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# TEN LESSONS FROM THE CHEVRON LITIGATION: THE DEFENSE PERSPECTIVE

Theodore J. Boutrous, Jr.\*

## INTRODUCTION

Of the many thorny issues raised by transnational litigation against U.S. companies, the lawsuit that Chevron Corporation is fighting in Ecuador touches on them all: legal ethics, weak and corrupt foreign judiciaries, litigation fraud, judgment enforcement, third-party litigation financing, cross-border discovery, and international arbitration, to name just a few.<sup>1</sup> In fact, one of the attorneys representing the Ecuadorian plaintiffs recently described the case as a “model” for future transnational litigation, a template for forcing U.S. companies to foot the bill for all manner of alleged injuries abroad.<sup>2</sup>

If the Chevron litigation is to serve as a roadmap for future transnational lawsuits, however, then plaintiffs’ lawyers seeking to bring claims in foreign

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\* Theodore J. Boutrous, Jr., a partner in the law firm of Gibson, Dunn & Crutcher LLP, is Co-Chair of the firm’s Appellate and Constitutional Law Group, its Crisis Management Group, and the Transnational Litigation and Foreign Judgments Group, and is one of the lead lawyers representing Chevron in the Ecuador litigation. He also represents Dole in the lawsuits mentioned in this Article. The views expressed in this Article are his own. This Article is based on his presentation at the Stanford Journal of Complex Litigation Symposium, *Lessons From Chevron*, on February 8, 2013. He would like to thank the following attorneys at Gibson Dunn who also assisted with that presentation and contributed to this article: Joshua Lipshutz, Anne Champion, Allison Kostecka, and Virginia Fitt.

1. This Article assumes some background familiarity with the Chevron litigation in Ecuador. For an overview of that litigation, see generally *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), slip op. at 7-28 (S.D.N.Y. Mar. 15, 2013); *Chevron Corp. v. Donziger*, No. 11 Civ. 0691, 2013 U.S. Dist. LEXIS 24086 (S.D.N.Y. Feb. 21, 2013); *Chevron Corp. v. Donziger*, 2012 U.S. Dist. LEXIS 107693 (S.D.N.Y. July 31, 2012); *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011), *injunction vacated on other grounds*, *Chevron Corp. v. Camacho Naranjo*, 667 F.3d 232 (2d Cir. 2012). In addition, Chevron’s website about the litigation (<http://www.theamazonpost.com>) contains court documents, video clips, media reports and other background on the case. Some of the authorities cited in this article are outtakes from a documentary film entitled *Crude: The Real Price of Oil*. That film, which was commissioned by the plaintiffs’ lawyers and their co-conspirators, purports to tell the story of the Lago Agrio litigation. Chevron obtained outtakes from the film by subpoena in the United States. See *infra* at sections . . .

2. Graham Erion, Lawyer for the Rainforest Communities, *Lessons From Chevron*: Stanford Journal of Complex Litigation Symposium (Feb. 8, 2013).

jurisdictions, especially those with troubled judiciaries that lack independence and basic due process protections, had better understand exactly where that map will lead them—and make sure they are comfortable going there. American lawyers are bound by ethical rules that follow them beyond the courthouse door and, indeed, beyond this Nation’s borders. Practitioners who view the weaknesses of certain foreign judicial systems as a business opportunity ripe for exploitation would be well-advised to avoid the path that other plaintiffs’ attorneys, including those in the *Chevron* litigation and a prior series of cases against Dole Food Company, Inc., have blazed. And companies forced to defend against exploitative and unscrupulous litigation behavior overseas should understand the tools at their disposal to protect against the injustice of corrupt foreign judgments.

The purpose of this article is not to re-litigate the *Chevron* case, but rather to explore ten key lessons that can be learned from it based on judicial opinions, court documents, exhibits, videotaped evidence, and other judicial records from the case. These lessons are important not just for the legal profession and our legal system, but also for our global marketplace and society.

- *Lesson 1: When You Tell a Lie a Thousand Times, it Does Not Become the Truth—it Becomes a Fraud.*

One of the most disturbing patterns in transnational litigation matters is that U.S. lawyers, when they traverse the globe and bring tort claims in countries with weak or corrupt judicial systems, sometimes act as though the usual rules of truth and accuracy do not apply. Perhaps it is because they are far from home or because they think that American-style discovery and adversarial truth seeking will not apply. Whatever the reason, making false statements inside and outside the courthouse becomes a major feature of the plaintiffs’ litigation strategy.

That may sound pejorative and biased coming from a defense attorney, but this observation is drawn from the words of the Ecuadorian plaintiffs’ lead attorney Steven Donziger himself, who, in an August 13, 2008 e-mail to Pablo Fajardo, his co-counsel in Ecuador, described his approach as follows: “If you repeat a lie a thousand times it becomes the truth.”<sup>3</sup>

Of course, that isn’t the case at all—if you repeat a lie a thousand times, all you’ve done is lied a thousand times and probably committed a fraud.

As *Chevron* has laid out in the complaint, motions, exhibits, and other court documents submitted in support of the Racketeer Influenced and Corrupt Organizations Act (“RICO”) case it filed in the Southern District of New York

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3. E-mail from Steven Donziger to Pablo Fajardo (Aug. 13, 2008) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF No. 47-14 (Ex. 253)).

against the Ecuadorian plaintiffs' attorneys, Messrs. Donziger and Fajardo and their collaborators used false statements about the conditions in Ecuador and about Chevron to create a fictional narrative of environmental harm and disruption of indigenous communities that has superficial but powerful appeal.<sup>4</sup> Their internal files, which Chevron has obtained in U.S.-based discovery proceedings,<sup>5</sup> reveal that this was in fact a major part of their strategy: to smear Chevron in the press and before U.S. and foreign government bodies with a false story to try to bludgeon the company into settling the case for huge sums that have no basis in fact or law.<sup>6</sup>

To be sure, not every case being litigated in a foreign country is fraudulent. This same strategy, however, was at work when Dole was defending a series of cases emanating from Nicaragua, which were litigated both in Nicaragua and the United States. In an order dismissing some of those actions on grounds of fraud, the Los Angeles Superior Court found: "These Plaintiffs, and their counsel were part of a broader conspiracy that permeates all [related] litigation arising from Nicaragua. . . . The purpose of this conspiracy was to manufacture evidence and improperly influence the outcome of [the] cases pending in Nicaragua and the United States to obtain millions of dollars in judgments that would then be enforced in the U.S. and possibly elsewhere."<sup>7</sup> Lies have a way of unraveling no matter how many times they are repeated, and a strategy built on lies is bound to backfire sooner or later.

- *Lesson 2: Don't Be Surprised if Fraud Comes Back to Haunt You—Especially if You Capture it on Video.*

Mr. Donziger and his legal team solicited and helped fund a so-called "documentary" about the Chevron litigation called *Crude*, as part of their pressure campaign and media strategy.<sup>8</sup> After studying the film, Chevron and

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4. Annotated Amended Complaint at 35-40, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Apr. 20, 2011), ECF No. 356-1.

5. *See infra* at section .

6. *See id.* at 1-2; Videotape: CRS-104-01-Clip-01, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF Nos. 6-2, 6-3 to 8-5 (Exs. 1, 2 at 41-42 (certified transcript)); E-mail from Andrew Woods to Steven Donziger (Oct. 16, 2009) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Nov. 29, 2011), ECF No. 356-12 (Ex. BU)).

7. *See Findings of Fact and Conclusions of Law Supporting Order Terminating Mejia and Rivera Cases for Fraud on the Court, Mejia v. Dole Food Co. & Rivera v. Dole Food Co.*, Los Angeles Superior Court Case Nos. BC340049, BC379820 (June 17, 2009); Steve Stecklow, *Fraud by Trial Lawyers Taints Waive of Pesticide Lawsuits*, WALL ST. J., Apr. 19, 2009, at A1, available at <http://online.wsj.com/article/SB125061508138340501.html?KEYWORDS=Dole>.

