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**SUMMARY OF FRAUD AND MISCONDUCT BY PLAINTIFFS' LAWYERS  
IN THE LAGO AGRIO LITIGATION AGAINST CHEVRON IN ECUADOR**

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## Table of Contents

|   | <u>Page</u> |
|---|-------------|
| <b>A. Introduction</b>  | 1           |
| <b>B. Background</b>  | 2           |
| <b>C. Plaintiffs' Own Experts Reveal Fabricated Evidence<br/>Of Environmental Harm</b>                              | 3           |
| (1) Russell: "analytical data was turning up blank"   | 4           |
| (2) Calmbacher: "I did not write this report."  | 7           |
| (3) Reyes: "I could not twist my professional assessments<br>to make them fit the plaintiffs' interests."           | 7           |
| (4) Beltman: Damages assessment "tainted and not<br>supported by reliable scientific evidence<br>and I disavow it." | 8           |
| a. Falsifying the Report  | 8           |
| b. Rigging the Damages Assessments  | 10          |
| c. Compounding the Errors   | 11          |
| (5) Maest: "There was no evidence that contamination<br>had migrated away from the pits"                            | 12          |
| (6) Plaintiffs Try to "Cleanse" the Damages Report  | 13          |
| (7) Plaintiffs Try to Discredit Their Own Experts   | 13          |
| <b>D. Fraud</b>   | 16          |
| (1) Judicial Findings of Fraud  | 17          |
| (2) The Huaorani Indigenous People Allege Unjust Enrichment   | 18          |
| (3) Plaintiffs Fraudulently Misrepresent the Damages Report   | 20          |
| a. Misrepresentations   | 21          |
| b. Desertions and Repudiations by Co-Counsel and Funders  | 22          |
| (4) Ghost Writing the Judgment  | 23          |
| <b>E. Forgery</b>   | 26          |
| <b>F. Bribery</b>   | 26          |
| <b>G. Blackmail</b>   | 27          |
| <b>H. Conclusion</b>  | 28          |

## A. INTRODUCTION

A lawsuit brought by lawyers purporting to represent Indigenous and other residents of the Lago Agrio zone of the Amazon basin in Ecuador resulted in an \$18.2 billion judgment against Chevron in 2011 for alleged damage to the environment.<sup>1</sup> Subsequently recalculated, the judgment now stands at over \$19 billion.<sup>2</sup>

Extensive evidence shows that the judgment was the product of gross misconduct by plaintiffs' lead lawyers. They fabricated evidence of alleged environmental harm; defrauded their clients, co-counsel, funders, courts and the public; and committed forgery, bribery, and blackmail.

Most of the evidence of misconduct comes from the lawyers' own internal emails; from their former experts, who now recant their prior claims of environmental harm; from former co-counsel and funders, who allege that they too were deceived; and from documents corroborating the testimonial evidence. The cumulative weight of the evidence of misconduct is compelling.

Numerous members of plaintiffs' legal team and their associated organization, the Amazon Defense Front, were involved in the litigation. However, two individuals were at the core of the misconduct: Steven Donziger, plaintiffs' lead United States lawyer, who by all accounts directed the litigation (at least until recently),<sup>3</sup> and Pablo Fajardo, plaintiffs' lead Ecuadorian lawyer. For purposes of this summary, it suffices to limit any attribution of responsibility for the misconduct to these two lead lawyers, attorneys Donziger and Fajardo.

Fraudulent litigation against any defendant -- including corporate defendants -- deserves repudiation by the human rights community. First, it offends human rights principles. Perversion of the judicial process violates due process of law, an essential bulwark of the protection of human rights and the rule of law. Second, committing -- or condoning -- fraud in the pursuit of justice for human rights victims risks the credibility of the human rights movement. And third, if we fail to distance ourselves from fraudulent human rights litigation against business corporations, business may be less inclined to take seriously its own human rights responsibilities.

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<sup>1</sup> *Aguinda y Otros v. Chevron*, Case No. 2003-0002, Provincial Court of Sucumbíos, Ecuador, judgment of Feb. 14, 2011, accessible at <http://chevrontoxico.com/assets/docs/2011-02-14-spanish-judgment-Aguinda-v-ChevronTexaco.pdf>; English translation accessible at [http://www.theamazonpost.com/wp-content/uploads/2011-02-14\\_Lago\\_Agrio\\_Judgment.PDF](http://www.theamazonpost.com/wp-content/uploads/2011-02-14_Lago_Agrio_Judgment.PDF).

<sup>2</sup> See, e.g., D. Gilbert, *Chevron's \$19 Billion Case*, WALL STREET JOURNAL, April 21, 2013.

<sup>3</sup> E.g., Affidavit of David L. Russell, May 8, 2013, par. 14: During 2003-05, "Donziger was always in control of the case, dictating case strategy, [and] overseeing the activities of the legal and technical teams, ..."; Witness Statement of Douglas Beltman, par. 4, concerning 2007-10: "While others, including Pablo Fajardo and Luis Yanza, participated in decision making regarding the litigation, it was apparent to Stratus that those in the LAPS' Quito office, including Pablo Fajardo, worked for Donziger and Joe Kohn and not vice versa."

## **B. BACKGROUND**

Chevron has never had oil operations in Ecuador. Its only connection with the alleged oil pollution is its indirect acquisition in 2001 of Texaco's Ecuadorian subsidiary ("TexPet"). TexPet had been a minority participant (37.5% share) in a consortium with the Ecuadorian State oil company, Petroecuador (62.5% share) in the Lago Agrio zone. The consortium expired in 1992. TexPet has had no oil operations in Ecuador since then; for the last two decades the only company pumping -- and spilling -- oil in the zone has been Petroecuador.

During 1995 to 1998 TexPet spent tens of millions of dollars on a remediation program for its agreed share of the prior contamination. In 1998 Ecuador certified the adequacy of the remediation and confirmed TexPet's release from liability. Whether the remediation was adequate, and whether the release now bars the plaintiffs' lawsuit, are matters in dispute between Chevron and the plaintiffs, and between Chevron and Ecuador in an international arbitration convened under the United States-Ecuador Bilateral Investment Treaty.<sup>4</sup>

The litigation over Lago Agrio began in 1993, when a class action suit for environmental and personal injuries was filed against Texaco in New York. In order to secure Ecuador's support for their lawsuit, plaintiffs' counsel committed in writing not to sue the State oil company, Petroecuador.<sup>5</sup> And true to their agreement, they have in fact never sued Petroecuador.

In 2002 (by which time a Chevron subsidiary had merged with Texaco), a US Court of Appeals affirmed the dismissal of the US lawsuit on the ground that Ecuador was a more convenient forum.<sup>6</sup> As a condition of the dismissal of the US case, the Court required Texaco (and later Chevron) to accept the jurisdiction of Ecuadorian courts.

However, in accepting Ecuadorian jurisdiction, Chevron agreed only to be sued -- not defrauded. Chevron reserved the right to contest the validity of any Ecuadorian judgment (1) fraudulently procured or rendered, (2) rendered by courts lacking impartiality, or (3) in violation of due process of law.<sup>7</sup> All three reservations apply to the judgment eventually entered against Chevron.

Following the dismissal of the US case, in 2003 a group of US and Ecuadorian lawyers purporting to represent victims of oil contamination in Lago Agrio sued Chevron (but not Petroecuador) in Ecuador. Their suit does not assert or prove any individual claims of harm, but only collective claims for environmental redress. An Ecuadorian trial court entered an \$18.2

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<sup>4</sup> Permanent Court of Arbitration Case No. 2009-23, Chevron and Texaco, Claimants, and Ecuador, Respondent. Most recently, see the Fourth Interim Award on Interim Measures, Feb. 7, 2013, accessible at <http://www.theamazonpost.com/wp-content/uploads/Fourth-Interim-Award-on-Interim-Measures.pdf>.

<sup>5</sup> In 1996 they agreed in writing to "expressly waive the right to file any claim against the Ecuadorian State, [the State oil company] and its affiliate companies, or any other Ecuadorian public sector institution or agency." 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>.

<sup>6</sup> *Aguinda v. Texaco*, 303 F.3d 470 (2d Cir. 2002).

<sup>7</sup> *Chevron v. Donziger*, 667 F.3d 232 (2<sup>nd</sup> Cir. 2012), slip op. at 6 and 15; N.Y.C.P.L.R. sections 5304 (b) (3) and 5304 (a)(1).

billion judgment against Chevron in 2011, and an appeals court upheld it in 2012, recalculating it to over \$19 billion.<sup>8</sup>

The conduct of the Ecuadorian litigation by plaintiffs' lead lawyers and judicial officials has violated fundamental human rights norms of fair trial, due process of law and rule of law. The evidence of fraud is so strong that numerous US federal judges have invoked the rarely used "crime-fraud" exception to pierce the confidentiality of Steven Donziger's work product and attorney-client communications.<sup>9</sup> The evidence of fraud is further reflected in interim awards by the international Arbitration Tribunal, directing Ecuador to suspend enforcement of the \$18.2 billion judgment against Chevron, pending the Tribunal's review of Chevron's objections.<sup>10</sup> The case to suspend enforcement was so clear that the Tribunal's decisions were unanimous, joined even by Ecuador's own appointee to the Tribunal (a respected Oxford University scholar of international law).<sup>11</sup>

The following is a non-exhaustive summary of the evidence of misconduct orchestrated and perpetrated by plaintiffs' lead lawyers, attorneys Donziger and Fajardo:

### **C. PLAINTIFFS' OWN EXPERTS REVEAL FABRICATED EVIDENCE OF ENVIRONMENTAL HARM**

The public relations web site of the Amazon Defense Front, an organization associated with plaintiffs' lawyers in the Lago Agrio litigation, claims even now that the result of Texaco's oil operations that ended over two decades ago in Ecuador "was, and continues to be, one of the worst environmental disasters on the planet." It is, they trumpet, a "Rainforest Chernobyl."<sup>12</sup>

Similarly, when Pablo Fajardo and other purported representatives of plaintiffs in early 2012 asked the Inter-American Commission on Human Rights for assistance, they claimed that enforcement of the judgment against Chevron was needed to avert a "serious and urgent" threat to health and the environment.<sup>13</sup> (When the Commission asked for evidence to substantiate this claim, Fajardo et al. promptly withdrew their request.)<sup>14</sup>

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<sup>8</sup> Note 1 above; see Reuters, *\$18 Billion Ruling Against Chevron Is Upheld*, Jan. 4, 2012. Chevron has asked the National Court of Justice to review the case. Chevron Press Release, *Chevron Appeals Illegitimate Ruling in Ecuador*, Jan. 20, 2012.

