011) (piercing privilege).

⁴¹ *Chevron Corp. v. Champ*, Nos. 1:10-mc-27, 1 :10-mc-28, 2010 U.S. Dist. LEXIS97440, at *16 (W.D.N.C. Aug. 30, 2010) (emphasis added).

⁴² *In re Chevron Corp.*, Nos. 1:10-mc-00021-22, 2010 U.S. Dist. LEXIS 119943, at *6 (D.N.M. Sept. 1,2010) (emphasis added).

⁴³ *In re Applic. of Chevron Corp.*, No. 10-cv-1146-IEG(WMC), 2010 U.S. Dist. LEXIS 94396, at *17 (S.D. Cal. Sept. 10, 2010) (emphasis added).

⁴⁴ *In re Applic. of Chevron Corp.*, 749 F. Supp. 2d 141, 167 (S.D.N.Y. Nov. 10, 2010) (emphasis added).

⁴⁵ *In re Applic. of Chevron Corp.*, 633 F.3d 153, 166 (3d Cir. Feb. 3, 2011) (emphasis added).

⁴⁶ Email from J. Horowitz to A. Wilson, copying co-counsel, dated May 16, 2010, accessible at <http://www.theamazonpost.com/wp-content/uploads/DONZ0056679.pdf>.

Pablo Fajardo, ghost wrote 15 of 17 filings purportedly submitted by Cabrera to the court – including several proclaiming his independence from plaintiffs.⁴⁷

(2) **Forgery**

The Legal Team’s misconduct included blatant forgery. Plaintiffs’ expert in charge of inspections was Dr. Charles Calmbacher. In 2005 the Legal Team submitted to the Ecuador court a report in Calmbacher’s name for two sites, “each purporting to show extensive environmental damage.”⁴⁸ Dr. Calmbacher later testified under oath: “I did not reach these conclusions and I did not write this report.”⁴⁹ On the contrary, he testified, he never found that any site he inspected required further remediation or that TexPet failed adequately to remediate the sites.⁵⁰ Judge Kaplan found that plaintiffs, “through their counsel, submitted forged expert reports in the name of Dr. Calmbacher.”⁵¹

(3) **Bribery**

The Legal Team’s bribery of Cabrera from their “secret account” is evidenced by a series of emails from June 2007 to July 2009, mainly between Donziger and Luis Yanza, a non-lawyer who the Legal Team describes as facilitator of their “executive committee” which “exercises control over core case strategy.”⁵² Initially the payments – made from plaintiffs’ “secret account” which was apparently opened in June 2007⁵³ – included “advances” of tens of thousands of dollars to Cabrera, at a time when the judge had not authorized payments to Cabrera.⁵⁴ Once Cabrera’s “report” was completed (albeit written by plaintiffs’ Legal Team and

⁴⁷ Declaration of G. McMenamain Expert Report, June 27, 2011, at 1, accessible at

<http://www.theamazonpost.com/wp-content/uploads/G.-McMenamin-Declaration-June-27-2011.pdf>.

⁴⁸ *Chevron v. Donziger*, 768 F. Supp. 2d 581, 606 (S.D.N.Y. 2011), *rev’d on other grounds*, 667 F.3d 232 (2nd Cir. 2012).

⁴⁹ Calmbacher Deposition at 116:9-10, accessible at

<http://www.chevron.com/documents/pdf/ecuador/calmbacherdepo.pdf>.

⁵⁰ *Id.* at 113:23-25 and 115:15-19.

⁵¹ *Chevron v. Donziger*, 768 F. Supp. 2d 581, 636 (S.D.N.Y. 2011), *rev’d on other grounds*, 667 F.3d 232 (2nd Cir. 2012). Judge Kaplan acknowledged, “The [plaintiffs] terminated Dr. Calmbacher. There perhaps is bad feeling between them. Nevertheless, his testimony is evidence that persons acting on behalf of the [plaintiffs] prepared reports expressing views contrary to Calmbacher’s and submitted those fictitious reports to the Lago Agrio court over his name. Perhaps there is a different explanation. But neither Donziger nor any other knowledgeable person on the [plaintiffs’] side has submitted an affidavit or other sworn proof ... denying Calmbacher’s assertions or offering any explanation.” 768 F. Supp. 2d at 606.

⁵² *Response*, n. 13.

⁵³ Email from Luis Yanza to Steven Donziger, June 13, 2007, subject: “important transfers immediately pls.”, accessible at <http://www.theamazonpost.com/wp-content/uploads/DONZ-HDD-01133611.pdf>.

⁵⁴ Email from Luis Yanza to Steven Donziger, Sept. 12, 2007, stating in part: “I think we should plan ahead ... , using the same mechanism from weeks ago, that is, he sends us money to our secret account, to give to Wuao [Cabrera], [to] not stop the work. I estimate it will be about 30,000, but since there are expenses from the last work day in the south, it might be another 20,000. In any case, this money will then be reimbursed to SV [Selva Viva] once the judge orders us to pay. To conclude, please explain this situation to JK so he can transfer 30 to our Secret Account and 20 to SV, but he could send the 50 to the secret account, and then we could pass the 20 to SV to save time and paperwork.” (accessible at <http://www.theamazonpost.com/wp-content/uploads/DONZ-HDD-0125080.pdf>).

consultants, not by Cabrera), the payments from the secret account continued long afterward. A July 2009 email from Yanza to Donziger reports that “we are paying Cabrera 10 [thousand dollars] today to calm him down.”⁵⁵ Donziger testified in his deposition that he was aware of no other purpose for the secret account than to pay Cabrera.⁵⁶ Yet plaintiffs’ Legal Team knew that they, and not Cabrera, were writing Cabrera’s report.

(4) Blackmail

Internal emails and Donziger’s diary⁵⁷ yield substantial evidence that plaintiffs’ Legal Team blackmailed the judge into changing his ruling on whether to halt inspections of oil sites and instead to appoint an expert (ultimately Cabrera) to assess damages. The Legal Team drafted a complaint against the judge who was already, according to Donziger, “on his heels from . . . charges of trading jobs for sex in the court.”⁵⁸ Before filing the complaint, however, their attorney Fajardo, in consultation with Donziger, met *ex parte* with the judge. Later the judge, who had previously rejected their request to halt site inspections on the ground that it “entirely lacks legal logic,”⁵⁹ reversed himself. Shortly beforehand, Donziger noted that plaintiffs were “reaping the benefits” of “saving” the judge’s job.⁶⁰ The Legal Team never filed its complaint against the judge.