8. *In re Chevron Corp.*, 749 F. Supp. 2d 141, 146 (S.D.N.Y. 2010), *aff'd sub nom.*, *Lago Agrio Plaintiffs v. Chevron Corp.*, 409 F. App'x 393 (2d Cir. 2010) ("Among [Donziger's] efforts was his persuasion of Joseph Berlinger, a documentary film maker, to make a documentary about the Lago Agrio litigation from the plaintiffs' point of view. That

its attorneys noticed at least one scene that had been conspicuously deleted, as well as footage showing clear wrongdoing by the plaintiffs' attorneys. Chevron therefore subpoenaed the outtakes and unused footage, more than 600 hours of video in total. In part because "Donziger in fact solicited" the filmmaker to "create a documentary of the litigation from the perspective of his clients," and because the filmmaker had been given "almost unprecedented access . . . behind the scenes of the Lago Agrio Litigation" and had "removed at least one scene from the final version of *Crude* at [plaintiffs' counsel's] direction," federal District Judge Kaplan of the Southern District of New York agreed that Chevron had "overcome the qualified journalist's privilege" and mandated that the filmmaker turn over all of the footage.<sup>9</sup> The Second Circuit affirmed, holding that the filmmaker lacked independence and thus was not entitled to the journalist's privilege.<sup>10</sup>

To say the least, the outtakes are a treasure trove of damning evidence that broke the case wide open and allowed Chevron to expose the plaintiffs' fraud and other wrongdoing—all of which is detailed in the company's complaint and summary judgment papers in its RICO case against the plaintiffs and their attorneys and other representatives.<sup>11</sup> As one federal court observed, the outtakes "sent shockwaves through the nation's legal communities, primarily because the footage shows, with unflattering frankness, inappropriate, unethical and perhaps illegal conduct."<sup>12</sup>

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film, entitled *Crude*, purports to tell the story of the Lago Agrio litigation. It is no exaggeration to say that Donziger is the star of the film, much of which focuses on his words and activities. *Crude* contains a good deal of material that casts Donziger and his cause in a negative light, although that doubtless was not the aura in which he expected to appear when he acted and spoke before Mr. Berlinger's cameras . . . . But the content of the publicly released documentary film has proved to be only the tip of the iceberg.").

9. *In re* Application of Chevron Corp., 709 F. Supp. 2d 283, 297-98 (S.D.N.Y. 2010).

10. *Chevron Corp. v. Berlinger*, 629 F.3d 297, 300 (2d Cir. 2011) ("Given all the circumstances of the making of the film, as reasonably found by the district court, particularly the fact that Berlinger's making of the film was solicited by the plaintiffs in the Lago Agrio litigation *for the purpose of telling their story*, and that changes to the film were made at their instance, Berlinger failed to carry his burden of showing that he collected information for the purpose of *independent* reporting and commentary. Accordingly, we cannot say it was error for the district court to conclude that petitioners had successfully overcome Berlinger's claim of privilege.").

11. Amended Complaint, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Apr. 20, 2011), ECF No. 283; Chevron Corporation's Memorandum of Law in Support of Motion for Partial Summary Judgment on All Claims, Counterclaims, and Affirmative Defenses, and Summary Judgment on Defendants' Affirmative Defense of Collateral Estoppel at 13, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Jan. 28, 2013), ECF No. 745.

12. *In re* Chevron Corp., Nos. 1:10-mc-00021-22 (JH/LFG), 2010 U.S. Dist. LEXIS 119943, at \*6 (D.N.M. Sept. 2, 2010). The *Crude* outtakes were instrumental in demonstrating that the reports of the allegedly independent, court-appointed expert, Richard Stalin Cabrera—the second of which assessed damages at \$27 billion—were fraudulent. *See* *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), slip op. at 9-10 (Mar. 15, 2013). Chevron has, in addition, presented substantial evidence showing that the Ecuadorian

To describe a few of the many examples: One video outtake shows the plaintiffs' lawyers meeting with the purportedly neutral "court appointed" damages expert, Richard Stalin Cabrera Vega, to plan the damages assessment two weeks *before* he was even appointed by the Court.<sup>13</sup> Another shows plaintiffs' counsel describing the lack of evidence to support their legal claims, and explaining that it doesn't matter because "at the end of the day, this is all for the Court just a bunch of smoke and mirrors and bullshit."<sup>14</sup> Several outtakes show plaintiffs' team openly discussing their strategy of intimidating judges and winning the case through fear and pressure. Mr. Donziger, for example, states point blank into the camera, "The only language I believe this judge is going to understand is one of pressure, intimidation, and humiliation. And that's what we're doing today."<sup>15</sup>

Why would the plaintiffs' team do and say these things in front of a camera crew? The answer likely ties back to the first lesson: Some U.S. plaintiffs' lawyers, when they go crusading into foreign countries, start to believe the normal ethical rules do not apply to them—maybe they start to think the ends justify the means, they feel above the law, they view themselves as global

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judgment itself was the product of fraud. *See, e.g.*, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2013 U.S. Dist. LEXIS 24086, at \*13 (S.D.N.Y. Feb. 21, 2013), ECF No. 846 (holding that "Chevron ha[s] presented substantial evidence of fraud in the procurement of the Judgment" and that "there [is] no genuine issue of fact to at least the following": (1) the LAPs coerced an Ecuadorian judge to unlawfully appoint a purportedly independent global inspection expert; (2) the LAPs fraudulently wrote the expert's report; (3) the LAPs secretly authored parts of the Ecuadorian judgment; and (4) the Ecuadorian judgment relied—to some extent—on the fraudulent court-appointed expert's report.); *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2012 U.S. Dist. LEXIS 107693, at \*\*158-59 (S.D.N.Y. July 31, 2012) ("The crux of the motion is the contention that the Lago Agrio Judgment should not be recognized or enforced by reason of fraud. As the foregoing demonstrates, the LAPs' procurement of the termination of judicial inspections, the adoption of the global assessment, and the appointment of Cabrera all unquestionably were tainted. The secret participation of the LAP team in Cabrera's activities and its secret drafting of the bulk of Cabrera's report were tainted as well. Moreover, there are serious questions concerning the preparation of the Judgment itself in view of the identity between some portions of the Judgment and the Unfiled Fusion Memo, especially in light of the undisputed pattern of *ex parte* advocacy in the Lago Agrio Litigation and the undisputed instance of the LAP team's coercion of and duress on one of the judges to obtain a desired result.").

13. Videotape: CRS-191-00-CLIP-03, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF Nos. 6-2, 6-3 to 8-5 (Exs. 1, 2 at 245-46 (certified transcript)) (*Crude* outtake video clip).

14. Videotape: CRS-195-05-CLIP-01, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y.), ECF Nos. 6-2, 6-3 to 8-5 (Exs. 1, 2 at 259 (certified transcript)) (*Crude* outtake video clip).

15. Videotape: CRS-032-00-01, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF Nos. 6-2, 6-3 to 8-5 (Exs. 1, 2 at 11 (certified transcript)) (*Crude* outtake video clip); Videotape: CRS-060-00-CLIP-04, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF Nos. 6-2, 6-3 to 8-5 (Exs. 1, 2 at 33 (certified transcript)) (*Crude* outtake video clip); Videotape: CRS-346-00-CLIP-02 *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF Nos. 6-2, 6-3 to 8-5 (Exs. 1, 2 at 402-03 (certified transcript)) (*Crude* outtake video clip).

celebrities instead of lawyers, and they forget that there are rules of law in the United States that will allow their adversaries to discover the evidence of their misconduct.<sup>16</sup> The plaintiffs' lawyers in the Dole litigation also starred in their own documentary entitled *Bananas!*<sup>\*</sup> and it did not help their case.

The bottom line: Don't film your wrongdoing. But even more importantly, don't engage in wrongdoing in the first place.

- *Lesson 3: When You Try to Enforce a Plainly Fraudulent Judgment, You Are Committing Fraud*

Courts in the United States refuse to enforce a foreign judgment that is the product of a judicial system lacking unbiased tribunals or due process, or a system that otherwise fosters fraud.<sup>17</sup> As has been well documented in both legal opinions and the press, Chevron has amassed a mountain of evidence that the \$19 billion Ecuadorian judgment issued in February 2011 by Ecuadorian Judge Zambrano is the product of a fraud.<sup>18</sup> As Judge Kaplan found, "there is probable cause . . . to suspect that [the plaintiffs'] lawyers and other representatives later bribed Judge Zambrano to obtain the result they wanted and, pursuant to the arrangement they struck with him, actually wrote the decision to which he signed his name."<sup>19</sup> Moreover, it is basically undisputed that the Cabrera report—the report of the supposedly neutral, court-appointed

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16. See *infra*, note 55.

17. See, e.g., Uniform Foreign Country Money-Judgments Recognition Act, N.Y. C.P.L.R. §§ 5301-5309 (Supp. 2011); N.Y. C.P.L.R. § 5304(a)-(b) (Under the New York Recognition Act, foreign judgments cannot be recognized if "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law," "the judgment was obtained by fraud", or "the cause of action on which the judgment is based is repugnant to the public policy of this state."); *Hilton v. Guyot*, 159 U.S. 113, 193 (1895) (holding that a judgment may not be recognized or enforced if there was "fraud in procuring the judgment"); *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1345 (S.D. Fla. 2009) (refusing to enforce Nicaraguan judgment because it "does not comport with the basic fairness that the international concept of due process requires. It does not even come close. Civilized nations do not typically require defendants to pay out millions of dollars without proof that they are responsible for the alleged injuries." (internal quotation marks omitted)), *aff'd sub nom.*, *Osorio v. Dow Chem. Co.*, 635 F.3d 1277 (11th Cir. 2011) (per curiam).