<sup>9</sup> See cases cited in part D.1 below.

<sup>10</sup> See note 4 above.

<sup>11</sup> Vaughan Lowe, who at the time of his appointment was Chichele Professor of International Law at Oxford.

<sup>12</sup> <http://chevrontoxico.com/about/> (accessed July 19, 2013).

<sup>13</sup> Request for Precautionary Measures, MC 48/12, Feb. 9, 2012, at 1, 5.

<sup>14</sup> Letter from Santiago Canton, Executive Secretary, Inter-American Commission on Human Rights, to Pablo Fajardo et al, Feb. 23, 2012; Letter from Pablo Fajardo to Santiago Canton, March 2, 2012; both in matter no. MC 48/12, before the Inter-American Commission on Human Rights. Together with Cambridge international law scholar James Crawford and lawyers representing Chevron in the international arbitration, I co-signed an *amicus* brief filed before the Commission on February 22, 2012, opposing the request by Fajardo et al.

Plaintiffs' lawyers' claims of an environmental and health disaster were debunked by eminent experts who testified for Chevron in the trial.<sup>15</sup> There is no need, however, to review that testimony here, because plaintiffs' lawyers' claims are now also debunked by their own former experts. Indeed, the plaintiffs' expert who coined the phrase "Rainforest Chernobyl" long ago repudiated the inapt comparison and advised Donziger and Fajardo to stop using it.<sup>16</sup>

Plaintiffs' legal team did indeed present expert evidence. But we now know that their evidence was fabricated. In a remarkable series of recent sworn statements, at least five former experts for plaintiffs, whose work collectively spans the duration of the proceedings, give similarly revealing testimony. The common thread is that plaintiffs' own experts advised Donziger and Fajardo that soil and water sampling data did not support their environmental and health claims. Donziger and Fajardo responded, against the advice of their own experts, by resorting to scientifically unsound sampling methods, using scientifically unsupported environmental standards, and by attempting to saddle Chevron with the blame for Petroecuador's pollution (which continues even today, long after Texaco cleaned its agreed share of the former consortium's drilling sites).

Plaintiffs' lead lawyers then persuaded some of their experts -- who now recant their prior testimony -- to make damage estimates based on scientifically invalid assumptions given to them by Donziger, but which the experts never verified and which they now repudiate.

Throughout the case, his own former experts now report, Donziger's overriding interest was not the validity of the scientific evidence, but was simply to find a "big number" with which to pressure Chevron into paying billions of dollars.

The following are brief summaries of their extensive testimonies:

**(1) Plaintiffs' Expert Russell: "analytical data was turning up blank"**

Environmental engineer David Russell was lead environmental scientist for the plaintiffs and oversaw their sampling and examination of oil production sites in 2004. In a recent affidavit he now states, "I have personal knowledge that Steven Donziger ... and the plaintiffs' representatives have tainted the legal process in Ecuador and are lying about the environmental conditions there."<sup>17</sup>

He explains,

"I spent several months investigating the environment at the oil production sites ... I found that the environmental evidence did not and does not support the plaintiffs' claims. I saw no evidence of any widespread health effects caused by oil contamination from

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<sup>15</sup> See the summary in Supplement to Chevron's *Amicus Curiae*, Appendix A: Health and Environmental Impacts, filed March 6, 2012 in the proceeding on Request for Precautionary Measures, MC 48/12, before the Inter-American Commission on Human Rights.

<sup>16</sup> Affidavit of David L. Russell, May 8, 2013, par. 28.

<sup>17</sup> Affidavit of David L. Russell, May 8, 2013, par. 2.

Texaco, and no evidence of drinking water contaminated with petroleum from Texaco's operations."<sup>18</sup>

According to Russell, Donziger told him that he wanted a "really big number" for the costs of remediation in order to "pressure Chevron into paying," and that "environmental and scientific evidence was of secondary importance."<sup>19</sup>

Plaintiffs' lawyers gave Russell a guided tour of several sites in Lago Agrio in 2003. Without taking samples or receiving sampling data, or knowing about Petroecuador's continuing operations in the zone, Russell produced a clean-up cost estimate of \$6 billion. However, his estimate was "based largely on the description of the environmental damage given to me by Donziger and members of the plaintiffs' team."<sup>20</sup>

Russell's reliance on plaintiffs' lawyers proved to be misplaced. Almost all of his \$6 billion estimate was "related to Donziger's claims that rivers and groundwater would need to be remediated, claims that I later found out were false. The remainder was based on my limited observation of pits at what I later learned were Petroecuador's operations."<sup>21</sup>

In 2004 Russell proceeded to conduct environmental sampling. He found that "[t]he sampling data did not show any groundwater contamination, or surface water contamination, or the kinds of soil contamination I expected to find based on Donziger's stories about Texaco practices."<sup>22</sup>

Although Russell trained plaintiffs' team on sampling techniques, "no one on that team (other than myself and Dr. Charles Calmbacher) had the technical expertise to conduct a valid scientific investigation."<sup>23</sup> Russell designed and recommended that plaintiffs carry out a thorough environmental investigation to determine whether their claims were accurate. But Donziger refused to approve the investigation, "claiming that it would be too costly."<sup>24</sup>

Instead Donziger opted for a scaled down study. The reduced version was practically a fail-safe technique to attribute contamination to Texaco. Where there appeared to be no contamination, plaintiffs would simply exclude those sites from the samples they presented to the court.<sup>25</sup> On the other hand, where contamination was found, scientific testing techniques indicated that "the oil contamination being found was Petroecuador's rather than Texaco's." So Donziger and team decided to simply stop using those testing techniques.<sup>26</sup>

Donziger and team also primarily tested for a misleading indicator: total petroleum hydrocarbons, or TPH. As Russell explained to Donziger, TPH picks up not only oil

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<sup>18</sup> *Id.*, par. 3.

<sup>19</sup> *Id.*, par. 5.

<sup>20</sup> *Id.*, par. 7.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, par. 12.

<sup>24</sup> *Id.*, par. 16.

<sup>25</sup> *Id.*, par. 17.

<sup>26</sup> *Id.*, par. 18.

contamination, but also the presence of natural oils from plants or other sources; its presence "does not indicate health risk." But Donziger "ignored what I told him and repeatedly claimed that sampling showing the presence of TPH was evidence of health risk to residents of the area. That was not true when I worked on the case and it is not true today."<sup>27</sup>

Rather than focus on TPH, Russell advised Donziger to test for certain carcinogenic chemicals and metals in order to establish a basis for plaintiffs' claims. But Russell found little evidence of these chemicals or metals in the soil, and certainly no evidence of "widespread" soil contamination. And he found "no evidence at all" of these chemicals or metals from Texaco operations in surface or drinking water.<sup>28</sup>

Russell further advised Donziger that illnesses among local residents might be caused by pesticides or bacterial contamination of drinking water. Yet Donziger refused to test for pesticides or herbicides.<sup>29</sup>

On Russell's recommendation, plaintiffs in 2004 began using a laboratory at the Catholic University. But Donziger "was very unhappy with the results of the analyses at the Catolica laboratory because they were unable to detect suspected contaminants in the samples provided." Plaintiffs later switched to a different laboratory.<sup>30</sup>

By late 2004 Russell realized that plaintiffs could not prove their claims "because the analytical data was turning up blank for both the soil and the water samples and the samples were not showing the contamination that Donziger wanted."<sup>31</sup> Moreover, "[t]he idea that the cleanup of the oil pits in the area would cost billions of dollars is nonsense."<sup>32</sup>

Before reaching these conclusions, however, in conversations with Donziger, Russell had used the phrase "Rainforest Chernobyl." Once the sampling data belied the comparison, Russell advised plaintiffs' team to stop using the phrase. But Donziger "insisted on continuing to use the phrase because the media liked it, Chevron hated it, and dropping the use of the phrase would reduce the pressure on Chevron."<sup>33</sup>

Russell concluded that Donziger "was not interested in whether oil was actually causing any health problems. He just wanted to keep saying that oil was causing health harms so he could force Chevron into settling."<sup>34</sup>

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<sup>27</sup> *Id.*, par. 19.

<sup>28</sup> *Id.*, par. 20.

<sup>29</sup> *Id.*, par. 21.

<sup>30</sup> *Id.*, par. 22.

<sup>31</sup> *Id.*, par. 25.

<sup>32</sup> *Id.*, par. 31.

<sup>33</sup> *Id.*, par. 28.

<sup>34</sup> *Id.*, par. 21.



**(2) Plaintiffs' Expert Calmbacher: "I did not write this report."**

As stated by Mr. Russell, the only other technically qualified member of plaintiffs' sampling team was Dr. Charles Calmbacher. In 2005 plaintiffs' lawyers submitted to the Ecuador court a report over Dr. Calmbacher's supposed signature for two sites, "each purporting to show extensive environmental damage."<sup>35</sup> Dr. Calmbacher later testified under oath: "I did not reach these conclusions and I did not write this report."<sup>36</sup> 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.<sup>37</sup> (See also part E below concerning forgery.)