Public Health Catastrophe?

The Legal Team alleges a “public health catastrophe produced by Chevron’s discharge of toxic waste.”⁶¹

Before responding to this hyperbolic charge, let us be clear: Chevron never discharged toxic waste in Ecuador. The Legal Team erroneously asserts that Chevron “operated under the

See also email from Luis Yanza to Steven Donziger, also dated Sept. 12, 2007 (“We need 50 thousand more next Monday at the latest.”), accessible at <http://www.theamazonpost.com/wp-content/uploads/DONZ-HDD-0124585.pdf>.

⁵⁵ Email from Luis Francisco [Yanza] to Steven Donziger, subject “very urgent,” July 3, 2009, accessible at <http://www.theamazonpost.com/wp-content/uploads/DONZ00051767.pdf>.

⁵⁶ Donziger Deposition, March 23, 2011, at 4414:16-4415:3, accessible at <http://www.theamazonpost.com/wp-content/uploads/S.-Donziger-Deposition-Mar.-23-2011.pdf>; Email from L. Yanza to S. Donziger, Sept. 12, 2007, accessible at <http://www.theamazonpost.com/wp-content/uploads/DONZ-HDD-0125080.pdf>.

⁵⁷ Email exchange between J. Mutti and S. Donziger, Subject: Potentially huge, July 26, 2006, accessible at <http://amlawdaily.typepad.com/chevronexhibits2.pdf> at 37 of 121 [DONZ00023182 Page 1 of 2]; Diary of S. Donziger, Nov. 16, 2006 [DONZ00027256] at 56 of 109, accessible at <http://amlawdaily.typepad.com/chevronexhibit1.pdf>; Diary of S. Donziger, Jan. 19, 2007 [DONZ00027256] at 26 of 109, accessible at <http://amlawdaily.typepad.com/chevronexhibit1.pdf>; Diary of S. Donziger, Nov. 28, 2006 [DONZ00042039], accessible at <http://www.theamazonpost.com/wp-content/uploads/Donziger-Diary-excerpt.pdf>.

⁵⁸ Email exchange between J. Mutti and S. Donziger, July 26, 2006, accessible at <http://amlawdaily.typepad.com/chevronexhibits2.pdf> at 37 of 121 [DONZ00023182 Page 1 of 2].

⁵⁹ Diary of S. Donziger, Nov. 28, 2006 [DONZ00042039], accessible at <http://www.theamazonpost.com/wp-content/uploads/Donziger-Diary-excerpt.pdf>.

⁶⁰ Diary of S. Donziger, Jan. 19, 2007, DONZ00027256, at 26 of 109, accessible at <http://amlawdaily.typepad.com/chevronexhibit1.pdf>.

⁶¹ *Response*, p. 5.

‘Texaco’ brand in Ecuador from 1964-1992.”⁶² Based on that fictitious claim, they proceed to vilify Chevron, accusing it of “malice” and visiting “horror” on Amazonians. Their rhetorical climax warns that such “wanton misconduct likely would have landed Chevron executives jail terms in the U.S.”⁶³

In fact, Chevron has *never* operated in Ecuador, under the Texaco or any other brand. Chevron’s only connection to plaintiffs’ case is its indirect acquisition of Texaco in 2001 – some nine years after Texaco withdrew entirely from all oil production in Ecuador.

More important, plaintiffs’ Legal Team has not produced credible scientific evidence, even of individual cancer cases caused by oil pollution,⁶⁴ let alone of a public health catastrophe. The following considers, first, plaintiffs’ evidence, and then Chevron’s.

Plaintiffs’ Experts. Plaintiffs’ own experts privately advised them of the absence of evidence of surface or groundwater contamination. In 2004 one expert advised that he had seen “no data which would indicate that there is any significant surface or groundwater contamination caused by petroleum sources in Ecuador.”⁶⁵ In 2007 another said on a film outtake that “all the reports are saying it’s just at the pits and stations and nothing has spread anywhere at all.”⁶⁶ And in 2008 yet a third wrote, “I do not think that contamination sufficient to impact the ecology extends very far beyond the pads, pits, and spills at the wells - there simply isn’t a migration pathway.”⁶⁷ The Legal Team knew this: when asked why they were not testing the water, Fajardo privately admitted that “the running drinking water in the river does not contain hydrocarbons.”⁶⁸

Even at oil sites, as already noted, plaintiffs’ expert Dr. Calmbacher – contrary to the forged reports the Legal Team submitted in his name – testified that he never found that any site he inspected required further remediation, or that TexPet failed adequately to remediate the sites.⁶⁹

⁶² Response, p. 1, asterisk.

⁶³ Response, pp. 4, 5.

⁶⁴ Their suit is a collective claim for damages to pay for environmental remediation, not a claim based on harm to any individual’s health. Judgment, p. 1, accessible at http://www.theamazonpost.com/wp-content/uploads/2011-02-14_Lago_Agrio_Judgment.PDF. Necessarily so: as one of their attorneys admitted, they had no actual proof of individualized cancer cases: “we DO NOT have medical certificates.” Email from J. Prieto to S. Donziger et al., Nov. 17, 2009 (emphasis in original), accessible at <http://www.theamazonpost.com/wp-content/uploads/DONZ00053202.pdf>. The Judgment (p. 184) accordingly notes that “reparation of particular cases of cancer has not been demanded, nor are such cases identified, thus they are not remediable.”

⁶⁵ Letter from D. Russell to S. Donziger, “Cease and Desist,” Feb. 14, 2006, accessible at <http://amlawdaily.typepad.com/chevronexhibits2.pdf> at 120 of 121.

⁶⁶ Crude outtakes, CRS-195-05-CLIP-01 (Tr. at 5), accessible at <http://www.theamazonpost.com/wp-content/uploads/CRS-195-05-CLIP-01.pdf>.

⁶⁷ Email from D. Beltman to L. Gamboa, Mar. 9, 2008, at 1-2, accessible at <http://www.theamazonpost.com/wp-content/uploads/STRATUS-NATIVE067644.pdf>.

⁶⁸ Email from Mike Bonfiglio to Joe Berlinger forwarding email chain between Mike Bonfiglio and Pablo Fajardo, Sept. 16, 2008 (JB-Nonwaiver00066577-81), at 4, accessible at <http://www.theamazonpost.com/wp-content/uploads/JB-NonWaiver00066579.pdf>.