18. See, e.g., *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), slip op. at 3-4 (S.D.N.Y. Mar. 15, 2013) ("Chevron has established at least probable cause to believe there was fraud or other criminal activity in the procurement of the Judgment and in other respects relating to the Lago Agrio litigation in which that Judgment was rendered and in certain litigations in the United States relating to the Ecuadorian litigation."); Michael Goldhaber, *The Global Lawyer: Closing in on Truth and Justice in the Chevron Ecuador Case*, AM. LAW LITIG. DAILY, <http://www.americanlawyer.com/digestTAL.jsp?id=120258695571> (Feb. 4, 2013); Roger Parloff, *Ex-judge says he was bribed by Ecuadorians suing Chevron*, CNN MONEY, <http://features.blogs.fortune.cnn.com/2013/01/28/judge-chevron-ecuador/> (Jan. 28, 2013, 10:47 AM).

19. *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), slip op. at 4 (S.D.N.Y. Mar. 15, 2013).

expert—was ghostwritten from start to finish by the plaintiffs’ lawyers and their consultants.<sup>20</sup> Indeed, Douglas Beltman and Ann Maest of Stratus Consulting, Inc., the environmental consulting firm commissioned by the plaintiffs to write the Cabrera report in secret, recently “disavow[ed] any and all findings and conclusions” related to their work in Ecuador and expressed that they “deeply regret” allowing themselves to become involved in the plaintiffs’ fraud.<sup>21</sup>

At least 8 federal courts around the country have similarly found that the Ecuadorian proceedings were tainted by the plaintiffs’ team’s fraud.<sup>22</sup> And the

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20. *Id.* at 3-4 (“The report that Cabrera ultimately submitted in fact was planned and written, at least in major part and quite possibly entirely, by lawyers and consultants retained on behalf of the LAPs though it was signed by Cabrera and filed as if it were his independent work. LAP representatives, moreover, took a number of steps to create the entirely inaccurate contention that the Cabrera report was the unbiased work of an independent expert when, in fact, it had been the work of the LAPs’ representatives themselves and was not independent in the slightest respect.”); *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2013 U.S. Dist. LEXIS 24086, at \*\*11-12 (S.D.N.Y. Feb. 21, 2013).

21. Witness Statement of Douglas Beltman, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Apr. 12, 2013), ECF No. 1007-1 (Ex. 3652); Witness Statement of Ann Maest, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Apr. 12, 2013), ECF No. 1007-1 (Ex. 3653); see also Paul M. Barrett, *Plaintiffs’ Experts Disavow Work in \$19 Billion Chevron Case*, BLOOMBERG BUSINESSWEEK, <http://www.businessweek.com/articles/2013-04-11/plaintiffs-experts-disavow-work-in-19-billion-chevron-case> (Apr. 11, 2013) (“The report was supposed to be neutral and independent, but it was not, Stratus said. The consulting firm described a court process in Ecuador that ‘was tainted by Donziger and the Lago Agrio plaintiffs [sic] representatives’ behind-the-scenes activities.”).

22. See, e.g., *In re Chevron Corp.*, 633 F.3d 153, 166 (3d Cir. Feb. 3, 2011) (“Though we recognize that the Lago Agrio Court may view what seems to us to be a conflict of interest differently than we do, we believe that this showing of [plaintiffs’ technical consultant] Villao’s dual employment is sufficient to make a prima facie showing of a fraud that satisfies the first element of the showing necessary to apply the crime-fraud exception to the attorney-client privilege.”); *In re Chevron Corp.*, No. 11-24599-CV, 2012 U.S. Dist. LEXIS 123315, at \*7 (S.D. Fla. June 12, 2012) (“Chevron has obtained mounds of evidence, in multiple § 1782 proceedings, that suggests that the judgment itself was also ghostwritten. For example a forensic document analysis conducted on the judgment revealed that it contains verbatim passages that were taken from various pieces of the LAP lawyers’ internal, unfiled work product . . . .”); *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 636 (S.D.N.Y. Mar. 7, 2011) (“There is ample evidence of fraud in the Ecuadorian proceedings. The LAPs, through their counsel, submitted forged expert reports in the name of [technical expert] Dr. [Charles] Calmbacher. Their counsel orchestrated a scheme in which [plaintiffs’ technical consulting firm] Stratus ghost-wrote much or all of [court expert] Cabrera’s supposedly independent damages assessment without, as far as the record discloses, notifying the Ecuadorian court of its involvement . . . . When it became evident that the LAPs’ improper contacts with Cabrera, including the pre-appointment meetings, ghost-writing, and illicit payments, would be revealed through the Section 1782 proceedings, LAP 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 from \$27 billion to \$113 billion.”); *In re Chevron Corp.*, No. 10-cv-1146-IEG (WMC), 2010 WL 3584520, at \*6 (S.D. Cal. Sept. 10, 2010) (“There is ample evidence in the record that the Ecuadorian Plaintiffs secretly provided information to Mr. Cabrera, who

State Department has repeatedly noted the corruption problems that plague the Ecuadorian judiciary—including the widespread problem of lawyers for a party ghostwriting judicial decisions.<sup>23</sup> For example, in another well-publicized case, President Correa of Ecuador obtained a \$40 million verdict against Ecuadorian newspaper *El Universo*, along with a three-year prison sentence for a columnist and three of the paper's owners, after the columnist referred to Correa as a "dictator" in a column. It has since been revealed through the courageous testimony of an Ecuadorian judge that the temporary judge who issued the 156-page decision (fewer than 33 hours after being appointed to the case) did not write it—a lawyer for President Correa did.<sup>24</sup>

In the Chevron case, Chevron obtained a declaration from a former

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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; Respondents' claim of privilege neither bars production of the subpoenaed documents nor gives [plaintiffs' technical consultant] Powers a basis for refusing to testify."); *In re Chevron Corp.*, Nos. 1:10-mc-00021-22 (JH/LFG), slip op. at 3-4 (D.N.M. Sept. 2, 2010) ("The release of many hours of the [*Crude*] outtakes has sent shockwaves through the nation's legal communities, primarily because the footage shows, with unflattering frankness, inappropriate, unethical and perhaps illegal conduct."); *Chevron Corp. v. Champ*, Nos. 1:10-mc-27, 1:10-mc-28, 2010 WL 3418394, at \*6 (W.D.N.C. Aug. 30, 2010) ("While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court. If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill."); *In re Chevron Corp.*, No. cv-10-2675 (SRC) (D.N.J. June 11, 2010) ("As far as the Court is concerned, the 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 . . ."); Hearing Transcript at 55, 58, *Chevron Corp. v. Page*, No. RWT-11-1942 (D. Md. Jan. 25, 2013) (finding evidence to support a crime-fraud ruling based on "substantial extrinsic evidence of wrongdoing," "ample evidence of the existence of a fraudulent scheme" and the fact that "Chevron has shown to anyone with common sense that [the Ecuadorian judgment] is a blatant cut and paste exercise").

23. See generally 2011 HUMAN RIGHTS REPORT: ECUADOR, U.S. DEPT. OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, available at <http://www.state.gov/j/drl/rls/hrrpt/2011/wha/186512.htm>; 2010 HUMAN RIGHTS REPORT: ECUADOR, U.S. DEPT. OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, available at <http://www.state.gov/j/drl/rls/hrrpt/2010/wha/154504.htm>; 2009 HUMAN RIGHTS REPORT: ECUADOR, U.S. DEPT. OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, available at <http://www.state.gov/j/drl/rls/hrrpt/2009/wha/136111.htm>; Theodore J. Boutros, Jr., *President Correa's Libel Suit and the Fraud Against Chevron*, FORBES, <http://www.forbes.com/sites/realspin/2012/03/06/president-correas-libel-suit-and-the-fraud-against-chevron/> (Mar. 6, 2012, 7:22 AM).

24. See Chevron Corporation's Statement of Material Facts in Support of Motion for Summary Judgment or Partial Summary Judgment on Defendants' Affirmative Defenses of Res Judicata and Collateral Estoppel ¶¶ 46-51, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Mar. 1, 2012), ECF No. 398; Chevron Corporation's Statement of Material Facts in Support of Motion for Summary Judgment or Partial Summary Judgment on Defendants' Affirmative Defenses of Res Judicata and Collateral Estoppel, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Mar. 1, 2012), ECF Nos. 400-16, 462-39, 400-14 (Exs. 2096, 2082, 2083).