**(3) Plaintiffs' Expert Reyes: "I could not twist my professional assessments to make them fit the plaintiffs' interests."**

Mr. Reyes, a petroleum and environmental engineer,<sup>38</sup> began work on the Lago Agrio case for Donziger in early 2006.<sup>39</sup> The court had appointed "settling experts" to review the conflicting environmental sampling data presented by Chevron and the plaintiffs. When the court's settling experts sided with Chevron, Donziger asked Reyes to produce a report stating that the settling experts "were wrong, that they lacked objectivity, and were biased toward Chevron."<sup>40</sup>

Reyes continues, "However, in my professional opinion the evidence did not support Mr. Donziger's position and I could not twist my professional assessments to make them fit the plaintiffs' interests."<sup>41</sup> He and a colleague prepared a report, but Donziger never asked him to submit it to the court.<sup>42</sup>

In March 2007 Reyes attended a meeting with Donziger, Fajardo, plaintiffs' consultant Dr. Ann Maest (see C.5 below) and others on plaintiffs' team, together with Richard Cabrera, in anticipation of Cabrera's appointment as the court's "independent" expert on damages assessment. According to Reyes' sworn statement, at the meeting Donziger and Fajardo "dropped any pretense that Mr. Cabrera would act independently in writing an expert report that would be technically sound and executed according to professional standards."<sup>43</sup> On the contrary, Reyes states, "[I]t was obvious that the plaintiffs had already predetermined the findings of the global assessment, that they themselves would write a report that would support their claim for billions of dollars against Chevron and would simply put Mr. Cabrera's name on it."<sup>44</sup>

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<sup>35</sup> *Chevron v. Donziger*, 768 F. Supp. 2d 581, 606 (S.D.N.Y. 2011), *rev'd on other grounds*, 667 F.3d 232 (2<sup>nd</sup> Cir. 2012).

<sup>36</sup> Calmbacher Deposition at 116:9-10, accessible at <http://www.chevron.com/documents/pdf/ecuador/calmbacherdepo.pdf>.

<sup>37</sup> *Id.* at 113:23-25 and 115:15-19.

<sup>38</sup> Declaration of Ramiro Fernando Reyes Cisneros, Oct. 12, 2012, certified English translation, par. 3, accessible at <http://www.theamazonpost.com/wp-content/uploads/Reyes-Declaration-English.pdf>.

<sup>39</sup> *Id.*, pars. 11 and 12.

<sup>40</sup> *Id.*, par. 20.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*, par. 35.

<sup>44</sup> *Id.*

Indeed, "The purpose of the meeting was to establish all the conditions for controlling and managing the expert's work, in secret, in accordance to the plaintiffs' interests."<sup>45</sup>

After reviewing Reyes' statement, plaintiffs' consultant Dr. Maest, who was also at the meeting, attests that "Mr. Reyes' recollections of the events for which we both were present are consistent with my own, ..."<sup>46</sup>

Subsequently Donziger paid Reyes \$10,000 to prepare two technical reports. Only later did Reyes learn that those reports were included in Annex S to the Report supposedly prepared by the court's "independent" damages expert -- Richard Cabrera.<sup>47</sup>

**(4) Plaintiffs' Expert Beltman: Damages assessment "tainted and not supported by reliable scientific evidence and I disavow it."**

Douglas Beltman, then an Executive Vice President of Stratus Consulting, Inc., was in charge of the firm's work on the Lago Agrio case from 2007 to 2010.<sup>48</sup> Stratus worked under the direction and control of Donziger.<sup>49</sup> Donziger asked Stratus to conduct a damage assessment, which he projected would justify "a major damages claim, probably in the many billions of dollars."<sup>50</sup>

***a. Falsifying the Reports***

Stratus never publicly filed reports in the case under its own name (except publicly to endorse the Report they secretly wrote for the court's expert, Richard Cabrera). Instead, as Beltman and his colleague Dr. Ann Maest (see part C.5 below) admit in recent witness statements,<sup>51</sup> their firm participated in an elaborate scheme, under Donziger's direction, to secretly draft the damage assessment Report of Mr. Cabrera, the court's "independent expert," and 11 of its 24 annexes.<sup>52</sup> (Other annexes were drafted for Cabrera by other members of plaintiffs' legal team and consultants.)<sup>53</sup>

Cabrera was neither independent nor expert. He took his Report and damage assessments wholesale from the plaintiffs' legal team.<sup>54</sup> Based on meeting Cabrera and reviewing his

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<sup>45</sup> *Id.*

<sup>46</sup> Witness Statement of Ann Maest, March 22, 2013, par. 12. The only difference in her recollection and that of Reyes -- she did not recall a presentation by another consultant (*id.*) -- does not affect their shared recollection of how Donziger et al. planned to use the court's "independent" damages expert. Dr. Maest' statement is accessible at <http://www.theamazonpost.com/wp-content/uploads/Maest-Witness-Statement.pdf>

<sup>47</sup> *Id.*, par. 38.

<sup>48</sup> Witness Statement of Douglas Beltman, March 21, 2013, par. 1, accessible at <http://www.theamazonpost.com/wp-content/uploads/Beltman-Witness-Statement.pdf>

<sup>49</sup> *Id.*, par. 2.

<sup>50</sup> *Id.*, par. 8.

<sup>51</sup> Witness Statement of Douglas Beltman, March 21, 2013; Witness Statement of Ann Maest, March 22, 2013.

<sup>52</sup> Witness Statement of Douglas Beltman, March 21, 2013, paras. 22-25.

<sup>53</sup> *Id.*, par. 25.

<sup>54</sup> *Id.*, par. 30.

background, Beltman testifies that Cabrera "lacked the skill, qualifications, and experience to conduct or review a multi-disciplinary environmental damages assessment himself."<sup>55</sup> Beltman saw no evidence that Cabrera had any experts assisting him, other than plaintiffs' legal team and their consultants.<sup>56</sup>

The misrepresentation of Stratus' work as that of the court's supposedly independent expert reached farcical proportions: First, Stratus and plaintiffs' team drafted the "expert's" Report as if it were written by the expert. Next, Stratus drafted the plaintiffs' "Critique" of the expert's Report. Then, Stratus drafted the expert's purported Response to questions posed by plaintiffs. Finally, Stratus made public Comments in its own name, endorsing the expert's Report.

In drafting the expert's Report, Beltman explains, "At Donziger's direction, I drafted my portions of the report in the first person as though it was written by Richard Cabrera."<sup>57</sup> Specifically, "Donziger told Stratus to indicate on the draft Summary Report that it was written 'By Richard Cabrera' and instructed Stratus to draft its portions of the Summary Report in the first person (e.g. 'I, Richard Cabrera, find...')."<sup>58</sup>

To avoid detection, authorship of the annexes was attributed falsely to various persons. Beltman testifies that Donziger and Fajardo "told me to whom authorship of the various Cabrera Report Annexes should be attributed, and I recorded those names in a table."<sup>59</sup> The reason, Donziger told Beltman, "was to make it more difficult to uncover that Stratus had written the Annexes. ... Stratus was provided with a format for annexes from the LAPs [Lago Agrio Plaintiffs] that indicated the annexes were written by the "Cabrera Technical Team" rather than Stratus."<sup>60</sup>

Having joined with Donziger and plaintiffs' team to draft Cabrera's Report and cost estimates, Stratus next drafted plaintiffs' formal Critique of "Cabrera's" Report. In so doing, they attacked their own prior work. Stratus now claimed that "[t]he omissions we have been able to detect in Expert Richard Cabrera's Expert Report greatly favor the interests of the defendant [Chevron], given that said omissions either minimize or fail to consider certain environmental damage ..."<sup>61</sup>

Their Critique also tightened the cleanup standards in order to raise cleanup costs. Based on nothing more than instructions from Donziger, Stratus lowered the TPH cleanup standard by a factor of ten -- from 1,000 parts per million down to 100 parts per million. This new, tighter standard enabled Stratus to inflate its estimate of soil cleanup costs from \$1.7 billion to \$2.7 billion.<sup>62</sup>

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<sup>55</sup> *Id.*, par. 15.

<sup>56</sup> *Id.*, par. 16.

<sup>57</sup> *Id.*, par. 22.

<sup>58</sup> *Id.*, par. 27.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*, par. 40.

<sup>62</sup> *Id.*

Even this was not enough. Plaintiffs' legal team later posed questions to Cabrera. Stratus assisted plaintiffs' legal team in drafting "Cabrera's" Response to their questions, as if it were written by Cabrera. In this round Stratus and plaintiffs' legal team managed to boost their own prior damage assessment from \$16 billion to \$27 billion.<sup>63</sup>

Finally, unable to find any independent scientists willing to endorse the outlandish damages assessments in Cabrera's Report, and at Donziger's request, in December 2008 Stratus made public its own "Comments" endorsing the Report (without revealing the Report's true authorship).<sup>64</sup> Now, five years later, Beltman reports that each Stratus scientist involved "withdraws and no longer stands behind or endorses the December 1, 2008 Comments as valid."<sup>65</sup>

### ***b. Rigging the Damages Assessments***

Even if their damage assessments had been credible, falsely presenting the work of plaintiffs and their consultants, as if it were the work of the court's independent expert, would have been a serious violation of due process of law. But in fact, the damage assessments -- based on assumptions and directions given to Stratus by Donziger<sup>66</sup> -- were wildly inflated.