⁶⁹ Transcript of Deposition of Dr. Calmbacher, Mar. 29, 2010, at 113:23-25 and 115:15-19, accessible at <http://www.chevron.com/documents/pdf/ecuador/calmbacherdepo.pdf>.

Plaintiffs' public health expert similarly testified that he did "not reach the conclusion that the healthcare needs of the population in the Oriente can be tied to any particular environmental damage."⁷⁰ Indeed, he admitted that there is no reason to believe that the healthcare needs of the population near the former oil concession area are any different from those of the rest of the Oriente.⁷¹

Undaunted, the Legal Team cites a statistical study by their expert, Dr. Daniel Rourke, to charge that "more than 9,000 Ecuadorians in the affected area likely will contract cancer due to exposure to oil contamination."⁷² But Dr. Rourke said no such thing. He is a statistician, not an epidemiologist. He was asked by plaintiffs to *assume* a "hypothetical" increase in cancer, and then to calculate the expected cancer deaths based on that *hypothetical* increase.⁷³ He testified that he was "not making any statement about causation" and that he did not conclude that "anybody actually got cancer because they live near an oil production facility" or that Chevron or Texaco "took any action that actually caused anybody to get cancer."⁷⁴

The Legal Team also cites "independent" studies based on the data of M. San Sebastian.⁷⁵ In fact, his studies were done in conjunction with plaintiffs' Amazon Defense Front, but he left their name off the cover to make his report appear independent.⁷⁶ But even setting aside his partisanship (and fatal methodological flaws in his data collection⁷⁷), the resulting studies do not purport to show any causal relation between oil production and cancer rates.⁷⁸

The Legal Team further reports soil contamination at some sites "*more than 900 times higher*" than the maximum allowed.⁷⁹ They omit to note, however, that these "sites" were oil-filled pits used in ongoing operations by the State oil company, not pits remediated by TexPet.⁸⁰

⁷⁰ *Chevron Corp. v. Picone*, No. 8:10-cv-02990-AW, U.S. Dist.Ct.D.Md., Deposition of Carlos Emilio Picone, Dec. 16, 2010, at 159:7-17, accessible at <http://www.scribd.com/doc/45842069/12-16-10-Deposition-Transcript-Picone>.

⁷¹ *Id.* at 220:20-221:3.

⁷² *Response*, pp. 5-6.

⁷³ Rourke Dep. Tr. at 122:22-123:5, 268:15-20, 293:5-9 (Rourke conceding that his excess cancer estimate was purely "hypothetical" and based on a "risk assumption" concocted for the case), accessible at <http://www.scribd.com/doc/45842244/12-20-10-Deposition-Transcript-Rourke>.

⁷⁴ *Id.* at 61:5-22, 268:2-9.

⁷⁵ *Response*, p. 5 and notes 5 and 11.

⁷⁶ San Sebastian Doctoral Thesis at 125, accessible at http://www.theamazonpost.com/wp-content/uploads/San_Sebastian_Doctoral_Thesis.pdf.

⁷⁷ By undercounting the area's population, he inflated their cancer rates. Once the correction is made, their cancer rates were no higher than elsewhere. http://www.texaco.com/sitelets/ecuador/docs/2007_oem_article.pdf.

⁷⁸ http://www.texacotoxico.org/eng/sites/default/files/Cancer_Report_IJE.pdf ("this ecologic study cannot lead to causal inference.").

⁷⁹ *Response*, p. 4 (emphasis in original).

⁸⁰ John Connor, *Expert Opinion of John A. Connor, P.E., P.G., B.C.E.E., Regarding Remediation Activities and Environmental Conditions in the Former Petroecuador-Texaco Concession, Oriente Region, Ecuador*, Sept. 3, 2010, at 59-64, accessible at <http://www.theamazonpost.com/wp-content/uploads/Connor-Sept.-2010.pdf>.

Finally, the Legal Team cites anecdotal evidence from local residents on illnesses and deaths of family members.⁸¹ Such testimonials deserve our utmost respect and sympathy. But they also deserve a degree of skepticism on the issue of causation. One resident, for example, blamed petroleum for his daughter's typhoid fever⁸² – even though typhoid fever is caused by contact with sewage, not oil.⁸³ And as President Correa recently acknowledged, “the main danger to the fresh water of Ecuador is not ... oil ... [the principal cause] is the cities’ sewer waters that are discharged into rivers and lakes.”⁸⁴

Chevron’s Scientific Evidence. Plaintiffs’ Legal Team claims that “Chevron’s *own undisputed evidence*” proves their case.⁸⁵ In fact, Chevron’s scientific evidence strongly contradicts plaintiffs’ claims of a public health catastrophe.

Dr. Michael Kelsh, a consultant and adjunct professor of epidemiology at UCLA, presented a peer-reviewed *epidemiological study*. He found that “mortality in cantons with long-term oil extraction activities were similar, or lower, compared to those without such activities for overall mortality, overall cancer, circulatory disease, infectious disease, and respiratory diseases, and for many site-specific cancers.”⁸⁶ He concluded that “analyses of national mortality data of the Amazon Region in Ecuador does not provide evidence for an excess cancer risk in regions of the Amazon with long-term oil production.”⁸⁷

Consistent with the plaintiffs’ experts’ private admissions, Chevron’s array of highly credentialed environmental experts found as follows:

- ***Ground water*** was “not impacted” by TexPet’s oil operations;⁸⁸

⁸¹ Response, p. 5.

⁸² Judgment, p. 142, accessible at http://www.theamazonpost.com/wp-content/uploads/2011-02-14_Lago_Agrio_Judgment.PDF.

⁸³ *Pennsylvania R. Co. v. Lincoln Trust Co.*, 91 Ind.App. 28 (1929). The local water in the Oriente is heavily contaminated with fecal bacteria – in some samples at **400 times** the U.S. permitted levels – which no doubt causes health issues in the population utilizing this water. This fecal bacteria contamination is not related in any way to petroleum operations. As the plaintiffs’ lead expert Douglas Beltman admitted, “[M]uch of the problem is caused by poor sanitation” Stratus Consulting Proposed Settlement Technical Basis (draft 6/12/2008) at STRATUS-NATIVE048254, accessible at <http://www.theamazonpost.com/wp-content/uploads/STRATUS-NATIVE048254.pdf>.