Ecuadorian judge (Judge Guerra, who once presided over the Ecuador proceedings) explaining how he and the judge who ultimately took over the case in Ecuador and issued the \$19 billion judgment (Judge Zambrano) were bribed to allow plaintiffs themselves to draft the judgment, and how he worked with Judge Zambrano and the plaintiffs to edit the plaintiff-authored judgment before it was issued.<sup>25</sup> There is documentary evidence of payments from the plaintiffs' representatives to the former judge,<sup>26</sup> contemporaneous e-mails from the plaintiffs describing their payments to "the puppeteer,"<sup>27</sup> and extensive overlap between the plaintiffs' unfiled, internal work product and passages in the judgment.<sup>28</sup> Judge Guerra also has files on his hard drive of draft orders in *Chevron* and other cases.<sup>29</sup> Any of those pieces of evidence standing alone would be strong evidence of corruption and fraud in the judgment.<sup>30</sup> Together,

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25. See *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), slip op. at 14-18 (S.D.N.Y. Mar. 15, 2013); Chevron Corporation's Memorandum of Law in Support of Motion for Partial Summary Judgment on All Claims, Counterclaims, and Affirmative Defenses, and Summary Judgment on Defendants' Affirmative Defense of Collateral Estoppel at 13, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Jan. 28, 2013), ECF No. 745; Declaration of Alberto Guerra Bastidas at ¶¶ 23-27, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Jan. 28, 2013), ECF No. 746-3 (Ex. C).

26. Attachments G, K, L M, & N to Declaration of Alberto Guerra Bastidas, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Jan. 28, 2013), ECF No. 746-3 to 746-6 (Ex. C).

27. E-mail from Pablo Fajardo to Steven Donziger, Luis Yanza, Julio Prieto, and Juan Saenz (Sept. 15, 2009) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Jan. 28, 2013), ECF No. 754-27 (Ex. 3140) (DONZ00052470)) ("I think that everything is quiet . . . 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 will finish off the entire matter tomorrow . . . I hope they don't fail me . . ."); E-mail from Pablo Fajardo to Steven Donziger and Luis Yanza (Oct. 27, 2009) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Jan. 28, 2013), ECF No. 754-41 (Ex. 3154) (DONZ00052993)) ("The puppeteer won't move his puppet until the audience doesn't pay him something . . .").

28. See *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), slip op. at 18-21 (S.D.N.Y. Mar. 15, 2013); Chevron Corporation's Memorandum of Law in Support of Motion for Partial Summary Judgment on All Claims, Counterclaims, and Affirmative Defenses, and Summary Judgment on Defendants' Affirmative Defense of Collateral Estoppel at 17-23, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Jan. 28, 2013), ECF No. 745; see also Chevron Corporation's Memorandum of Law in Support of Motion for Partial Summary Judgment on All Claims, Counterclaims, and Affirmative Defenses, and Summary Judgment on Defendants' Affirmative Defense of Collateral Estoppel, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Jan. 28, 2013), ECF No. 755-15 (Ex. 3276); E-mail from Douglas Beltman to the "Science Group" at Stratus (Feb. 22, 2008) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y.), ECF No. 33-2 at 51, 57, 65 (Ex. 168); Chevron Corporation's Motion for an Order of Attachment and Other Relief, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Nov. 29, 2011), ECF No. 355-27 (Ex. 1076).

29. Expert Report of Michael L. Younger at 6-11, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Jan. 28, 2013), ECF No. 755-16 to 755-25 (Ex. 3278).

30. See *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), slip op. at 62 (S.D.N.Y. Mar. 15, 2013) ("[T]he Guerra declaration, in and of itself, establishes probable cause to

they are undeniable and overwhelming.

In the face of that evidence, the rulings of numerous federal courts, and the State Department's repeated findings that the Ecuadorian judiciary is weak and subject to corruption, it is difficult to understand how lawyers from the United States or any other country can, in good faith, seek to enforce this judgment against Chevron. As the Supreme Court has observed, "tampering with the administration of justice . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society."<sup>31</sup> If any reasonable lawyer, confronted with the record, would conclude that a judgment is a fraud, then it must also be a fraud to try to enforce that judgment and collect billions of dollars in doing so. In fact, when Chevron began to expose the fraud, one of plaintiffs' lawyers in Ecuador expressed concern that, "apart from destroying the proceeding, all of [plaintiffs' lawyers] might go to jail."<sup>32</sup>

As evidence of the plaintiffs' misconduct continued to build, individuals and organizations that initially supported the plaintiffs recognized that they too had been duped. Early on, several law firms withdrew from representing the plaintiffs, with one attorney explaining that "if we proceed I may be compromising th[e] firm's reputation and ethical stature and cannot do that."<sup>33</sup> More recently, Burford Capital, a publicly-traded fund that agreed to finance part of the Ecuadorian litigation in 2010, executed a sworn declaration stating it never would have financed the litigation were it not for Mr. Donziger's, Mr. Fajardo's, and Patton Boggs' "multi-month scheme to deceive and defraud in order to secure desperately needed funding."<sup>34</sup> Despite providing the plaintiffs with \$4 million in 2010, Burford Capital has decided to "give up any claim to any recovery" because it "has no desire to profit from fraud, deception or

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suspect that the LAPs' representatives, including Fajardo, Donziger, and Yanza, bribed Judge Zambrano to obtain their desired result in the Ecuadorian case and the privilege of writing the Judgment and that they took advantage of the latter. The latter point, moreover, is supported by abundant evidence that portions of the judgment are identical or substantially similar to internal documents prepared by the LAPs that were never filed with the Court.").

31. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944).

32. E-mail from Julio Prieto to Steven Donziger, Pablo Fajardo, Luis Yanza, and Juan Pablo Saenz (Mar. 30, 2010) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF No. 9-6 (Ex. 11)).

33. E-mail Chain between Steven Donziger and John McDermott (Mar. 21, 2010) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF No. 48-9 (Ex. 312)); E-mail from A. Woods Attaching Memorandum to File from Andrew Woods (Mar. 18, 2010), (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Nov. 29, 2011), ECF No. 356-10 (Ex. AS)); *see also* Transcript of the Deposition of Steven Donziger, *In re* Application of Chevron Corp., No. 10 MC 00002 (LAK) (S.D.N.Y. Dec. 29, 2010) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 27, 2013), ECF No. 850-8 (Ex. 8)).

34. Declaration of Christopher Bogart ¶ 4, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Apr. 17, 2013), ECF No. 1039-2 (Ex. 3687)).

unethical behavior.”<sup>35</sup> And, as discussed above, Stratus Consulting, the plaintiffs’ lead scientific consultant in Ecuador, “disavow[ed]” its work for the plaintiffs, admitting its conclusions were based on “a series of assumptions and data provided [] by Donziger and the LAPs’ representatives that [it did] not know to be true.”<sup>36</sup> Finally, counsel for both Mr. Donziger and the Ecuadorian plaintiffs have moved to withdraw their representation in the civil RICO action due to their clients’ inability to pay their mounting legal fees.<sup>37</sup>

Although nearly everyone around them has acknowledged the fraud and recognized that enforcing the fraudulent judgment would be both unjust and improper, Mr. Donziger, Mr. Fajardo, the law firm of Patton Boggs and others have hung on in an attempt to do so.<sup>38</sup>

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35. *Id.* ¶¶ 2-4; see also Roger Parloff, *Litigation finance firm in Chevron case says it was duped by Patton Boggs*, CNN MONEY, <http://features.blogs.fortune.cnn.com/2013/04/17/burford-patton-boggs-chevron-suit/> (Apr. 17, 2013, 1:16 PM) (“Burford relied on a misleading analysis of the case made by Patton Boggs partner, James Tyrrell, Jr., with whom Bogart says, Burford had a ‘special and multifaceted relationship’ at the time. Most of the misrepresentations Bogart alleges concern the extent to which Patton Boggs already knew that a crucial damages assessment drafted by a purportedly ‘neutral and independent’ court-appointed expert in the case had, in reality, been secretly ghost-written by the Lago Agrio plaintiffs lawyers themselves.”).

36. Witness Statement of Douglas Beltman ¶ 76, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Apr. 12, 2013), ECF No. 1007-1 (Ex. 3652).

37. Memorandum of Law In Support of Kecker & Van Nest LLP’s Motion by Order to Show Cause for an Order Permitting it to Withdraw as Counsel for Defendants Steven Donziger, the Law Offices of Steven R. Donziger and Donziger & Associates, PLLC, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. May 3, 2013), ECF No. 1100; Memorandum of Law In Support of Application by Order to Show Cause Why Smyser Kaplan & Veselka, L.L.P.’s Motion to Withdraw as Attorney in Charge for Defendants Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje Should not be Granted, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. May 3, 2013), ECF No. 1103. Interestingly, counsel for the Ecuadorian plaintiffs, who was to be compensated on a mixed hourly and contingent fee basis, chose to withdraw just one day after a Canadian court rejected an attempt to enforce the fraudulent Ecuadorian judgment. *See infra* note 38.