First, the damage assessments attribute to Texaco (and hence to Chevron) contamination that was actually caused by Petroecuador. Donziger never asked Stratus to "attempt to allocate any identified contamination between TexPet and Petroecuador."<sup>67</sup> On the contrary: " the environmental sampling designed and conducted by the LAPs' [Lago Agrio Plaintiffs] representatives indicates that Donziger and the LAPs' representatives were not concerned with allocating the contamination caused by Petroecuador to anyone but TexPet, and in fact their data do not allow for such an allocation."<sup>68</sup>

Beltman elaborates:

"Donziger never instructed Stratus to conduct any analysis of the contamination in the former concession area caused by Petroecuador, including recent spills by Petroecuador. In Stratus's review of the evidence, it observed that some of the samples with the highest levels of petroleum in soil were at sites where Petroecuador had operated or was currently operating. From the documents I reviewed, TexPet had remediated all of the pits it was responsible for in accordance with its settlement agreements with the Government of Ecuador."<sup>69</sup>

And indeed, the "majority of the sites" in the damage assessment Stratus drafted for the Cabrera Report were Petroecuador sites, not Texaco sites.<sup>70</sup>

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<sup>63</sup> *Id.*, pars. 43-45.

<sup>64</sup> *Id.*, pars. 58-60.

<sup>65</sup> *Id.*, par. 60.

<sup>66</sup> *Id.*, par. 32.

<sup>67</sup> *Id.*, par. 21.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*, par. 31.

<sup>70</sup> *Id.*, par. 33.

Second, Donziger instructed Stratus to ignore Petroecuador's ongoing cleanup program. This resulted in a double inflation of costs. If Stratus had used Petroecuador's much lower actual costs to clean each pit -- which Beltman testifies would have been the "best estimates" to use<sup>71</sup> -- the estimated total cleanup costs would have been only a "fraction" of those claimed in the Cabrera Report.<sup>72</sup> Moreover, the number of pits to be cleaned would also have been fewer, since "many of the pits that the Cabrera Report finds require cleanup had already been remediated or were in the process of being remediated by Petroecuador ... "<sup>73</sup>

Third, Donziger instructed Stratus to use cleanup standards that lack scientific validity. Petroecuador's cleanup program uses a TPH standard of 2,500 parts per million.<sup>74</sup> By comparison, Donziger initially instructed Stratus (for purposes of drafting the Cabrera Report) to require cleanup to a much lower TPH level of 1,000 parts per million. Later (for purposes of plaintiffs' "Critique" of the Report) Donziger lowered even that TPH standard tenfold, bringing it down to 100 parts per million. Yet, as Beltman notes, the Agency for Toxic Substances and Diseases Registry confirms that "TPH itself is not a direct indicator of risk to humans or to the environment."<sup>75</sup>

Fourth, Donziger instructed Stratus to use a "pit inventory" of 916 or 917 pits to be cleaned, a figure Stratus never verified,<sup>76</sup> and which far exceeds the number of pits Ecuador had agreed were Texaco's responsibility, let alone the number of pits not yet remediated.

### *c. Compounding the Errors*

In addition to the foregoing, overarching flaws in the damages assessments in the Cabrera Report and Response, Beltman testifies that individual components of the damage assessments are further invalid. For example:

- **Groundwater (assessed at \$3.2 billion in the Cabrera Response):** "There are no scientific data to support a \$3.2 billion groundwater remediation, nor am I aware of any scientific basis for the \$600 million for groundwater remediation award in the judgment." These assessments "are not accurate, reliable, or valid estimates."<sup>77</sup>
- **Potable Water (assessed at \$428 million in Cabrera Annex R):** "Stratus is not aware of any scientific evidence that people in the former concession area are drinking water contaminated with petroleum. To the contrary, none of the drinking water samples I have seen exceeded the drinking water guidelines or standards established by WHO and the U.S. EPA for any chemical compound related to oil operations, ... "<sup>78</sup>

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<sup>71</sup> *Id.*, par. 34.

<sup>72</sup> *Id.*, par. 48.

<sup>73</sup> *Id.*, par. 35.

<sup>74</sup> *Id.*, par. 40.

<sup>75</sup> *Id.*, par. 36.

<sup>76</sup> *Id.*, par. 37.

<sup>77</sup> *Id.*, par. 49.

<sup>78</sup> *Id.*, par. 50.

- **Healthcare System (assessed at \$480 million in Cabrera Annex P):** "I am not aware of any scientific data that shows that any adverse health effects are caused by contamination from petroleum operations in the Oriente [where Lago Agrio is located]."<sup>79</sup>
- **Cancer (assessed at \$9.5 billion in Cabrera Response and Cabrera Annex Q):** "... [T]he conclusion that there were 1,400 "excess cancer" deaths near the oil operations area is invalid and unsupported. ... The Cabrera Report cannot be relied upon to conclude that any individual actually has gotten cancer as a result of living near oil operations in the Oriente, that there was any elevated risk of cancer from living near oil operations in the Oriente, or that there is any reliable or valid basis for the damages assessed to Chevron."<sup>80</sup>
- **Unjust Enrichment (assessed at \$8.4 billion in Cabrera Response and Cabrera Annex T):** "I understand this category is a form of punitive damages in Ecuador. I have never used this category before in any damages assessment, and I have no basis to believe that this is a valid claim."<sup>81</sup>

In sum, Beltman now concludes, "The Cabrera damages assessment is tainted and not supported by reliable scientific evidence and I disavow it."<sup>82</sup>

**(5) Plaintiffs' Expert Maest: "[T]here was no evidence that contamination had migrated away from the pits."**

Ann Maest was a Managing Scientist at Stratus who worked on the Ecuador project with Beltman beginning in August of 2007. Previously she worked on the project with another consulting firm during 2006 and 2007,<sup>83</sup> also under Donziger's direction.<sup>84</sup>

Before Stratus came into the case, Maest and two other consultants met with Donziger in Ecuador in March 2007. They "raised issues with Donziger about the environmental data we had seen. In particular, I found in my analysis of the data that there was no evidence that contamination had migrated away from the pits." She told Donziger, "all the reports are saying it's [*i.e.*, groundwater contamination] just at the pits and the stations and nothing has spread anywhere at all."<sup>85</sup>

In her recent testimony Maest states that the water sampling method being used by the plaintiffs' team at the time was improper. She adds:

"I requested from Donziger and the Quito team on multiple occasions that additional groundwater sampling be conducted but never received approval for that sampling. At no

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<sup>79</sup> *Id.*, par. 51.

<sup>80</sup> *Id.*, par. 53.

<sup>81</sup> *Id.*, par. 54.

<sup>82</sup> *Id.*, par. 47.

<sup>83</sup> Witness Statement of Ann Maest, March 22, 2013, par. 1, accessible at <http://www.theamazonpost.com/wp-content/uploads/Maest-Witness-Statement.pdf>

<sup>84</sup> *Id.*, pars. 2 and 3.

<sup>85</sup> *Id.*, par. 13.

time while working on the Ecuador Project did I see any data supporting a finding of groundwater contamination from TexPet operations away from the pits."<sup>86</sup>

The events she recounts following Stratus' entry into the case are consistent with those described by her colleague, Mr. Beltman. Having reviewed his statement, she states that his recollection of the process of drafting the Cabrera Report and related events is "consistent with my own."<sup>87</sup>

Like Beltman, Maest now concludes that the "damages assessment in the Cabrera Report and Cabrera Response are not reliable. I disavow the Cabrera Report and Cabrera Response, ..." <sup>88</sup> She is not aware of any facts to contradict Beltman's statements about the damages categories, and as to the "limited portions" of the Cabrera Report and Response she was involved in, "I agree with and adopt Mr. Beltman's statements and conclusions."<sup>89</sup>

#### **(6) Plaintiffs Try to "Cleanse" the Damages Report**

As the Cabrera Report became gradually discredited through information obtained by Chevron, plaintiffs' legal team attempted to "cleanse" the report by hiring new damages experts. However, as Judge Kaplan of the federal court in New York explained:

"... [Plaintiffs'] counsel orchestrated a scheme in which 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 ..." <sup>90</sup>

#### **(7) Plaintiffs Try to Discredit Their Own Experts**

Plaintiffs' public relations releases attempt to discredit the revelations by their former experts Russell, Calmbacher, Reyes, Beltman and Maest.<sup>91</sup> Granted, there are some grounds for skepticism. Russell had a fee dispute with plaintiffs' legal team which was litigated and then settled.<sup>92</sup> Plaintiffs terminated Calmbacher.<sup>93</sup> Beltman and Maest admit that they participated in

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<sup>86</sup> *Id.*, par. 14.

<sup>87</sup> *Id.*, par. 30.

<sup>88</sup> *Id.*, par. 38.

<sup>89</sup> *Id.*, par. 43.

<sup>90</sup> *Chevron v. Donziger*, 768 F. Supp. 2d 581, 636 (S.D.N.Y. 2011), *rev'd on other grounds*, 667 F.3d 232 (2<sup>nd</sup> Cir. 2012).

<sup>91</sup> *E.g.*, see the following press releases by the Amazon Defense Coalition, accessible at <http://chevrontoxico.com> *In Chevron Case, Stratus' Truth-Telling Loses Out to Oil Company Money*, April 12, 2013; *Chevron Star "Witness" Worked on Fraudulent Remediation in Ecuador*, Dec. 19, 2012.

<sup>92</sup> Affidavit of David L. Russell, May 8, 2013, par. 29.

<sup>93</sup> *Chevron v. Donziger*, 768 F. Supp. 2d 581, 636 (S.D.N.Y. 2011), *rev'd on other grounds*, 667 F.3d 232 (2<sup>nd</sup> 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

a deceptive scheme. Plaintiffs' spokespersons allege that Stratus bowed to legal and financial pressure from Chevron.<sup>94</sup>

On the other hand, there are compelling reasons to credit the recent testimonies of the five experts. If there were only one recanting expert, prudence might dictate extreme caution in accepting his or her testimony. But in fact five former experts for plaintiffs now challenge the claims by their former employers. Moreover, their testimonies are mutually consistent, both as to the *modus operandi* of Donziger and Fajardo et al., and as to particular events.