⁸⁴ Cadena Presidencial, Correa television broadcast, March 24, 2012, accessible at <http://www.theamazonpost.com/wp-content/uploads/2012.03.24-Cadena-Presidencial-Aguas-Servidas-24-de-marzo-2012.pdf>.

⁸⁵ Response, p. 2 (emphasis in original).

⁸⁶ Kelsh, *Cancer mortality and oil production in the Amazon Region of Ecuador, 1990-2005*, INT ARCH OCCUP ENVIRON HEALTH. 2009 Feb;82(3):381-95, accessible at http://www.texaco.com/sitelets/ecuador/docs/occ_health.pdf. His findings were not limited to cancer. He further found that “mortality rates from all causes, cancer, circulatory disease, and respiratory disease were lower in the Amazon than in Pichincha province [where Ecuador’s capital is located], while death rates from infectious diseases were higher.” *Id.*

⁸⁷ *Id.*

⁸⁸ In an evaluation of groundwater samples from 206 sampling points, hydrogeologist Dr. Charles Newell concluded that “groundwater resources are not impacted by constituents associated with the past oilfield activities of Texpet.” Sampling results from 28 household wells that utilize groundwater in the immediate vicinity of former oil operations also showed no groundwater impacts from petroleum products. Another study analyzed the risk that groundwater could become contaminated in the future from residual crude oil in soils. It found “no groundwater

- **Drinking water:** “there is no indication of public health concerns related to drinking water as a result of petroleum exploration;”⁸⁹ and
- **Soil:** potentially toxic constituents were rarely detected in soil samples, and not at concentrations or locations indicating a potential health risk for the community.⁹⁰

In sum, plaintiffs’ evidence fails to demonstrate a public health catastrophe, while Chevron’s evidence contradicts their claims.

Blocking Remediation

If there were truly a public health emergency, why would plaintiffs’ Legal Team seek to block remediation of oil sites? Yet during 2007-09 the Legal Team attempted to block a remediation program belatedly undertaken by the State oil company.⁹¹ The Legal Team now offers an innocent explanation: They “asked for a halt to the program until it could be redesigned to be effective.”⁹²

Their contemporaneous private memos and emails, however, tell a different story. In 2007 one admitted, “We can’t stop the government from starting a cleanup we will just look like

impacts from oily soil,” and that “further weathering will not result in future groundwater impacts.” Newell Report (Sept. 2010) at 2-3 (citing O’Reilly & Thorsen’s publication in the *Journal of Soil and Sediment Contamination* (2008)), accessible at http://www.theamazonpost.com/wp-content/uploads/Newell_Report.pdf.

⁸⁹ All of the drinking water results in the Lago Agrio litigation record, more than 7,000 analyses from more than 250 drinking water sampling events, were evaluated by Dr. William Bellamy, an expert and former advisor on drinking water to the US Environmental Protection Agency. He concluded that “there is no indication of public health concerns related to drinking water as a result of petroleum exploration and production activities in the former concession area.” William D. Bellamy, *Evaluation of Drinking Water Quality Related to Petroleum Exploration and Production Activities in the Oriente Region of Ecuador*, at 7, accessible at <http://www.theamazonpost.com/wp-content/uploads/William-D.-Bellamy-Evaluation-of-Drinking-Water-Quality-Related-to-Petroleum-Exploration-and-Production-Activities-in-the-Oriente-Region-of-Ecuador.pdf>. None of the samples exceeded WHO or US EPA drinking water guidelines or standards for any chemical compound related to oil operations in the Oriente. *Id.* at 1.

⁹⁰ A health-based risk assessment of the environmental sampling results was conducted in 2008 by Dr. Thomas McHugh, a toxicologist and environmental scientist. His assessment (updated in 2010) evaluated all of the samples collected by the parties, including more than one thousand soil samples, to determine if they demonstrated any potential health risks for the local community. The study determined that potentially toxic constituents were rarely detected in soil samples, and not at concentrations indicating a potential health risk for the community. *McHugh, Lack of Evidence of Health Risks Associated with Hydrocarbons and Metals in the Former Concession Area* at 6, accessible at <http://www.scribd.com/doc/67951290/Expert-Report-Thomas-McHugh>. The study concluded that “the low frequency at which these constituents were detected at concentrations above health-based screening levels leads to the conclusion that conditions associated with the former Consortium operations do not pose a health risk for the local population.” *Id.* at 6. Further confirmation was provided by the sample locations: “even for the small fraction of samples where petroleum hydrocarbons or metals were detected at concentrations above health-based screening concentrations, the location of these samples would prevent any actual unsafe exposure.” *Id.* at 7.

⁹¹ The State oil company is known as Petroecuador.

⁹² *Response*, p. 7.

a bunch of bigots we claim that we are just looking for an environmental restoration and we are opposing it.”⁹³

By 2009 their “Action Plan” saw the State oil company’s cleanup as a “threat” to their legal strategy.⁹⁴ Fajardo emailed Donziger that he was “scared” that the State oil company’s “remediation costs little money” and that its cleanup was “worrisome” and “very unfavorable to us.”⁹⁵ Donziger’s reply: “You have to go to Correa to put an end to this shit once and for all.”⁹⁶

As these emails reveal, their real reason for opposing the remediation was that it posed a threat to their legal strategy: its cost (about \$70 million)⁹⁷ was nowhere near the multi-billion dollar sums they pretended to justify in their lawsuit for “remediation.”

Private Litigation?

Plaintiffs sued Chevron, based on TexPet’s minority share in the consortium, but they never sued the majority participant, the State oil company. The Legal Team’s explanation initially sounds plausible: “They chose not to sue Ecuador’s government at the same time, given that Chevron was the sole operator and therefore the most culpable party.”⁹⁸

Plausible, but inaccurate. First, the State oil company, not Texaco or Chevron, has been the sole operator for the last 22 years, and was majority owner even before 1990.

Second, the decision on whom to sue was not based on relative culpability. As Donziger admitted in private, “the government here will never pay for any judgment. In contrast, Texaco can pay.”⁹⁹ Plaintiffs’ original lead attorney likewise acknowledged that “there was no way a court was going to find against the Government.”¹⁰⁰

The Legal Team therefore struck a deal with the State. In 1996 they agreed in writing to “expressly waive the right to file any claim against the Ecuadorian State, [the State oil company]

⁹³ Email M. Pallares to S. Donziger, June 8, 2007, DONZ00043441, accessible at <http://www.theamazonpost.com/wp-content/uploads/DONZ000434411.pdf>.