38. The plaintiffs have initiated enforcement actions in Canada, Argentina, and Brazil. Recognizing that the attempt to enforce the fraudulent judgment against Chevron’s subsidiaries was improper, the Ontario Superior Court of Justice stayed the enforcement action on May 1, 2013, stating:

[T]he plaintiffs have no hope of success in their assertion that the corporate veil of Chevron Canada should be pierced and ignored so that its assets become exigible to satisfy a judgment against its ultimate parent. There is no basis in law or fact for such a claim. . . . Ontario courts should be reluctant to dedicate their resources to disputes where, in dollar and cents terms, there is nothing to fight over. In my view, the parties should take their fight elsewhere to some jurisdiction where any ultimate recognition of the Ecuadorean judgment will have a practical effect.

*Yaiguaje v. Chevron Corp.*, 2013 ONSC 2572, ¶¶ 109-11 (Can. Ont. Sup. Ct. J.), Ct. File No. CV-12-9808. The Canadian court recognized that the plaintiffs should be seeking to enforce their judgment in the United States, but refuse to do as many U.S. courts have already deemed the Ecuadorian proceedings fraudulent. *See id.* ¶ 84 (“In less than an hour’s drive one can cross a bridge which takes you into the very state in which Chevron initiated its anti-enforcement injunction proceedings. Yet, the plaintiffs have not sought the recognition and enforcement of the foreign judgment in the place of their judgment debtor’s

- *Lesson 4: Litigation Might Benefit From A Political or Media Campaign, But it Should Not Be Run Like One*

The plaintiffs' team has been quite explicit that they view the Chevron litigation not as a legal case, but a political and media campaign. As Mr. Donziger wrote in his personal journal: "We can have the best proof in the world, and if we don't have a political plan we will surely lose. On the other hand, we can [have] mediocre proof and a good political plan and stand a good chance of winning."<sup>39</sup> Mr. Donziger made similar remarks on camera, explaining that the Chevron litigation "is not a legal case," but a "political battle that's being played out through a legal case."<sup>40</sup> "[What] we need to do is to get the politics in order . . . [because] the only way we're going to succeed, in my opinion, is [i]f the country gets excited about getting this kind of money out of Texaco . . ."<sup>41</sup>

High-stakes litigation often will involve media and political components, and there is nothing wrong with trying to inform and persuade the public, government agencies and other key decision-makers in seeking zealously and effectively to represent one's client. But it is exceedingly dangerous to let the tail wag the dog—to let the political and media campaign overtake the lawsuit. The litigation itself is more than just a forum for letting a "political battle . . . play[] out"<sup>42</sup> and it is subject to different rules than those that govern media and political battles—rules of truth, truth-testing through the adversary system, due process, and reliable and admissible evidence placed before an unbiased decision-maker. Those rules may not be discarded or ignored simply because there is *also* a media or political component to the case.

But that is exactly what has happened in the *Chevron* case, as plaintiffs and their team have employed tactics that include, among other things, false statements to the media, Congress, the SEC and other government officials and

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[Chevron's] residence or place of business and, instead, have come to Ontario arguing that the assets nominally held by a stranger to the foreign judgment [Chevron Canada] should be made available to satisfy it."); Roger Parloff, *Why Chevron's win in Canada might be big*, CNN MONEY, [http://features.blogs.fortune.cnn.com/2013/05/03/why-chevrons-win-in-canada-might-be-big/?section=magazines\\_fortune](http://features.blogs.fortune.cnn.com/2013/05/03/why-chevrons-win-in-canada-might-be-big/?section=magazines_fortune) (May 3, 2013, 10:21 AM) (noting "yesterday's ruling by Judge Brown, if upheld, is a bad omen for the Front's chances, at least in the stronger courts of the world—those with respect for the rule of law").

39. Entry in Steven Donziger's Personal Notes (May 31, 2006) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF Nos. 28-7 to 29-3 (Ex. 76)).

40. Videotape: CRS-060-00-CLIP-04, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011) (*Crude* outtake video clip), ECF Nos. 6-2, 6-3 to 8-5 (Exs. 1, 2 at 33 (certified transcript)).

41. *Id.* (ECF Nos. 6-2, 6-3 to 8-5 (Exs. 1, 2 at 34-35 (certified transcript))).

42. Videotape: CRS-060-00-CLIP-04, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011) (*Crude* outtake video clip), ECF. Nos. 6-2, 6-3 to 6-5 (Exs. 1, 2 at 33).

bodies in the U.S. and abroad.<sup>43</sup> Mr. Donziger himself has stated that the purpose of these types of tactics is to make judges feel that they cannot rule against the plaintiffs without jeopardizing their political standing, their career, and their personal safety.<sup>44</sup> And, indeed, President Correa has complied, making numerous statements indicating his expectation that judges must rule against Chevron.<sup>45</sup> These types of tactics, which go well beyond appropriate

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43. Amended Complaint at ¶ 18, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Apr. 20, 2011), ECF No. 283 (“The enterprise’s ultimate aim is to create enough pressure on Chevron in the United States to extort it into paying to stop the campaign against it. The RICO Defendants have sought to inflict maximum ‘damage to [Chevron’s] reputation,’ to put ‘personal psychological pressure [on] their top executives,’ to disrupt Chevron’s relations with its shareholders and investors, to provoke U.S. federal and state governmental investigations, and therefore force the company into making a payoff.”) (quoting Videotape: CRS-060-00-CLIP-04, *supra* note 42); E-mail from Andrew Woods to Steven Donziger (Oct. 16, 2009) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF. Nos. 6-2, 6-3 to 6-5, 356-12 (Exs. 1, 2 at 41-42, BU)).

44. *See, e.g.*, Videotape: CRS-195-05-CLIP-01, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011) (*Crude* outtake video clip), ECF. Nos. 6-2, 6-3 to 6-5 (Exs. 1, 2 at 259) (“Hold on a second, you know, this is Ecuador, okay, . . . You can say whatever you want and at the end of the day, there’s a thousand people around the courthouse, you’re going to get what you want.”); Videotape: CRS-129-00-CLIP-02, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011) (*Crude* outtake video clip), ECF. Nos. 6-2, 6-3 to 6-5 (Exs. 1, 2 at 70) (Donziger explaining that while a judge might not get killed if he ruled against the plaintiffs “he thinks he will be . . . Which is just as good.”); Entry in Steven Donziger’s Personal Notes (May 11, 2006) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF Nos. 28-7 to 29-3 (Ex. 76)) (one of Donziger’s co-conspirators stating “The only way we will win this case is if the judge thinks he will be doused with gasoline and burned if he rules against us.”); E-mail from Steven Donziger to Alejandro Villacis (June 14, 2006) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF. Nos. 30-7, (Ex. 96)) (Donziger instructed one of his coconspirators to “prepare a detailed plan with the necessary steps to attack the judge through legal, institutional channels and through any other channel you can think of.”); Entry in Steven Donziger’s Personal Notes (June 14, 2006) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF. No. 30-7 (Ex. 76 at 55) (Donziger explained: “[T]he only way the court will respect us is if they fear us—and . . . the only way they will fear us is if they think we have [s]ome control over their careers, their jobs, their reputations—that is to say, their ability to earn a livelihood.”).

45. *See* *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), slip op. at 20-25 (S.D.N.Y. Feb. 21, 2013) (discussing the “Alliance Between the LAPs and the Ecuadorian Government”); *see also, e.g.*, Press Release, Office of President Rafael Correa, *Que el mundo entero vea la barbaridad que hizo Texaco* [*The whole world should see the barbarity displayed by Texaco*] 1 (Apr. 26, 2007); *Correa se declara ‘indignado’ por daños en la Amazonía causados por Texaco* [*Correa Says He is ‘Furious’ About the Damage Texaco caused in the Amazonian Region*], EFE, Apr. 28, 2007, at 1; Isabel Ordóñez, *Amazon Oil Row: US-Ecuador Ties Influence Chevron Amazon Dispute*, DOW JONES, Aug. 7, 2008, at 3 (Ecuadorian Attorney General Diego García Carrión told a reporter that the Correa administration’s position in this case is clear: “The pollution is [the] result of Chevron’s actions and not of Petroecuador.”); Joffre Campaña Mora, *Injerencia en la administración de justicia* [*Interference in the Administration of Justice*], EL UNIVERSO [THE UNIVERSE] (Mar. 5, 2009); Juan Forero, *In Ecuador, High Stakes in Case Against Chevron*, WASH. POST, Apr. 28, 2009, at A12.

sensitivity to the political and media ramifications of litigation, are dangerous and harmful, and undermine the rule of law.<sup>46</sup>

- *Lesson 5: Science and Facts Matter, Even When You Are Litigating in a Foreign Country*