Their new testimonies are also corroborated by multiple sources, including emails and other internal documents of plaintiffs' lawyers (disclosed under court order); the experts' own, contemporaneous communications to plaintiffs' lawyers; reports by independent experts who testified for Chevron; and extensive forensic and other documentary evidence summarized in the sections that follow. For example:

#### **Corroboration by plaintiffs' lawyers:**

- Reyes and Maest testified that in their March 2007 meeting with plaintiffs' lawyers and Cabrera, it was clear that the lawyers planned to write Cabrera's report and then pass it off as the expert's own work. This is corroborated by a diary entry written by Donziger two months earlier, insisting that the court's expert must in fact "totally play ball with us and let us take the lead while projecting the image that he is working for the court."<sup>95</sup>
- The testimony by Beltman and Maest -- that they ghost wrote the Cabrera Report together with plaintiffs' legal team -- is corroborated by an email from plaintiffs' counsel admitting that "we authored the [expert's] report."<sup>96</sup>
- The testimony by Russell, Beltman and Maest that there was no surface water contamination was confirmed by Fajardo. When asked why plaintiffs were not testing the water, Fajardo privately admitted in a 2008 email that "the running drinking water in the river does not contain hydrocarbons."<sup>97</sup>

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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.

<sup>94</sup> Amazon Defense Coalition, *In Chevron Case, Stratus' Truth-Telling Loses Out to Oil Company Money*, April 12, 2013, accessible at <http://chevrontoxico.com>.

<sup>95</sup> Diary of Steven Donziger, Dec. 16, 2006, at 30 [DONZ00027256], accessible at <http://amlawdaily.typepad.com/chevronexhibit1.pdf>.

<sup>96</sup> 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>.

<sup>97</sup> 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>.



### **Corroboration by plaintiffs' experts' contemporaneous statements:**

- Russell's testimony that there was no significant water contamination mirrors his February 2006 statement to Donziger that he had seen “no data which would indicate that there is any significant surface or groundwater contamination caused by petroleum sources in Ecuador.”<sup>98</sup>
- The March 2007 statement testified to by Maest, in which she advised plaintiffs' lawyers that “all the reports are saying it’s just at the pits and stations and nothing has spread anywhere at all,” was captured on film at the time by a documentary filmmaker commissioned by Donziger.<sup>99</sup>
- Beltman's testimony that Stratus is not aware of any scientific evidence that people near Lago Agrio "are drinking water contaminated with petroleum," is corroborated by his March 2008 email stating, “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.”<sup>100</sup>

### **Corroboration by independent experts who testified for Chevron:**

Consistent with plaintiffs’ experts’ testimonies and with their contemporaneous private admissions, Chevron’s array of independent, highly credentialed environmental experts found as follows:

- **Ground water** was “not impacted” by TexPet’s oil operations;<sup>101</sup>
- **Drinking water:** “[T]here is no indication of public health concerns related to drinking water as a result of petroleum exploration;”<sup>102</sup> none of the samples exceeded WHO or

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<sup>98</sup> 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.

<sup>99</sup> *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>.

<sup>100</sup> 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>.

<sup>101</sup> Hydrogeologist Dr. Charles Newell evaluated groundwater samples from 206 sampling points. He concluded that “groundwater resources are not impacted by constituents associated with the past oilfield activities of Texpet.” Sampling results from 28 household wells also showed no groundwater impacts from petroleum products. Newell Rep. (Sept. 2010) at 2-3, accessible at [http://www.theamazonpost.com/wp-content/uploads/Newell\\_Report.pdf](http://www.theamazonpost.com/wp-content/uploads/Newell_Report.pdf).

<sup>102</sup> Dr. William Bellamy, an expert and former advisor on drinking water to the US Environmental Protection Agency, evaluated more than 7,000 analyses from more than 250 drinking water sampling events. He found “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>.

US EPA drinking water guidelines or standards for any chemical compound related to oil operations in the zone.<sup>103</sup>

- **Soil:** Potentially toxic constituents were rarely detected in soil samples, and not at concentrations or locations indicating a potential health risk for the community.<sup>104</sup>
- **Public Health:** Mortality near the oil operations in Lago Agrio was "similar, or lower" than other zones in Ecuador "for overall mortality, overall cancer, circulatory disease, infectious disease, and respiratory diseases, and for many site-specific cancers."<sup>105</sup> Mortality data "does not provide evidence for an excess cancer risk in regions of the Amazon with long-term oil production."<sup>106</sup>

Further forensic and documentary corroboration is summarized in the sections that follow. In short, the testimony of the five former plaintiffs' experts should give human rights advocates strong reason not to accept the Ecuadorian judgment against Chevron as legitimate.

#### **D. FRAUD**

One of the most important frauds in the case has already been reviewed: the fabrication of evidence to support wildly inflated claims of alleged harm to health and the environment, based on self-serving assumptions, lacking scientific validity, given to consultants by Donziger.

There are at least three additional areas of apparent fraud or false representations committed by Donziger and Fajardo. First are allegations by some of their purported Indigenous clients that these attorneys do not, in fact, represent them or protect their rights. Second is the misrepresentation of the Cabrera Report and Response to third parties as if they were the expert's work, rather than that of plaintiffs' lawyers and consultants. And third is the substantial forensic and testimonial evidence that the judgment eventually entered by the Ecuadorian court was also ghost written by plaintiffs' legal team.

This section addresses each of these areas in turn, including allegations of fraud leveled against Donziger and Fajardo by some of their former co-counsel and funders.

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<sup>103</sup> *Id.* at 1.

<sup>104</sup> Dr. Thomas McHugh, a toxicologist and environmental scientist, conducted a health-based risk assessment of the environmental sampling results in 2008. His study (updated in 2010) evaluated all samples collected by the parties, including more than one thousand soil samples. 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>.

<sup>105</sup> Dr. Michael Kelsh, a consultant and adjunct professor of epidemiology at UCLA, so concluded in a peer-reviewed epidemiological study. *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](http://www.texaco.com/sitelets/ecuador/docs/occ_health.pdf).

<sup>106</sup> *Id.*

## (1) Judicial Findings of Fraud

At the outset, it should be noted that -- even before the recent revelations by Reyes, Beltman and Maest of the planned and actual ghost writing of the Cabrera Report -- multiple federal courts in the United States had already found evidence of fraud sufficient to invoke the rarely used "crime-fraud" exception to the confidentiality of attorney-client communications. Plaintiffs' lead US attorney Donziger was accordingly ordered to disclose to Chevron his otherwise confidential emails on the case.

Chevron has filed suit in federal court in New York against Donziger and other members of plaintiffs' team for fraud in the Lago Agrio proceedings.<sup>107</sup> The case is now scheduled to go to trial in October 2013.<sup>108</sup> Presiding is Judge Lewis Kaplan, who has previously found "ample evidence of fraud in the Ecuadorian proceedings."<sup>109</sup>

The plaintiffs' legal team claims that Judge Kaplan is biased against them, and that in an earlier ruling the court of appeals "sharply rebuked" him.<sup>110</sup> In fact, while the court of appeals reversed on legal grounds his injunction against enforcing the Lago Agrio judgment outside of Ecuador, it did not disturb his findings of fact.<sup>111</sup> It denied the plaintiffs' lawyers' request to remove him from the case,<sup>112</sup> and left issues of the independence of Ecuador's legal system and the conduct of the Ecuadorian proceedings to be "addressed as relevant in other litigation before the district court or elsewhere."<sup>113</sup>

If Judge Kaplan were the only judge to spot their fraud, the plaintiffs' legal team might plausibly cast him as an outlier. But he is in good company. Other US federal courts in a number of jurisdictions have similarly found as follows:<sup>114</sup>

- **New Jersey:** "... [T]he concept of an employee of a party covertly functioning as a consultant to a court appointed expert in the same proceeding *can only be viewed as a fraud upon that tribunal* . . . ." <sup>115</sup>

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<sup>107</sup> *Chevron Corp. v. Donziger et al.*, Case No. 11 Civ. 0691 (S.D.N.Y.), filed Feb. 11, 2011.

<sup>108</sup> Legal Newline, *Federal judge denies request for three-month stay of Chevron Ecuador RICO trial*, July 17, 2013, accessible at <http://www.theamazonpost.com/>.

<sup>109</sup> *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 (2<sup>nd</sup> Cir. 2012).

<sup>110</sup> Lago Agrio Legal Team, *Response to Doug Cassel's Apology for Chevron's Human Rights Violations In Ecuador*, March 15, 2012, p. 10.

<sup>111</sup> 667 F. 3d 232.

<sup>112</sup> 667 F. 3d at n. 11.

<sup>113</sup> *Id.* at n. 17. Plaintiffs' lawyers have recently again asked the appeals court to remove Judge Kaplan from the case; at this writing their request is pending. See R. Parloff, *Chevron's latest headache in \$19 billion lawsuit*, CNNMONEY, July 22, 2013, accessible at <http://features.blogs.fortune.cnn.com/2013/07/22/chevron-lawsuit-ecuador/>.

<sup>114</sup> 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).

<sup>115</sup> *In re Chevron Corp.*, No. cv-10-2675 (SRC) (D.N.J. June 11, 2010), Hr'g Tr. at 43:13-44:16 (emphasis added).

- **North Carolina:** “... [W]hat has blatantly occurred in this matter would in fact be *considered fraud by any court.*”<sup>116</sup>
- **New Mexico:** The “footage [from outtakes of a documentary on the case] shows, with unflattering frankness, *inappropriate, unethical and perhaps illegal conduct.*”<sup>117</sup>
- **California:** “There is *ample evidence*... that the Ecuadorian Plaintiffs secretly provided information to ... [the] supposedly ... neutral court-appointed expert, and *colluded* with [him] to make it look like the opinions were his own. . . .”<sup>118</sup>
- **US Court of Appeals:** “... [T]his showing of [plaintiffs’ consultant] Villao’s dual employment is sufficient to make a *prima facie showing of a fraud*... .”<sup>119</sup>
- **Florida:** “Here, the matter pertains to a *large scale fraud* ... and a related multibillion dollar judgment ... ” “Chevron has obtained *mounds of evidence* ... that suggests that *the judgment itself was also ghostwritten.* . . . .”<sup>120</sup>
- **Maryland:** “[T]here is ample evidence of the existence of a *fraudulent scheme* in that these [plaintiffs’ lawyers’] documents bear close relationship to [the Ecuadorian judgment]. And *Chevron has shown to anyone with common sense that this [judgment] is a blatant cut and paste exercise.* . . . . [T]here is substantial extrinsic evidence of wrongdoing . . . .”<sup>121</sup>

We now turn to the three areas of fraud and false representations by Donziger and Fajardo: their alleged misrepresentations of their clients, of the Cabrera Report, and of the judgment itself.