⁹⁴ Plaintiffs’ “Action Plan,” dated Jan. 5, 2009, DONZ00026928, accessible at <http://www.theamazonpost.com/wp-content/uploads/DONZ000269281.pdf>.

⁹⁵ Email from Fajardo to Donziger, June 21, 2009, DONZ00066731, accessible at <http://www.theamazonpost.com/wp-content/uploads/DONZ00066731.pdf>.

⁹⁶ *Id.*

⁹⁷ In fact, the disparity is even greater, because the \$70 million is for all areas where the State oil company operates, not merely the area where it formerly operated in the consortium with Texaco. See Victor Gomez, *Ecuador will clean up areas in \$18 bln Chevron case*, REUTERS, December 15, 2011.

⁹⁸ *Response*, p. 8. Inventing something called the “Chevron/Cassel distraction technique,” the Legal Team complains that “they” – Chevron and I – use the State’s responsibility, not to argue that Chevron should pay less, but to argue that Chevron “shouldn’t pay anything.” *Response*, n. 17. It is of course rhetorically convenient for the Legal Team to equate my views with those of Chevron. It is also not accurate. Because there has been no fair trial, I am not in a position to opine on the amount of damages, if any, that Chevron should pay.

⁹⁹ *Crude Outtakes*, Nov. 16-17, 2007, at CRS-116-01-CLIP-01 (video clip of meeting between S. Donziger and L. Yanza), accessible at <http://www.theamazonpost.com/wp-content/uploads/CRS-116-01-CLIP-01.pdf>.

¹⁰⁰ Deposition of C. Bonifaz, Mar. 1, 2011, 94:6-95:18, accessible at <http://www.theamazonpost.com/wp-content/uploads/Deposition-of-C.-Bonifaz-Mar.-1-2011-94-951.pdf>.

and its affiliate companies, or any other Ecuadorian public sector institution or agency.”¹⁰¹ In return, the government agreed to “intervene” on their behalf in the then-pending New York litigation.¹⁰² During the Correa Administration the deal continued: plaintiffs were barred by their waiver not to sue the State, while Correa promised the government’s “full support” to help plaintiffs win against Chevron, and the judiciary colluded with plaintiffs as well.

Finally, if any party is “most culpable,” it is the State oil company, not Texaco. As Fajardo admitted in 2003 (before he joined the case):

“[The State oil company is] unreliable because what [it] says is one thing and what it does is the complete opposite. *Since Texaco left here, [the State oil company] has inflicted more damage and many more disasters than Texaco itself.* ... [T]here’s one spill after another; there’s broken pipes, there’s contamination of wetlands, of rivers, of streams in great magnitude. But since it’s a state-owned company, since it’s the same people involved in the laws and all, no one says a thing.”¹⁰³

Media reports support Fajardo’s assessment. The State oil company was reportedly responsible for more than 1,400 oil spills during 2000 to 2008 alone.¹⁰⁴

The reality, then, is that plaintiffs’ Legal Team entered into a pact with one defendant – the State – to collaborate in suing the other – Chevron. The suit against Chevron is thus a private litigation in name only. In fact, it is a joint venture by plaintiffs and the State to shift any liability incurred by the State, during 22 years as sole operator, to a foreign company.¹⁰⁵

Who Wrote the Judgment?

In an attempt to pass off their Judgment as if it were independently written by the judge, plaintiffs’ Legal Team claims that Chevron’s forensic experts “identified only a handful of phrases in the judgment that were similar, not verbatim, to a [plaintiffs’] litigation memo.”¹⁰⁶

In fact, the evidence that the Legal Team covertly co-authored their Judgment is far more extensive. Even though they never submitted a proposed judgment on the record,¹⁰⁷ the Judgment bears their handprints.

¹⁰¹ Waiver of Rights Granted Before Notaries Public of Massachusetts and Pennsylvania, Respectively, Nov. 20, 1996, accessible at <http://www.theamazonpost.com/wp-content/uploads/1996-Waiver-of-Rights.pdf>.

¹⁰² *Id.*; see also Deposition of C. Bonifaz, Mar. 1, 2011, 33:2-20, accessible at <http://www.theamazonpost.com/wp-content/uploads/Deposition-of-C.-Bonifaz-Mar.-1-2011-94-951.pdf>.

¹⁰³ Pablo Fajardo, quoted in Dr. Guillaume Fontaine, Final Report FLACSO-Petroecuador Project dated Nov. 2003 at 77 (emphasis added), accessible at <http://www.theamazonpost.com/wp-content/uploads/Final-Report-FLASCO.pdf>.

¹⁰⁴ *Petroecuador Diagnoses Environmental Damage Caused by Crude Oil*, EL UNIVERSO, Feb. 28, 2009.

¹⁰⁵ Hence the arbitral panel’s orders to Ecuador to suspend temporarily the execution of the Judgment, pending the outcome of the arbitration between Chevron and the State, are not orders to interfere in a “private” litigation, but rather involve a litigation in which the State is a real party in interest.

¹⁰⁶ *Response*, p. 8.

One expert, a professor of linguistics, identified several matches between their unfiled work product and the Judgment, including identical or nearly identical copying of strings of up to 90 words or more; out-of-place numerical ordering; and other errors in the unfiled work product that were repeated in the Judgment. He concluded “to a reasonable degree of certainty” that these matches were “due to common authorship.”¹⁰⁸

A second expert, a professor emeritus of linguistics, compared the language of the Judgment to 36 other writings by the same judge. He examined markers such as the use of headings, dollar amounts, date format, spacing, punctuation, ellipsis format, and capitalization. He concluded that it is “highly probable that the [Judgment] has multiple authors” and that it is “highly probable” that the judge “did not author a significant amount of the [Judgment].”¹⁰⁹

A third expert, on digital forensics, compared data in the Judgment with plaintiffs’ private database not filed in the court record. Even though the Judgment claims to rely only on evidence in the record,¹¹⁰ the expert concluded that data points in the Judgment were “copied, cut-and-pasted, or otherwise taken directly” from plaintiffs’ private database, and that the Judgment was “not authored independent” of the unfiled database.¹¹¹

Illustrative examples are telling:¹¹²

- At sites where the official record shows *no* mercury above detection limits, the Judgment reports “alarming” levels. The source of the error is plaintiffs’ unfiled database: by misplacing the “less than” symbol, it mistakenly converted a negative into a positive.
- Whereas certain sample results should be “micrograms,” the Judgment reports them as “milligrams.” The source of the error (which makes contamination appear a thousand times higher) was an identical mislabeling of those same samples in plaintiffs’ private database.
- Whereas *no* laboratory sampling results in the record gave sample names that end in the suffix “_sv,” *all* of plaintiffs’ sampling results listed at pp. 104-112 of the Judgment end with that suffix – as do all of plaintiffs’ sampling results recorded in their unfiled database.