Sworn testimony from the plaintiffs' lead scientific consultants now conclusively demonstrates that, when confronted with the fact that the evidence did not support their multi-billion dollar damages claim, plaintiffs implemented a scheme to manufacture more favorable facts.<sup>47</sup> Indeed, the internal files that Chevron obtained in discovery from the plaintiffs' lawyers and their experts, and from the *Crude* outtakes, are filled with admissions and statements revealing that their claims lack a valid scientific basis—and that plaintiffs' attorneys knew it, instructing their experts that “prov[ing] damages [is] preferred but not necessary.”<sup>48</sup> For example, when consultants working for the plaintiffs' lawyers in Ecuador told Mr. Donziger that there was no evidence of contamination from the oil pits spreading to the surrounding groundwater, Mr. Donziger responded: “Hold on a second, you know, this is Ecuador, okay, . . . . You can say whatever you want and at the end of the day, [if] there's a thousand people around the courthouse, you're going to get what you want.”<sup>49</sup> “Therefore, if we take our existing evidence on groundwater contamination, which admitted[ly] is right below the source . . . [a]nd wanted to extrapolate based on nothing other than our, um, theory,” then “[w]e can do it, [a]nd we

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46. Further, in an internal strategy document entitled “Invictus” that Chevron obtained in discovery, the Patton Boggs firm proposes several ways to launch enforcement and other litigation all over the world in order to coerce Chevron into a settlement, including initiating a shareholder derivative action in the United States and utilizing its political connections abroad. *See Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), slip op. at 41-42 (S.D.N.Y. Mar. 15, 2013) (“The [Invictus] memorandum, which recognized that enforcement of the Judgment may be difficult in the United States, emphasized that ‘Patton Boggs’ current and former representation of numerous, geographically diverse foreign government means that barriers to judgment recognition in a given country may not necessarily preclude enforcement there.’ . . . Subsequently, [Patton Boggs] has been heavily involved in the LAPs’ efforts to enforce the judgment in other countries.”) (quoting Ex. 341 to Chevron’s Complaint, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF No. 49-5 (Ex. 341 at 12)).

47. Witness Statement of Douglas Beltman ¶ 76, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Apr. 12, 2013), ECF No. 1007-1 (Ex. 3652) (admitting that all of Stratus principal Douglas Beltman’s “opinions and conclusions” were based on “a series of assumptions and data provided to me by Donziger the LAPs’ representatives that I did not know to be true” and that “the damages assessment in the Cabrera Report and Cabrera Response are tainted”).

48. Chevron Corporation’s Motion for Preliminary Injunction, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF No. 53-2 (Ex. 402).

49. Videotape: CRS-195-05-CLIP-01, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011) (*Crude* outtake video clip), ECF Nos. 6-2, 6-3 to 8-5 (Exs. 1, 2 at 259 (certified transcript)).

can get money for it.”<sup>50</sup>

One of the ways the plaintiffs’ litigation team carried out Mr. Donziger’s plan was by forging expert reports, including the report of Dr. Charles Calmbacher. Dr. Calmbacher did not find evidence of significant harm to human health or the environment in his inspections, but Mr. Donziger had his team submit under Dr. Calmbacher’s signature a report that reached the opposite conclusion.<sup>51</sup> Dr. Calmbacher had never seen the document submitted in his name in the Ecuadorian proceedings. As Dr. Calmbacher later testified, “I did not reach these conclusions and I did not write this report.”<sup>52</sup> Another expert quit when the plaintiffs refused to stop using false facts in their media campaign and attributing those facts to his work.<sup>53</sup> And, of course, if science and evidence had been on their side, plaintiffs obviously would not have ghostwritten the court-appointed expert’s damage assessment, let alone the judgment itself.<sup>54</sup>

It is one thing for a lawyer to weave together an emotion-packed story

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50. *Id.* (Exs. 1, 2 at 259 (certified transcript)).

51. *See* Memorandum of Points and Authorities in Support of the Application of Chevron Corporation for an Order Under 28 U.S.C. § 1782 Permitting Chevron Corporation to Issue a Subpoena for the take of a Deposition, and the Production of Documents from Charles William Calmbacher, *In re* Application of Chevron Corp., No. 10-MI-0076 (TWT) (GGB) (N.D. Ga. Feb. 19, 2010), ECF Nos. 1-27, 1-28 (Exs. Q, R).

52. *See Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), slip op. at 22 (S.D.N.Y. Mar. 15, 2013); Transcript from Deposition of Charles Calmbacher, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF No. 31-21 (Ex. 136 at 60:22-63-11, 116:9-10) (describing how the Lago Agrio Plaintiffs’ attorneys submitted a false report under his name).

53. *See* Letter from David Russell to Steven Donziger (Feb. 14, 2006) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF No. 31-14 (Ex. 129)).

54. *See, e.g., Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), slip op. at 14-21 (S.D.N.Y. Mar. 15, 2013); *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2013 U.S. Dist. LEXIS 24086, at \*13 (S.D.N.Y. Feb. 21, 2013) (holding that “Chevron ha[s] presented substantial evidence of fraud in the procurement of the Judgment” and that “there [is] no genuine issue of fact to at least the following”: (1) the LAPs coerced an Ecuadorian judge to unlawfully appoint a purportedly independent global inspection expert; (2) the LAPs fraudulently wrote the expert’s report; (3) the LAPs secretly authored parts of the Ecuadorian judgment; and (4) the Ecuadorian judgment relied—to some extent—on the fraudulent court-appointed expert’s report.); *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2012 U.S. Dist. LEXIS 107693, at \*\*158-59 (S.D.N.Y. July 31, 2012) (“The crux of the motion is the contention that the Lago Agrio Judgment should not be recognized or enforced by reason of fraud. As the foregoing demonstrates, the LAPs’ procurement of the termination of judicial inspections, the adoption of the global assessment, and the appointment of Cabrera all unquestionably were tainted. The secret participation of the LAP team in Cabrera’s activities and its secret drafting of the bulk of Cabrera’s report were tainted as well. Moreover, there are serious questions concerning the preparation of the Judgment itself in view of the identity between some portions of the Judgment and the Unfiled Fusion Memo, especially in light of the undisputed pattern of ex parte advocacy in the Lago Agrio Litigation and the undisputed instance of the LAP team’s coercion of and duress on one of the judges to obtain a desired result.”).

filled with vivid imagery, purporting to pit foreign indigenous people against a large multinational corporation. But, at the end of the day, only proof, backed by science and evidence, can prevail in a fair and just trial. A lawsuit without proof will eventually be revealed as a sham.

- *Lesson 6: Even if You Are a Defendant Litigating in a Foreign Tribunal, Discovery is Available in the United States*

The Ecuadorian plaintiffs litigated their case as though no discovery would ever be available to Chevron, perhaps because of their confidence in their ability to manipulate the Ecuadorian judicial system. That was a mistake. Under certain circumstances, United States law allows a litigant to obtain discovery of information for use in a foreign proceeding. The requirements to obtain discovery under Section 1782 are: (1) the order must be issued by “[t]he district court . . . of the district in which [respondent] resides or is found”; (2) the discovery must be “for use in a proceeding in a foreign or international tribunal”; and (3) the order may be made upon “application of any interested person.”<sup>55</sup>

Chevron has filed 23 actions in federal courts throughout the United States to obtain discovery for use in the proceedings in Ecuador and in its Bilateral Investment Treaty Arbitration against Ecuador, and has succeeded in almost all of them, obtaining all manner of information, including the outtakes from *Crude* and the plaintiffs’ lawyers’ and experts’ internal files.<sup>56</sup>

55. 28 U.S.C. § 1782 (2012); *see also* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 256-63 (2004) (discussing the mandatory requirements of Section 1782); *id.* at 264-66 (discussing the discretionary “factors that bear consideration in ruling on a Section 1782(a) request”).

56. *See generally* Chevron Corp. v. Banco Pichincha, No. 1:11-cv-24599-MGC (S.D. Fla. Dec. 22, 2011); Chevron Corp. v. Page, No. 8:11-mc-00395 (D. Md. Nov. 1, 2011); Chevron Corp. v. Env’tl Law Alliance Worldwide, No. 6:11-mc-07003-TC (D. Or. filed Nov. 1, 2011, withdrawn Dec. 5, 2011); Chevron Corp. v. Weinberg Grp., Inc., No. 1:11-mc-00030-CKK (D.D.C. Jan. 21, 2011); *In re* Application of Chevron Corp. (Bonifaz), Nos. 10-mc-30022-MAP, 10-mc-30023-MAP (D. Mass. Nov. 19, 2010); *In re* Application of Chevron Corp. (Kohn), No. 2:10-mc-00208-JD (E.D. Pa. Nov. 16, 2010); *In re* Chevron Corp. (Scardina), No. 7:10-cv-020067, renumbered No. 10-cv-00549 (W.D. Va. Nov. 4, 2010); Chevron Corp. v. Picone, Nos. 10-cv-02990, 10-cv-02989 (D. Md. Oct. 22, 2010); Chevron Corp. v. Allen, No. 10-mc-00091 (D. Vt. Oct. 22, 2010); Chevron Corp. v. Shefftz, No. 10-mc-10352-JLT (D. Mass. Oct. 22, 2010); Chevron Corp. v. Barnthouse, No. 10-mc-00053-SSB-KLL (S.D. Ohio Oct. 22, 2010); Chevron Corp. v. Rourke, Nos. 10-cv-02989, 10-cv-02990 (D. Md. Oct. 22, 2010); Chevron Corp. v. Champ, Nos. 10-mc-00027, 10-mc-00028 (W.D.N.C. Aug. 16, 2010); *In re* Application of Chevron Corp. (Kamp/E-Tech), No. 10-mc-00021 (D.N.M. Aug. 16, 2010); *In re* Application of Chevron Corp. (Donziger), No. 10-mc-00002-LAK (S.D.N.Y. Aug. 6, 2010); *In re* Application of Chevron Corp. (Berlinger), No. 10-mc-00001-LAK (S.D.N.Y. July 22, 2010); Chevron Corp. v. Quarles, No. 10-cv-00686 (N.D. Tenn. July 16, 2010); *In re* Application of Chevron Corp. (Wray), No. 10-mc-00371-CKK (D.D.C. June 8, 2010); Chevron Corp. v. E-Tech Int’l, No. 10-cv-01146-IEG-WMC (S.D. Cal. May 27, 2010); *In re* Application of Chevron Corp. (Uhl), No. 10-cv-2675 (SRC)