## (2) The Huaorani Indigenous People Allege Unjust Enrichment

Donziger, Fajardo and the Amazon Defense Front stand accused of misconduct by some of the people they claim to represent. One of the Indigenous groups affected by oil operations in Lago Agrio is the Huaorani people.<sup>122</sup> In 2013 Huaorani individuals, on behalf of themselves, their family groups and the Huaorani people, sued Donziger, the Front and others in New

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<sup>116</sup> *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).

<sup>117</sup> *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).

<sup>118</sup> *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).

<sup>119</sup> *In re Applic. of Chevron Corp.*, 633 F.3d 153, 166 (3d Cir. Feb. 3, 2011) (emphasis added).

<sup>120</sup> *In re Chevron Corp.*, No. 11-24599-CV, slip op. at 4, 26 (S.D. Fla. June 12, 2012) (emphasis added).

<sup>121</sup> *Chevron Corp. v. Page*, No. RWT-11-0395 (D. Md. Jan. 25, 2013), Hr’g Tr. at 56:23-57:1; 57:20-24; 58:2-3; 58: 7-8 (emphasis added).

<sup>122</sup> *Id.*, par. 8.

York.<sup>123</sup> They allege "unjust enrichment and breach of fiduciary duty against the Defendants, who have represented (falsely) that they represented the Huaorani Plaintiffs (and all members of the Huaorani people)," in the Lago Agrio litigation.<sup>124</sup>

The suit accuses the Amazon Defense Front and lawyers Donziger and Fajardo (among others) of falsely claiming to represent the Huaorani, and of using the Lago Agrio case to pursue their own financial interests, and those of their investors, rather than those of their purported clients, including the Huaorani.

Their suit notes that the Front "is the designated beneficiary of a trust ordered by the Judgment in the Lago Agrio Litigation to receive the monies awarded by the court for environmental remediation, compensation and mitigation measures . . . , and is also designated as the entity that will select the directors of said trust and of a second trust ordered by the court to receive punitive damages monies . . ." <sup>125</sup>

No named plaintiff in the Lago Agrio litigation, they allege, is a Huaorani, even though the Lago Agrio suit asserts claims on behalf of all affected Indigenous communities, including the Huaorani,<sup>126</sup> and the Lago Agrio judgment is based "in significant part" on alleged injuries to the Huaorani.<sup>127</sup> Nor did any Huaorani authorize the Front, Donziger, Fajardo or members of their team to represent the Huaorani. No Huaorani ever entered into a retainer agreement with Donziger et al.<sup>128</sup>

The suit objects that Fajardo and the Front have "refused to acknowledge what portion of the Lago Agrio Judgment corresponds to Plaintiffs and other Huaorani"<sup>129</sup> -- *if any*.<sup>130</sup> This raises concern because the Huaorani are informed and believe that the Donziger Defendants' and the Amazon Defense Front's "interests in the Lago Agrio Litigation lie not in securing the Plaintiffs' rights . . . , but rather in collecting as much of the judgment as possible for their own use and benefit."<sup>131</sup>

On information and belief, the Huaorani elaborate that the Donziger defendants and the Front "have sold interests in the Lago Agrio Judgment to investors and/or funders," and that they "do not intend to distribute any portion of the Lago Agrio Judgment proceeds to Plaintiffs . . . , as any judgment proceeds recovered from Chevron will go first to filling the coffers of the Donziger Defendants and the ADF, not to compensating Plaintiffs and other Huaorani . . ." <sup>132</sup>

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<sup>123</sup> *Kemperi Baihua Huani et al. v. Donziger et al.*, No. 151372/2013, Complaint filed Feb. 13, 2013, in the Supreme Court of the State of New York, County of New York, accessible at <http://lettersblogatory.com/wp-content/uploads/2013/02/tribevdonziger.pdf>. The Huaorani plaintiffs had earlier attempted unsuccessfully to intervene in Chevron's federal court suit against Donziger. *Id.*, pars. 70-73.

<sup>124</sup> *Id.*, par. 1.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*, par. 17.

<sup>127</sup> *Id.*, par. 21.

<sup>128</sup> *Id.*, pars. 54, 55.

<sup>129</sup> *Id.*, par. 64.

<sup>130</sup> *Id.*, par. 83.

<sup>131</sup> *Id.*, par. 86.

<sup>132</sup> *Id.*, par. 87.

More specifically, they allege that the Donziger Defendants:

- have already been paid over \$10.7 million,<sup>133</sup>
- have obtained funding commitments of over \$25 million from twelve different investors, and in return, "these third parties or funders are entitled to recover a portion of the total amount" of any proceeds on the judgment,<sup>134</sup> and
- "intend to continue selling off pieces of the judgment to investors."<sup>135</sup>

In this context, the Huaorani allege that Fajardo, as a lawyer for both the Lago Agrio plaintiffs and the Amazon Defense Front, is "funded by the Donziger defendants, and thus appears to have a conflict of interest."<sup>136</sup>

Finally, the Huaorani allege on information and belief that the Republic of Ecuador expects to receive 90% of the proceeds of the Lago Agrio judgment.<sup>137</sup>

Among other relief, the Huaorani seek the imposition of a constructive trust on any proceeds collected by the Donziger Defendants or by the Amazon Defense Front.<sup>138</sup>

These allegations are, as yet, unproved before the New York court. However, the very fact that Indigenous people Donziger et al. claim to represent are driven to sue their supposed lawyers for false representations, unjust enrichment and breach of fiduciary duty, should give further pause to human rights advocates before treating the Lago Agrio judgment as if it were legitimate.

### **(3) Plaintiffs Fraudulently Misrepresent the Damages Report**

The ghost writing of both the Cabrera Report and the Cabrera Response by plaintiffs' legal team and their consultants has been detailed above. But these were apparently not the only documents plaintiffs' lawyers wrote for Cabrera. By comparing format, structure, capitalization, dropped accents, misspellings, punctuation and syntax, a forensic expert concluded that it is "highly probable" that Fajardo ghost wrote 13 of a sample of 15 filings submitted by Cabrera to the court – including several proclaiming Cabrera's independence from plaintiffs.<sup>139</sup>

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<sup>133</sup> *Id.*, par. 94.

<sup>134</sup> *Id.*, par. 95.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*, par. 53.

<sup>137</sup> *Id.*, par. 97.

<sup>138</sup> *Id.*, Prayer for Relief, par. 2.

<sup>139</sup> Declaration of G. McMenamin Expert Report, June 27, 2011, at par. 3, accessible at <http://www.theamazonpost.com/wp-content/uploads/G.-McMenamin-Declaration-June-27-2011.pdf>.

*a. Misrepresentations*

Even this does not reveal the full extent of the deceit directed by Donziger. To begin, as Douglas Beltman and Ann Maest testify, Donziger demanded strict secrecy:

"Donziger insisted at all times that all aspects of Stratus's work related to the damages assessment, including Stratus's ... meeting with Cabrera, their involvement in drafting the damages assessment and the ... responses to the Lago Agro Plaintiffs' ... questions or comments regarding the Cabrera Report ... remain absolutely secret. Donziger stressed to me and Ann Maest the importance of Stratus ensuring that no one learn of Stratus's involvement in any aspect of the Cabrera Report, including the comments and Responses, unless Donziger directed us to reveal it – which he never did."<sup>140</sup>

Donziger went beyond strict secrecy to demand affirmative misrepresentations. First and foremost, these included mislabeling the Cabrera Report and Response as if they were the court-appointed expert's own work. In Beltman's euphemistic understatement, "Misattribution of authorship is not standard practice for Stratus."<sup>141</sup>

However, the deceit went much further. It also included person-to-person misrepresentations: "At Donziger's direction, Stratus also represented the Cabrera Report as having been prepared by Cabrera, including confirming the understanding of prospective endorser [environment expert] Lou Blanck that the 'report is by an expert appointed by the judge...'"<sup>142</sup>

The deceit also included steps to mislead a member of the US Congress:

"On November 9 and 10, 2008, United States Representative Jim McGovern visited Ecuador on a "fact-finding trip" in part related to the Lago Agrio litigation. In early November 2008, Steven Donziger instructed me to talk to Richard Clapp regarding Clapp's interactions with the Congressman regarding the Cabrera Report so Clapp didn't "go off the reservation and talk to the congressman in a way that damns the Cabrera report with faint praise." Steven Donziger also did not authorize Stratus to disclose its role on the Cabrera Report to the congressional delegation. Based on his instructions, I helped Steven Donziger limit the distribution of one of Richard Clapp's reports, which was intended for the Cabrera Response, so that the delegation and others would not have that document. ... At no time did Donziger authorize disclosure of Stratus's role in the Cabrera Report and the Cabrera Response to Congressman McGovern or anyone on his staff."<sup>143</sup>

In addition, Donziger made unfounded assertions before the US Congressional Tom Lantos commission, *e.g.*, claiming that cancer rates in the Lago Agrio area were up to 30 times higher than

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<sup>140</sup> Witness Statement of Douglas Beltman, March 21, 2013, par. 10; see also Witness Statement of Ann Maest, March 22, 2013, par. 25.

<sup>141</sup> Witness Statement of Douglas Beltman, March 21, 2013, par. 28.