¹⁰⁷ Donziger Deposition, July 19, 2011, at 4758:16 – 4759:3, accessible at <http://www.theamazonpost.com/wp-content/uploads/S.-Donziger-Deposition-July-19-2011.pdf>.

¹⁰⁸ Expert Report of Robert A. Leonard, Ph.D., Jan. 5, 2012, at 12, accessible at <http://www.theamazonpost.com/wp-content/uploads/R.-Leonard-Report-Jan.-5-2012.pdf>.

¹⁰⁹ Expert Report of Gerald R. McMenemy, March 14, 2012, at 1, accessible at <http://www.theamazonpost.com/wp-content/uploads/G.-McMenamin-Declaration-Mar.-14-2012.pdf>.

¹¹⁰ Lago Agrio Judgment at 99, 100, 105, 112, 122, 160-62, 179, accessible at http://www.theamazonpost.com/wp-content/uploads/2011-02-14_Lago_Agrio_Judgment.PDF.

¹¹¹ Expert Report of Michael L. Younger, Dec. 21, 2011, at 11, 19, accessible at <http://www.theamazonpost.com/wp-content/uploads/M.-Younger-Expert-Report-Dec.-21-2011.pdf>.

¹¹² *Id.* at 11-14.

Plaintiffs' Legal Team responds that one cannot rule out the possibility that all these linguistic and data idiosyncrasies may be found somewhere in the record.¹¹³ But they fail to identify even a single source in the record. Without showing record sources, does the same Legal Team that ghost wrote the court's expert report, and then lied about it, now expect us to credit their denial that they also co-authored the Judgment?

And what of the judge who put his name on the Judgment? On a petition brought by Ecuador's organized crime unit, the judicial disciplinary body recently removed him from the bench for "inexcusable judicial error," and referred his file to the public prosecutor to investigate his handling of a drug case.¹¹⁴

In sum, one can have no confidence in the purported authorship of plaintiffs' Judgment.

Illegitimate Judgment

The Legal Team's pervasive fraud alone renders the \$18.2 billion Judgment illegitimate. In addition, without here commenting on all the facially arbitrary elements of the Judgment – which tosses out figures in the billions of dollars without even a pretense of budgetary justification¹¹⁵ – the \$8.6 billion in conditional punitive damages stands out for two reasons.

First, as in most civil law countries, and as plaintiffs' lawyer Steven Donziger admitted,¹¹⁶ Ecuadorian law has never authorized punitive damages.¹¹⁷ The \$8.6 billion is a convenient innovation, designed simply to double the damages award against a foreign company with deep pockets.

Second, making the award conditional – Chevron would not have had to pay the \$8.6 billion if it publicly apologized and accepted responsibility within 15 days of judgment – violates due process. It forces Chevron either to waive its right to appeal, or to pay a multi-billion penalty as the price for exercising that right. No other court in the world has ever awarded such a "conditional punitive" damages award, and none should.

¹¹³ *Response*, n. 18.

¹¹⁴ El Pleno del Consejo de la Judicatura, 29 de febrero de 2012, Expediente Disciplinario No. OF-130-UCD-011-MAC, párrs. 6.2, 7.1, 7.2 y 7.4.

¹¹⁵ *E.g.*, \$1.4 billion for health improvement and monitoring, and \$800 million for reparation for cancer cases, with no indication whatsoever of so much as a line item of budgetary justification. Judgment at 183 and 184, accessible at http://www.theamazonpost.com/wp-content/uploads/2011-02-14_Lago_Agrio_Judgment.PDF.

¹¹⁶ Email from S. Donziger to J. Lipton, Apr. 22, 2007 [DONZ00038322-25] ("Punitive [damages have] no basis in Ecuadorian law, but we could push it and seek it anyway."), accessible at <http://www.theamazonpost.com/wp-content/uploads/DONZ00038322.pdf>.

¹¹⁷ Ecuadorian Civil Code, Art.1572 ("[Compensation for damages]. – Damages include consequential damages and lost profit, regardless of whether they result from failure to comply with the obligation, or improper performance of the obligation or delay in the performance."), accessible (in Spanish) at http://www.wipo.int/wipolex/en/text.jsp?file_id=251955.

Is Ecuador's Judiciary Independent in Politically Sensitive Cases?

Declaring Ecuador's judiciary "independent," plaintiffs' Legal Team objects that I "smear" their Judgment by comparing it to the widely condemned, \$42 million judgment which President Correa recently orchestrated in his favor against the *El Universo* newspaper.¹¹⁸

But the shoe fits. To believe that Ecuador's judiciary is independent in cases – like Chevron and *El Universo* – in which President Correa is personally interested, requires naiveté of sophomoric proportions. In such cases Donziger, at least, knows better: Ecuadorian judges, as he stated in documentary outtakes, are "all corrupt! ... it's their birthright to be corrupt."¹¹⁹ Moreover, they "make decisions based on who they fear the most, not based on what the laws should dictate."¹²⁰

Under President Correa, judges well know "who they fear the most." Four months before the Chevron Judgment was handed down in February 2011, the president of one Ecuadorian Superior Court stated that, in her 26-year career, "I have never seen the independence of the Judiciary reduced to such truly alarming levels as now." She added that there is "no judge who is not afraid."¹²¹

And for good reason. For example, in October 2010 Correa's office sought criminal charges against officers involved in a police uprising. Ecuador's Interior Minister later announced that, if the judge ruled in favor of any of the defendants, the government would "file a criminal action" against the judge.¹²² Intimidation extends beyond criminal cases. In November 2010 Correa's Legal Counsel sent a memorandum to all Ecuadorian Ministers and Secretaries of State, with a copy to the former head of the Judicial Council, relaying Correa's order that if any judge entered an injunction against a State agency, and was later reversed on appeal, the agency should sue the judge immediately and personally for damages.¹²³ And one month before the Judgment against Chevron was issued, Correa announced a referendum to approve his creation of a new commission that would give him effective control over the continued tenure of every judge in Ecuador.¹²⁴

¹¹⁸ *Response*, p. 1 and n. 3.