- *Lesson 7: Multinational Companies Need to Be More Effective in Advocating for the Rule of Law in Countries Where They Invest*

For companies that invest or have operations overseas but may not have given much thought to transnational litigation, the time has come to advocate for the rule of law, both at home and abroad. This means pushing for worldwide due process protections and fighting corruption through all available means, including the U.S. government (the Departments of State and Commerce, as well as the U.S. Trade Representative), and through treaties and trade agreements. In today's global economy, such protections are crucial and can make a huge difference for companies seeking to protect their assets and investments from unjust seizures and deprivations.<sup>57</sup>

One part of the effort should be to bolster the status of international institutions designed to protect against transnational abuses by foreign judiciaries. As an example, Chevron has filed an arbitration action against the Republic of Ecuador in the Hague, pursuant to the Bilateral Investment Treaty between the United States and Ecuador.<sup>58</sup> Chevron is arguing, among other

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(D.N.J. May 25, 2010); *Chevron Corp. v. 3TM Int'l Inc.*, No 10-mc-134 (S.D. Tex. Mar. 20, 2010), *In re Application of Chevron Corp.* (Calmbacher), No. 10-mi-0076 (N.D. Ga. Feb. 19, 2010); *Chevron Corp. v. Stratus Consulting Inc.*, No. 10-cv-00047-MSK-MEH (D. Colo. Dec. 18, 2009).

57. At least one commentator has argued that Chevron's "great blunder in this dispute was to ship it to Ecuador in the name of forum non conveniens," suggesting that Chevron's decision to do so was driven by "a rigid belief in the evils of U.S. court[s]" and that the overriding lesson of this litigation is "that business defendants should stop invoking FNC." Michael D. Goldhaber, *Kindergarten Lessons from Chevron in Ecuador*, CORP. COUNSEL, [http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1363538256567&Kindergarten\\_Lessons\\_from\\_Chevron\\_in\\_Ecuador](http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1363538256567&Kindergarten_Lessons_from_Chevron_in_Ecuador) (Mar. 21, 2013). But the decision to seek dismissal on forum non conveniens grounds does not reflect mistrust of the U.S. judiciary and does not amount to acquiescence in foreign fraud. Rather, the doctrine of forum non conveniens allows litigation to proceed in the jurisdiction that, at least at the outset, is anticipated will "best serv[e] the convenience of the parties and ends of justice." *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1355 (S.D. Tex. 1995) *aff'd*, 231 F.3d 165 (5th Cir. 2000) (internal citation and quotation marks omitted). It is often more convenient for parties to litigate in the jurisdiction where the conduct at issue took place—where the witnesses and relevant evidence are likely to be located, and where the defendant is likely to be sued regardless of any lawsuit filed in the United States. There is nothing inconsistent about seeking to litigate a foreign dispute in a foreign country, while still expecting to be treated fairly and accorded due process of law. *See Osario v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1344 (S.D. Fla. 2009), *aff'd*, 635 F.3d 1277 (11th Cir. 2011) ("The Court rejects Plaintiffs contention that Defendants' position here, arguing that Nicaragua is an inadequate forum is inconsistent with their earlier positions, because in 1995 no one could have predicted that Nicaragua's legislature would pass, Special Law 364, a law which, as acknowledged by the Nicaraguan Supreme Court, singles out the DBCP defendants for 'Positive Discrimination.'"). If, ultimately, the foreign judgment ends up being a product of fraud and corruption, it is not more enforceable than any other fraudulent judgment simply because the litigation began with a forum non conveniens dismissal. *See Goldhaber, supra* note 18 ("Be careful what you wish for.").

58. Treaty Between the United States of America and the Republic of Ecuador

things, that Ecuador is required to take all necessary measures to stop the enforcement of the fraudulent judgment against Chevron, and that Ecuador is responsible for any alleged damages resulting from that judgment because it settled and released Texaco from any such claims almost two decades ago—at which point, Ecuador took complete control over the oil sites at issue.<sup>59</sup>

Although the proceedings are still ongoing, the Arbitration Tribunal ruled in February 2013 that Ecuador had breached its prior orders requiring Ecuador to take steps to prevent enforcement of the \$19 billion judgment and thus “has violated . . . international law” by facilitating “the finalisation and enforcement . . . of the Lago Agrio Judgment within and outside Ecuador.”<sup>60</sup> The Tribunal ordered Ecuador to “show cause . . . why it . . . should not compensate [Chevron] for any harm caused by [its] violations.”<sup>61</sup>

- *Lesson 8: U.S. Plaintiffs’ Lawyers Claiming to Protect Poor, Uneducated Citizens of Foreign Countries May Actually Be Exploiting Them*

A big part of the offensive narrative in the Chevron case, the Dole cases, and other similar litigation is that the United States and its multinational corporations are guilty of invading foreign nations and exploiting their people and resources.<sup>62</sup> But while there is room for debate and discussion about the U.S. government’s historical treatment of indigenous peoples, both at home and abroad, and the global benefits of American-style capitalism, those are not the kinds of issues that can be resolved through transnational tort litigation.

In the case of the Chevron litigation, the plaintiffs’ contention that U.S. oil companies are to blame for supposedly destroying the rainforest and the indigenous communities of Ecuador’s Oriente region has been thoroughly and repeatedly discredited. In fact, it was the Ecuadorian governments’ official policy of forced acculturation and assimilation—carried out from the mid-nineteenth century until 1998 through the hiring of missionary organizations, agricultural colonization, the construction of roads, massive

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Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, Aug. 27, 1993, available at [http://unctad.org/sections/dite/iaa/docs/bits/us\\_ecuador.pdf](http://unctad.org/sections/dite/iaa/docs/bits/us_ecuador.pdf).

59. Claimants’ Memorial on the Merits at 1-11, *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23 (Sept. 6, 2010).

60. *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Fourth Interim Award of Interim Measures at 31 (Feb. 7, 2013), available at <http://www.theamazonpost.com/wp-content/uploads/Fourth-Interim-Award-on-Interim-Measures.pdf>.

61. *Id.*

62. See Judith Kimerling, *Transnational Operations, Bi-National Injustice: ChevronTexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 492 n.94 (2007); Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, Chevron-Texaco, and Aguinda v. Texaco*, 38 N.Y.U. J. INT’L L. & POL. 413, 449-68 (2006).

transfers of native lands to migrating settlers, and cultural re-educational policies—that was responsible for significantly changing indigenous traditions, culture, and way of life.<sup>63</sup> Indeed, as recently as 1972, the Law of National Culture declared homogeneity to be one of Ecuador’s official national objectives.<sup>64</sup> And the area of the Oriente in which Texaco operated was officially deemed to be “vacant land” open for immigration and colonization between 1964 and 1994, with the Ecuadorian Institute of Agrarian Reform and Colonization issuing land titles covering millions of acres and the population increasing six-fold.<sup>65</sup> American oil companies had no role in any of this.

In any event, whatever the debate about the past, today, companies like Chevron have strong social responsibility programs.<sup>66</sup> As this case and the Dole litigation show, it is actually the *plaintiffs’* lawyers who are often doing the invading and exploiting with little regard for their supposed “clients.” As Mr. Donziger remarked on camera, “the business of plaintiffs’ law [is] to make [expletive] money.”<sup>67</sup> Indeed, Maria Aguinda, the lead plaintiff in the Chevron litigation, admitted that when the plaintiffs’ lawyers originally instructed her to sign the litigation papers, she thought she was signing up for free medicine: in her own words, the lawyer told her, “In four months, I will bring medications so you will be healed. But first, sign this paper here.”<sup>68</sup> Similarly, in the *Dole* litigation, the California court found that “[t]he Nicaraguan . . . law firms took advantage of the plaintiffs throughout this process. These firms attempted to recruit people in the poorest areas of Nicaragua—thought most susceptible to exploitation—and after promising them an imminent windfall, proceeded to

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63. See, e.g., Dr. Robert Wasserstrom, *Disputing the Statements Made on Alleged Cultural Damages Caused to Indigenous Peoples by the PetroEcuador-Texaco Consortium* (on file in Chevron Corp. v. Donziger, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Mar. 5, 2012), ECF No. 410-3 (Ex. 1250)); Expert Report of Dr. Robert Wasserstrom: Agricultural Settlement, Deforestation and Indigenous People in Ecuador, 1964-1994 (on file in Chevron Corp. v. Donziger, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Nov. 29, 2011), ECF No. 355-44 (Ex. 1151)).