<sup>142</sup> *Id.*, par. 11.

<sup>143</sup> *Id.*, par. 13.

normal. Beltman is "not aware of any credible scientific evidence" that supports that (and other) statements by Donziger to the Lantos commission.<sup>144</sup>

The deceit extended to prospective funders: "Under Donziger's direction and oversight, I drafted and made presentations to funders and potential funders of the litigation, ... At Donziger's insistence, I did not reveal Stratus's or the LAPs' representatives' involvement in drafting the Cabrera Report or the Cabrera Response, ... "<sup>145</sup>

The misrepresentations of course extended to the media. Beltman explains: "I regret that I allowed myself to be pressured by Donziger to make those public statements. ... I cannot stand behind any statements I made to the media concerning these matters."<sup>146</sup>

For example, on a May 3, 2009 segment of the US television news magazine, *60 Minutes*, the coverage and Beltman's statements on the program were misleading. Video and still imagery on the program "reflected Petroecuador rather than TexPet operations." The well water of one resident visited on the program in fact "met USEPA drinking standards."<sup>147</sup>

Another source of misrepresentations was (and is) the misleading public relations web page associated with the Amazon Defense Fund. For example, Beltman dismisses the claims by *chevrontoxico.com* that TexPet "cleaned up only 1% of the damage of its former sites for which it was responsible, or that it did so by merely covering up with dirt or burning off the crude by-products." He is not aware of "any credible scientific evidence" supporting those claims.<sup>148</sup>

Beltman now repents: "I deeply regret that I allowed myself and my company to be used in the Lago Agrio Litigation in the way that we were, as detailed throughout this declaration."<sup>149</sup> So, too, does Ann Maest.<sup>150</sup>

But not, apparently, Donziger or Fajardo, from whom not a word of regret is heard.

### ***b. Desertions and Repudiations by Co-Counsel and Funders***

Meanwhile, as plaintiffs' Cabrera scheme began to come to light through Chevron's court-ordered discovery in 2010, a number of plaintiffs' lawyers and funders protested the fraud:

- In March 2010, one plaintiffs' attorney, after being subjected to months of misrepresentations by Donziger that there was "nothing untoward" in regard to Stratus, finally learned the truth about the ghost writing of the Cabrera Report from Beltman.

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<sup>144</sup> *Id.*, par. 70; see also par. 69.

<sup>145</sup> *Id.*, par. 62.

<sup>146</sup> *Id.*, par. 64.

<sup>147</sup> *Id.*, par. 66.

<sup>148</sup> *Id.*, par. 72.

<sup>149</sup> *Id.*, par. 76.

<sup>150</sup> Witness Statement of Ann Maest, March 22, 2013, par. 50.



"Disturbed" and "disgusted" by the unethical conduct, he decided that "we could not in good conscience continue with the engagement" and withdrew from the case the very next day.<sup>151</sup>

- In May 2010 another plaintiffs' attorney, not involved in the fraud, advised his co-counsel that, unless Chevron knew of the ghostwriting 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 Stratus was an active conspirator."<sup>152</sup>
- In August 2010 the Philadelphia attorney who had principally bankrolled the Lago Agrio litigation wrote a letter to Fajardo and others on the Ecuadorian team. Joseph Kohn wrote that he was "shocked by recent disclosures concerning potentially improper and unethical, if not illegal, contacts with the court-appointed expert, Mr. Cabrera." Not only was Kohn unaware of these contacts, he found them "contrary to assurances that Donziger and you made to us on numerous occasions." Donziger, he wrote, "intentionally misled us."<sup>153</sup>
- In September 2011 Burford Capital, which had provided \$4 million in funding for the lawsuit, terminated its funding. Burford told plaintiffs' lawyers, "[W]e believe that you ... engaged in a multi-month scheme to deceive and defraud in order to secure desperately needed funding ..., all the while concealing material information and misrepresenting critical facts in the fear that we would have walked away had we known the true state of affairs."<sup>154</sup> Burford added that "the conduct discovered amounts to fraud."<sup>155</sup>

#### **(4) Ghost Writing the Judgment**

There is substantial evidence that plaintiffs' team ghost wrote, not only the Cabrera Report and Response, but also the Lago Agrio judgment. There is a striking textual overlap between the "judgment" and an internal plaintiffs' legal team strategy memo, never filed with the Court or made public before the judgment. The better part of entire pages of the judgment are verbatim or substantially identical to plaintiffs' internal memo. As noted by one US court, there are "mounds of evidence" that the judgment was ghostwritten, including its "significant overlapping" with plaintiffs' internal memo.<sup>156</sup> Another US court observed that the plaintiffs' lawyers' unpublished work product appears to have found its way into the judgment, in some

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<sup>151</sup> Deposition of Jeffrey Shinder, June 28, 2013, in *Chevron v. Donziger et al.*, S.D.N.Y., Case no. 11 CIV 0691 (LAK), transcript at 28-29 ("disturbed" and "could not in good conscience continue"), 30, 33-34, 35-36, 62-63, 68-69, 82-83, 91-92 ("nothing untoward"), 99-101 (withdrawal the next day), 102-03 ("disgusted").

<sup>152</sup> 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>.

<sup>153</sup> Letter from Joseph C. Kohn to Pablo Fajardo et al., August 9, 2010, p. 1.

<sup>154</sup> Letter from Burford Group to Steven Donziger, Pablo Fajardo and others, Sept. 29, 2011, pp. 1-2, accessible at <http://lettersblogatory.com/wp-content/uploads/2013/01/Burford.pdf>.

<sup>155</sup> *Id.*, p. 1.

<sup>156</sup> *In re Applic. Of Chevron*, Case No. 1:11-cv-24599-MGC, Dkt, 86 at 4 (S.D. Fla. June 13, 2012).

instances on a “virtual line-by-line” basis.<sup>157</sup> As yet another US court concluded, “Chevron has shown to anyone with common sense that this [judgment] is a blatant cut and paste exercise.”<sup>158</sup>

All these judicial assessments were written even before taking into account the recent sworn statement of a former Ecuadorian judge, Alberto Guerra, who alleges essentially that plaintiffs' lawyers -- and in particular Fajardo -- drafted the court's judgment.

Guerra alleges that from 2008 to 2012, in return for monthly payments of about \$1,000, he served as ghost writer for Judge Nicolás Zambrano, the judge who put his name on the \$18.2 billion judgment against Chevron.<sup>159</sup> Guerra says that pursuant to an agreement with Fajardo, by which plaintiffs would pay Guerra \$1,000 per month, he wrote several orders in the Chevron case for Zambrano.<sup>160</sup>

Guerra further claims that, at Zambrano's suggestion, he met with Donziger and Fajardo to solicit a \$500,000 bribe for Zambrano, plus extra for Guerra. He states that Donziger replied that plaintiffs did not then have that amount of money, but that Zambrano later told Guerra that plaintiffs agreed to pay it out of the proceeds of the judgment.<sup>161</sup>

Guerra does not claim to have drafted the judgment against Chevron. Instead, he alleges that about two weeks before the judgment was issued in February 2011, Zambrano passed Guerra a draft of the judgment on Fajardo's personal computer. Guerra says he slightly edited the draft, among other reasons “to make it seem more like a judgment issued by the Sucumbíos court,” before passing Fajardo's computer back to Zambrano.<sup>162</sup> During the editing, Guerra contends, “I called Mr. Fajardo on his cell phone to ask him about some sections of the document that confused me. Mr. Fajardo told me not to worry and that he would e-mail me a memory aid to clarify my questions. Mr. Fajardo e-mailed me a document of around 10 to 12 pages titled ‘Memory Aid,’ with some information about the case.”<sup>163</sup>

Guerra's declaration must be viewed with due caution. He was admittedly corrupt. Fajardo<sup>164</sup> and Zambrano<sup>165</sup> both deny his allegations (although Zambrano's denial should be

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<sup>157</sup> *Chevron v. Page*, No. RTW-11-1941, Oral Arg. Tr. (D. Md. Aug. 31, 2011).

<sup>158</sup> *Chevron Corp. v. Page*, No. RWT-11-0395 (D. Md. Jan. 25, 2013), Hr’g Tr. at 56:23-57:1; 57:20-24; 58:2-3; 58: 7-8.

<sup>159</sup> Declaration of Alberto Guerra Bastidas, Nov. 17, 2012, (hereafter “Guerra Declaration”), par. 7, accessible at [http://www.theamazonpost.com/wp-content/uploads/Declaration-of-A-Guerra\\_English-REDACTED.pdf](http://www.theamazonpost.com/wp-content/uploads/Declaration-of-A-Guerra_English-REDACTED.pdf); filed in court and made public on January 28, 2013, see Chevron Press Release, *Former Ecuadorian Judge Admits Role in Orchestrating Fraudulent Judgment Against Chevron*, Jan. 28, 2013, accessible at [http://www.chevron.com/chevron/pressreleases/article/01282013\\_formerecuadorianjudgeadmitsroleinorchestratingfraudulentjudgmentagainstchevron.news](http://www.chevron.com/chevron/pressreleases/article/01282013_formerecuadorianjudgeadmitsroleinorchestratingfraudulentjudgmentagainstchevron.news).

<sup>160</sup> *Id.*, pars. 7, 13-16.

<sup>161</sup> *Id.*, par. 23.

<sup>162</sup> *Id.*, pars. 25-27.

<sup>163</sup> *Id.*, par. 26.