¹¹⁹ As quoted in *Chevron v. Donziger*, 768 F. Supp. 2d 581, 595 (S.D.N.Y. 2011), *rev'd on other grounds*, 303 F.3d 470 (2d Cir. 2002). The Court added, "Nor was this an offhand remark or a new sentiment on Donziger's part. In a brief filed in this Court in 2000 in an effort to avoid a *forum non conveniens* dismissal of his earlier case, Donziger stated that Ecuador could not provide an adequate forum and that its judiciary was corrupt." *Id.*

¹²⁰ *Crude Outtakes*, June 6, 2007, at CRS350-04-CLIP 01, accessible at <http://www.theamazonpost.com/wp-content/uploads/Crude-Outtakes-June-6-2007-CRS350-04-CLIP-01.pdf>.

¹²¹ *According to Jiménez, the Judiciary Council Should Disappear*, EXPRESO, Oct. 10, 2010.

¹²² *Threats against judge prior to sentence*, EL HOY, May 14, 2011.

¹²³ Letter from Legal Counsel to the Office of the President of the Republic, Official Circular No. T1.C1-SNJ-10-1689, Nov. 18, 2010.

¹²⁴ Letter from D. Cassel et al. to the Inter-American Commission on Human Rights, Jan. 28, 2011, p. 2 and n. 7. The letter was co-signed by, among others, Hernán Salgado Pesantes, the former Ecuadorian Judge on the Inter-American Court of Human Rights. The letter is accessible at http://www.nd.edu/~ndlaw/cchr/news/Pier/2_LetterENGIACHR.pdf.

Correa has been intensely and publicly interested in the case against Chevron. In 2007 he issued a press release announcing his intention to assist plaintiffs in gathering evidence and offering them the government's "full support."¹²⁵ Privately he met with them, and members of plaintiffs' team reported his "fabulous support" and his statement that he would "call the judge."¹²⁶

In 2008 Correa publicly lauded plaintiffs' attorneys as "real heroes."¹²⁷ When the Judgment against Chevron was announced in 2011, he praised it at a press conference as "the most important judgment in the history of the country."¹²⁸

No Ecuadorian judge could have been unaware that the case against Chevron mattered to Correa. Moreover, only a judge living on the moon could fail to be aware of the risk of adverse consequences for the career of any magistrate who dared to rule against the President's preferred result.

Plaintiffs' Legal Team counters that "[e]ven the U.S. State Department, in its annual human rights reports, agrees that Ecuador's courts are independent."¹²⁹ Not so. What the State Department actually says is the following:

While the Constitution provides for an independent judiciary, in practice the judiciary was at times susceptible to outside pressure and corruption. The media reported on the susceptibility of the judiciary to bribes for favorable decisions and resolution of legal cases ... Judges occasionally reached decisions based on media influence or political and economic pressures.¹³⁰

In other words, although Ecuador's Constitution (like all constitutions) provides formal independence, in practice the courts are not independent in politically sensitive cases.¹³¹

¹²⁵ Government of Ecuador Secretary General of Communications, Press Release, *Government Backs Actions of Assembly of Persons Affected by Texaco*, March 20, 2007.

¹²⁶ Email from María Eugenia Yépez to Steven Donziger, dated March 21, 2007, accessible at <http://www.theamazonpost.com/wp-content/uploads/2012-02-06-31-7-Rada-Decl-Exhibit-97-HIGHLIGHTED.pdf>. Plaintiffs' Legal Team accuses me of a "rank double standard" because, they say, Correa's comments were "bland" compared to President Obama's public comments on the BP oil spill case. *Response* at n. 3. But they ignore crucial distinctions: Unlike Correa, Obama did not say he would "call the judge." Unlike Correa, Obama has no control over the careers of sitting judges. And unlike Correa, Obama does not threaten criminal actions and damage suits against judges who rule against him or the government.

¹²⁷ State Channel, *Weekly Presidential Address*, Aug. 9, 2008.

¹²⁸ *Ecuador's Correa says Chevron's ruling 'important'*, Reuters, Feb. 15, 2001; Press Conference, Ecuador TV, Feb. 16, 2011.

¹²⁹ *Response*, p. 3.

¹³⁰ U.S. Dept. of State, *2010 Human Rights Report: Ecuador*, Section 1 (e), Denial of Fair Trial, accessible at <http://www.state.gov/j/drl/rls/hrrpt/2010/wha/154504.htm>.

¹³¹ That is one of several reasons why an affidavit by an assistant professor of political science at the University of Minnesota, paid for by plaintiffs' Legal Team for their litigation, is unpersuasive. *Response*, n. 6. The professor asks whether Ecuador's courts *in general* are independent, not whether they are independent in cases of special interest to Correa, such as those against Chevron and *El Universo*.

The issue, then, is not so much whether Ecuador's judiciary is independent in ordinary cases (although it is not),¹³² but its lack of independence in cases – like Chevron and *El Universo* – where President Correa takes a special interest. Yet if ever an Ecuadorian trial was under outside political pressure, the case against Chevron – Correa's "most important judgment in the history of the country" – fits that description.

The Judgment against Chevron (like the *El Universo* judgment¹³³) also fits another pattern noted by the State Department: "judges parceling out cases to outside lawyers, who wrote the judicial sentences and sent them back to the presiding judge for signature."¹³⁴

In short, one can take no comfort in any hope that the fraudulent trial against Chevron was embedded in an independent, self-correcting judiciary. If anything, the broader context of the judiciary in politically sensitive cases in Ecuador gives more, not less, reason for concern.

Did Chevron Agree to be Defrauded?

The Legal Team argues that Chevron chose to have the trial in Ecuador "with full knowledge of the Ecuadorian system." Chevron, they say, filed 14 affidavits attesting to the fairness of Ecuador's courts, and promised to accept jurisdiction in Ecuador and to abide by any adverse judgment – "subject only to narrow enforcement defenses."¹³⁵

In fact, when Texaco (not Chevron¹³⁶) filed the *forum non conveniens* motion and affidavits, it could not have had "full knowledge" of what would later become of Ecuador's beleaguered judiciary. The motion and affidavits were filed years before the arbitrary removal of 27 justices of Ecuador's Supreme Court in 2004,¹³⁷ the unwarranted removal of all nine judges of the Constitutional Court in 2007,¹³⁸ and the installation of Rafael Correa as President in 2007.

¹³² The World Economic Forum Executive Opinion Survey rates Ecuador 130th out of 142 countries surveyed for judicial independence. World Economic Forum, *Global Competitiveness Report 2011-12*, Table 1.06, accessible at <http://reports.weforum.org/global-competitiveness-2011-2012/#>. The World Bank's Worldwide Governance Indicators for 2010, compiled from 16 independent sources, rate Ecuador in the 11th percentile of all countries surveyed with respect to the "rule of law" – down from the 25th percentile in 2005. (accessible at http://info.worldbank.org/governance/wgi/sc_chart.asp).

¹³³ "A subsequent independent investigation determined that [the judge] did not write [the *El Universo* judgment], and that the author was probably Mr. Correa's attorney." WASHINGTON POST, Editorial, Jan. 12, 2012, p. A16.

¹³⁴ U.S. Dept. of State, *2010 Human Rights Report: Ecuador*, Section 1 (e), Denial of Fair Trial, accessible at <http://www.state.gov/j/drl/rls/hrrpt/2010/wha/154504.htm>.

¹³⁵ *Response*, p. 3.

¹³⁶ The district court ruling on *forum non conveniens* was issued in May 2001, *Aguinda v. Texaco*, 142 F.Supp.2d 534, 538 (S.D.N.Y. 2001), before Chevron bought Texaco in October 2001. (Although the boards of the two companies had agreed in October 2000 to merge, the merger was not approved by stockholders until October 2001. A. Sorkin and N. Banerjee, *Chevron Agrees to Buy Texaco For Stock Valued at \$36 Billion*, NY TIMES, Oct. 16, 2000, p. A1; M. Davis, *Texaco sells off two joint ventures; Chevron merger now official*, HOUSTON CHRONICLE, October 10, 2001, Business p. 1.) At the time the sale was completed in October 2001, the case was still pending on an appeal ultimately decided as *Aguinda v. Texaco*, 303 F.3d 470 (2d. Cir. 2002).

¹³⁷ Int.-Am.Comm.H.Rts., Press Release, *IACHR Takes Case Involving Ecuador to Inter-American Court*, Aug. 17, 2011, accessible at http://www.oas.org/en/iachr/media_center/PReleases/2011/093.asp.

¹³⁸ Human Rights Watch, *Ecuador: Removal of Judges Undermines Judicial Independence*, May 11, 2007, accessible at <http://www.hrw.org/news/2007/05/10/ecuador-removal-judges-undermines-judicial-independence>.

As described above, Correa eventually brought what little remained of judicial independence in Ecuador to a new low.

Most important, the “narrow enforcement defenses” reserved by Texaco fully justify Chevron’s opposition to the Judgment. Texaco reserved the right to contest the validity of any judgment (1) fraudulently procured or rendered, (2) by courts lacking impartiality, or (3) in violation of due process of law.¹³⁹ All three reservations apply to the Judgment against Chevron.

In short, Texaco agreed to be sued, not defrauded, in Ecuador.

Selling Credibility

The Legal Team has a consistent *modus operandi*: attack the motives and good faith of anyone who challenges their sanctimonious insistence on a public health “catastrophe” and their unethical manipulations of the Ecuadorian trial process.

Chevron’s respected forensic experts are thus dismissed as “scientific mercenaries.”¹⁴⁰ All three members of the Ecuador-US arbitral tribunal – even the member named by Ecuador¹⁴¹ – are “tainted with conflicts of interest,” because each stands to “reap millions of dollars in fees by granting jurisdiction over the case when in fact no basis exists.”¹⁴²

I am of course not exempted. (Only plaintiffs’ organization and their Legal Team, it seems, are immune to monetary temptations.¹⁴³) The Legal Team’s *Response* to my *Open Letter* opens by declaring that I “sold” my credibility to Chevron. Apparently they cannot imagine that anyone could honestly disagree with their inflated claims or their fraudulent conduct. Any departure from their righteous cause could only be in exchange for thirty pieces of silver.

I invite readers to consider both the Legal Team’s *Response*, and the foregoing reply, and to come to their own conclusions.

Conclusion

The plaintiffs’ Legal Team trades on appearances that are inherently attractive to human rights advocates: vulnerable Amazonians victimized by a powerful, polluting corporation. The appearance evokes sympathy – until one examines their shaky evidence and their misconduct of

¹³⁹ *Chevron v. Donziger*, 667 F.3d 232 (2nd Cir. 2012), slip op. at 6 and 15; N.Y.C.P.L.R. sections 5304 (b) (3) and 5304 (a)(1).

¹⁴⁰ Plaintiffs’ Motion to the Lago Agrio Court, Dec. 6, 2011, accessible at <http://www.theamazonpost.com/wp-content/uploads/Plaintiffs'-Motion-to-the-Lago-Agrio-Court-Dec.-6-2011.pdf>.

¹⁴¹ Professor Vaughan Lowe of Oxford University.

¹⁴² *Response*, p. 13.

¹⁴³ The Judgment awards an \$865 million windfall bonus to plaintiffs’ organization. Judgment at 187, http://www.theamazonpost.com/wp-content/uploads/2011-02-14_Lago_Agrio_Judgment.PDF. In addition, the appellate court in Ecuador added \$18 million for attorney’s fees. Lago Agrio First-Instance Appellate Decision at 11, accessible at [http://www.docstoc.com/docs/110401927/Ecuador-Appeals-Court-Judgment-\(English\)](http://www.docstoc.com/docs/110401927/Ecuador-Appeals-Court-Judgment-(English)). Both plaintiffs’ organization and their lawyers stand to win these jackpots *only* if their Judgment escapes condemnation for fraud.

the trial – a labor-intensive task which few outside observers have the time to undertake. The Legal Team is thus effectively insulated from outside scrutiny. Almost the only outsider who knows the record is Chevron. But who in the human rights community would take the word of a multinational oil company against the pleas of lawyers claiming to defend the human rights of the weak against the powerful?

For the sake of human rights everywhere, advocates would be well served to pierce these stereotypes and to take a close look at what is being done in the name of human rights in the Ecuador case. Our most valuable asset – our credibility – is at stake. We ought not, by default or simply for lack of time, to acquiesce in a frontal assault on due process of law – even against the rich and powerful.

Doug Cassel