<sup>164</sup> Amazon Defense Coalition, *Chevron Paying at least \$326,000 Bribe to Ecuadorian Judge for False Testimony*, Jan. 28, 2013, accessible at <http://chevrontoxico.com/news-and-multimedia/2013/0128-chevron-paying-bribe-to-ecuadorian-judge-for-false-testimony>.

assessed in light of his subsequent dismissal from the bench, in an anti-corruption investigation, for improperly releasing drug traffickers).<sup>166</sup> Guerra admits that Chevron paid him handsomely to gain access to the information on his computer and other electronic devices, for his time and expenses in reconstructing his personal records, and, in response to security concerns, for moving and living expenses for his family to relocate to the US.<sup>167</sup>

On the other hand, Guerra's declaration is extensively corroborated by his computer hard drive, airline shipping records, and bank records. His hard drive contains at least eight prior drafts of orders entered by Zambrano in the Lago Agrio case.<sup>168</sup> Airline shipping records show that, from 2010 to 2012, Guerra sent eleven shipments of documents to Zambrano. Zambrano signed for most deliveries. There were also at least five shipments from Zambrano to Guerra.<sup>169</sup>

Although Guerra says Zambrano usually paid him in cash, on one occasion Zambrano deposited funds into Guerra's bank account.<sup>170</sup> A copy of the deposit slip, certified by the bank, bears Zambrano's signature and national identification number.<sup>171</sup>

Guerra claims that Fajardo likewise paid him in cash. But Guerra claims that plaintiffs made at least two payments by deposits into his bank account. He asserts that amounts of \$1,000 each were deposited into his account on December 23, 2009 and February 5, 2010, "by Ms. Ximena Centeno, whom I know to be a worker at the Plaintiffs' office."<sup>172</sup>

Bank records corroborate his claim. His declaration attaches copies of the bank deposit slips, certified by the bank. Both are signed with identical signatures by Ms. Ximena Centeno. One also shows the depositor's Ecuadorian national identification number. Ecuadorian Institute of Social Security records confirm that the number belongs to one "Ximena Maribel Centeno Viteri." Ecuadorian social security records and plaintiffs' internal emails confirm that Ms. Centeno was an administrator during 2009 and 2010 at "Selva Viva" (Living Jungle) – plaintiffs' *de facto* office in Ecuador.<sup>173</sup>

Guerra's declaration is thus largely corroborated by computer, airline and bank records, as well as by suggestive evidence in plaintiffs' internal emails.<sup>174</sup> Especially when his claims are

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<sup>165</sup> Declaration of Nicolás Augusto Zambrano Lozada, March 28, 2013, English translation accessible at <http://chevrontoxico.com/assets/docs/2013-04-04-zambrano-declaration.pdf>.

<sup>166</sup> Victor Gómez, *Dos jueces de Sucumbíos apelan decision del CJT que los destituyó del cargo*, EL UNIVERSO, 6 de marzo, 2012, accessible at <http://www.eluniverso.com/2012/03/06/1/1355/dos-jueces-sucumbios-apelan-decision-cjt-destituyo-cargo.html>.

<sup>167</sup> Guerra Declaration, par. 33.

<sup>168</sup> *Id.*, par. 18 and Attachments O, P, Q, R, S, T, U, V and W thereto.

<sup>169</sup> *Id.*, par. 9 and Attachment F thereto.

<sup>170</sup> *Id.*, par. 10.

<sup>171</sup> *Id.*, Attachments G and H thereto.

<sup>172</sup> *Id.*, par. 14 and Attachments K, L, M and N thereto.

<sup>173</sup> Witness Statement of Ann Maest, March 22, 2013, par. 6.

<sup>174</sup> Plaintiffs' internal emails add circumstantial corroboration. On September 13, 2009, Fajardo noted that Judge Zambrano might be taking over the Lago Agrio case. (Zambrano in fact did so.) Two days later, writing in code language, Fajardo emailed plaintiffs' legal team, stating: "The puppeteer is pulling the string and the puppet is returning the package... By now it's pretty safe that there won't be anything to worry about... The puppet

viewed together with the forensic testimony, which tracks portions of the judgment line-for-line with internal documents of plaintiffs' legal team, there is substantial evidence that plaintiffs' legal team, and in particular Fajardo, drafted the judgment against Chevron.

### **E. FORGERY**

Plaintiffs' legal team also committed blatant forgery. As noted above (section C.2), plaintiffs' expert in charge of inspections was Dr. Charles Calmbacher. In 2005 plaintiffs' legal team submitted to the Ecuador court a report in Calmbacher's name for two sites, "each purporting to show extensive environmental damage."<sup>175</sup> Dr. Calmbacher later testified under oath: "I did not reach these conclusions and I did not write this report."<sup>176</sup> 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.<sup>177</sup> Judge Kaplan found that plaintiffs, "through their counsel, submitted forged expert reports in the name of Dr. Calmbacher."<sup>178</sup>

### **F. BRIBERY**

The evidence that plaintiffs bribed Judges Guerra and Zambrano is described above (section D.4). In addition, they bribed the court's "independent" expert, Cabrera, in two ways. One way was for the Amazon Defense Front to take funds from a "secret account," apparently opened in June 2007,<sup>179</sup> to make payments to Cabrera which were never officially reported to the court. Such payments included "advances" of tens of thousands of dollars to Cabrera -- even

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will finish off the entire matter tomorrow..." The timing and circumstances suggest that the puppeteer and puppet were Zambrano, the new judge on the case, and Guerra, his ghost writer.

The puppetry soon became expensive. On October 27, 2009, Fajardo emailed Yanza and Donziger, lamenting, "The puppeteer won't move his puppet until the audience pays him something ..."<sup>174</sup> Plaintiffs responded by paying their puppeteer. In a November 27, 2009 email on plaintiffs' finances, Yanza explained to Donziger that "the budget is higher in relation to the previous months, since we are paying the puppeteer, ..." Only one month later, as noted above, plaintiffs' administrator Centeno made a \$1,000 deposit into Guerra's bank account, and only three months later (February 2010), she deposited a second \$1,000 payment into his account.

<sup>175</sup> *Chevron v. Donziger*, 768 F. Supp. 2d 581, 606 (S.D.N.Y. 2011), *rev'd on other grounds*, 667 F.3d 232 (2<sup>nd</sup> Cir. 2012).

<sup>176</sup> Calmbacher Deposition at 116:9-10, accessible at <http://www.chevron.com/documents/pdf/ecuador/calmbacherdepo.pdf>.

<sup>177</sup> *Id.* at 113:23-25 and 115:15-19.

<sup>178</sup> *Chevron v. Donziger*, 768 F. Supp. 2d 581, 636 (S.D.N.Y. 2011), *rev'd on other grounds*, 667 F.3d 232 (2<sup>nd</sup> 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.

<sup>179</sup> 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>.

before the court authorized payments to Cabrera.<sup>180</sup> For example, this method was used for a \$33,000 payment to Cabrera in August 2007.<sup>181</sup>

The second way was for plaintiffs to pay Cabrera, without using the Front's secret account, for work in fact done, not by him, but by plaintiffs' counsel and their consultants. Once Cabrera's "Report" was completed in April 2008, and his "Response" was completed in November 2008 (albeit both written by plaintiffs' lawyers and their consultants, not by him), payments of hush money to Cabrera 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."<sup>182</sup> In October 19, 2009 Pablo Fajardo reported to the court a \$25,000 payment by plaintiffs to Cabrera, supposedly for Cabrera's "expert examination."<sup>183</sup>

## **G. BLACKMAIL**

Internal emails and Donziger's diary<sup>184</sup> yield substantial evidence that plaintiffs' lead lawyers 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. Plaintiffs' lawyers 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."<sup>185</sup> Before filing the complaint, however, 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

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<sup>180</sup> 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>). 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>.

<sup>181</sup> August 17, 2007 letter to the office manager of the Coca branch of Banco Pichincha to arrange transfer from account ending 9800 to account of R. Cabrera ending 1700. Signed by Jose Fajardo and Marisol Asimbaya; August 17, 2007 "Record of Cash Transactions" for \$33,000 transfer to account of R. Cabrera ending 1700. Jose Fajardo is listed as the legal representative of the Amazon Defense Front and Marisol Asimbaya as the person performing the transaction.

<sup>182</sup> 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>.

<sup>183</sup> Filing 159,059 to the President of the Provincial Court of Justice of Sucumbíos, signed by Pablo Fajardo Mendoza, October 19, 2009 (English translation).

<sup>184</sup> 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>.

<sup>185</sup> 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].

logic,”<sup>186</sup> reversed himself. Shortly beforehand, Donziger noted that plaintiffs were “reaping the benefits” of “saving” the judge’s job.<sup>187</sup> Plaintiffs’ legal team never filed their complaint against the judge.

## **H. CONCLUSION**

The extensive evidence summarized above is cumulatively powerful: plaintiffs' lead lawyers in the Lago Agrio litigation against Chevron fabricated environmental and health evidence, and also orchestrated and perpetrated fraud, forgery, bribery and blackmail.

Accordingly, the Lago Agrio proceedings and judgment cannot be deemed to meet basic international standards of due process of law, fair trial or the rule of law. Unless and until the evidence of misconduct is credibly assessed by an independent and impartial tribunal, human rights advocates should refrain from treating the Lago Agrio judgment as legitimate.

Meanwhile, some other means are needed to assess and redress any legitimate claims by residents of the Lago Agrio zone. Some form of fair, independent and impartial procedure would be required in order to assess any responsibility which Texaco (and now Chevron) might have for any legally valid claims of harm.

In addition, under international human rights law, the State of Ecuador is legally responsible for any environmental wrongs committed in Lago Agrio by the State oil company, Petroecuador. The State of Ecuador is also ultimately responsible for any violations of due process of law committed by its judges and judicial officials, through their collusion with plaintiffs' lead lawyers in the misconduct that deprives the Lago Agrio judgment of any claim to legitimacy.

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<sup>186</sup> Diary of S. Donziger, Nov. 28, 2006 [DONZ00042039], accessible at <http://www.theamazonpost.com/wp-content/uploads/Donziger-Diary-excerpt.pdf>.

<sup>187</sup> Diary of S. Donziger, Jan. 19, 2007, DONZ00027256, at 26 of 109, accessible at <http://amlawdaily.typepad.com/chevronexhibit1.pdf>.