64. Wasserstrom, *Disputing the Statements*, *supra* note 63 at 6.

65. *Id.* at 10.

66. See *About Our Human Rights Policy*, CHEVRON, <http://www.chevron.com/documents/pdf/AboutOurHumanRightsPolicy.pdf> (last visited June 19, 2013).

67. Videotape: CRS258-00 CLIP 01 (*Crude* outtake video clip), available at [http://www.youtube.com/watch?v=\\_oEA0aqQqss](http://www.youtube.com/watch?v=_oEA0aqQqss).

68. See Declaration of Gus R. Lesnevich at ¶ 12.1, Chevron Corp. v. Donziger, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF No. 29-12 to 29-16 (Ex. 85); see also *The Fraudulent Case Against Chevron in Ecuador—An Introduction to Aguinda v. Chevron*, at 1:02-1:48, THE AMAZON POST, <http://www.theamazonpost.com/video> (last visited Feb. 24, 2013) (“Then the man has said, he says that you have been sick. In four months, I will bring medications so you will be healed. But, first, sign this paper here. They have made her sign. Alright? Then, fo—in four months, I’ll be back . . . he hasn’t come back in four months, but instead after a year. When Manuel Pallares and . . . and attorney Cristobal Bonifaz get here, saying that you are a plaintiff in the Texaco trial. That is when she found out that she had been a plaintiff. Alright?”).

charge them for the right to be part of a plaintiff ‘group.’”<sup>69</sup> And the Los Angeles Superior Court found that the judgment against Dole “was the product of fraud committed by plaintiffs and their agents and fostered by a convergence of social, political, and legal factors in Nicaragua that turned the nation into fertile ground for fraudulent claims.”<sup>70</sup>

Plaintiffs’ lawyers work hard to turn their cases into local political and social movements; in doing so, they frequently mislead the local populations into believing that the defendant is responsible for every societal problem they face, and that the lawsuit will solve them all. Such recriminations have little to do with justice and lead inexorably to disappointment and anger.<sup>71</sup>

- *Lesson 9: Lawsuits Brought by U.S. Plaintiffs’ Lawyers and Funded by Third Parties Do Not Benefit the Local Communities*

Chevron has had access to an unprecedented array of the internal files of the plaintiffs’ lawyers and there is one glaring absence: any discussion of how they would use a recovery to fix the problems in Ecuador they claim to be seeking to remedy. Instead, a large portion of the recovery is slated to go to the plaintiffs’ attorneys and their funders.<sup>72</sup> In fact, the plaintiffs’ agreement with Burford Capital—a litigation funding outfit that has now withdrawn from the case and accused plaintiffs’ team of “engag[ing] 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”—shows that the claimants themselves would receive little, if any, recovery, and

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69. Findings of Fact and Conclusions of Law Supporting Order Terminating *Mejia* and *Rivera* Cases for Fraud on the Court, *Mejia v. Dole Food Co. & Rivera v. Dole Food Co.*, Los Angeles Superior Court Case Nos. BC340049, BC379820, at ¶ 83 (June 17, 2009); see also Steve Stecklow, *Fraud by Trial Lawyers Taints Wave of Pesticide Lawsuits*, WALL ST. J., Apr. 19, 2009, at A1, available at <http://online.wsj.com/article/SB125061508138340501.html?KEYWORDS=Dole>.

70. Redacted Version of Statement of Decision for Order Granting Petitions for Writ of Error *Coram Vobis*, Vacating Judgment, and Dismissing With Prejudice, *Tellez v. Dole Food Co.*, No. BC 312852, slip op. at 11 (Cal. Super. Ct. Mar. 11, 2011).

71. *Id.* at 27 (“While the court agrees . . . that the situation in Nicaragua is dire and requires social change, suing Dole and Dow for the general conditions of poverty in Nicaragua and illness in Nicaragua and blaming them for all the suffering of the Nicaraguan people is unjust.”).

72. See Transcript from the Deposition of Steven Donziger, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF No. 8-9 (Ex. 6 at 1902:12-1904:8) (testifying that Donziger, Fajardo, other U.S. and Ecuadorian lawyers and investors expect up to thirty percent of the judgment); Transcript from the Deposition of Steven Donziger, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF No. 8-9 (Ex. 6 at 2700:10-13) (admitting the individual Lago Agrio plaintiffs are at most nominal plaintiffs).

only after everyone else had been paid.<sup>73</sup> In one exchange, the plaintiffs' attorneys and representatives laid out their plans to "keep the proceeds out of Ecuador" by placing any funds from the judgment in a "trust" outside the country, under the exclusive control of a trustee they approve.<sup>74</sup> As the BIT Arbitration Tribunal held, "the first part (probably a substantial part) of any recoveries on execution of the Lago Agrio Judgment outside Ecuador appears unlikely to be paid to the Lago Agrio plaintiffs in Ecuador, but rather to foreign funding and other financial institutions associated with persons acting in their name, based in countries other than Ecuador."<sup>75</sup>

The fact is that the damages award the plaintiffs' lawyers are chasing will do nothing to address the atrocious environmental record of the Ecuadorian government's state-owned oil company, which has been the primary petroleum producer in the region since 1993.<sup>76</sup> Plaintiffs' attorneys even tried to *stop* Petroecuador's remediation activities because they viewed such remediation as a "threat" that might hurt their case against Chevron,<sup>77</sup> with Mr. Donziger telling his legal team "to go to [President] Correa to put an end to this shit once and for all."<sup>78</sup>

This type of litigation is not the answer to solving the problems of the communities who are supposed to be its primary beneficiaries.

- *Lesson 10: If the Facts Do Not Support Your Theory of the Case, You Cannot Simply Create the Facts*

The final lesson leads right back to the first, and is really the fundamental

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73. Draft Funding Agreement between Treca and the Lago Agrio Plaintiffs' Representatives (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Nov. 29, 2011), ECF Nos. 355-15—355-16 (Ex. 1033)); *see also* Declaration of Christopher Bogart ¶ 2-4, *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Apr. 17, 2013), ECF No. 1039-2 (Ex. 3687); Roger Parloff, *Have you got a piece of this lawsuit?*, FORTUNE, <http://features.blogs.fortune.cnn.com/2011/05/31/have-you-got-a-piece-of-this-lawsuit/> (May 31, 2011 5:00 AM).

74. E-mail Chain among Nick Purrington, Eoin Beirne, Erik Moe, Nicolas Economou, William Carmody, Steven Donziger (Oct. 12, 2010) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF No. 29-19 (Ex. 88).

75. *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Fourth Interim Award of Interim Measures at 31 (Feb. 7, 2013).

76. *See* E-mail Chain, *supra* note 74 (discussing plans to "keep the proceeds out of Ecuador"); E-mail from Steven Donziger to Julio Prieto, Pablo Fajardo, Luis Yanza and others (July 7, 2009) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF No. 29-21 (Ex. 90 at 1)) (Prieto noting that "Petroecuador is NOT the one who must contract the remediation companies . . . That's our job.").

77. E-mail and Attachment from Steven Donziger to Steven Donziger (Jan. 5, 2009) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Mar. 2, 2012), ECF No. 401-11 (Ex. 2193)).

78. E-mail Chain among Steven Donziger, Juan Pablo Saenz, Pablo Fajardo, Luis Yanza and others (June 22, 2009) (on file in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK) (S.D.N.Y. Feb. 6, 2011), ECF Nos. 30-23 to 30-24 (Ex. 112)).

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lesson of the Chevron case: You can't make up the facts. But that has been Mr. Donziger's strategy all along, as he was caught explaining to both his law school interns and his experts: "We need to make facts that help us; the facts that we need don't always exist."<sup>79</sup> "I once worked for a lawyer who said something I've never forgotten. He said, 'Facts do not exist. Facts are created.'"<sup>80</sup>

Those quotes speak for themselves. Lawyers, of course, should be zealous advocates for their clients and for truth and justice. They cannot, however, just invent facts and hope that their vigorous advocacy will make up for the lack of evidence.

#### CONCLUSION

The Ecuador litigation against Chevron case should make clear that the use of fraudulent litigation methods, unscrupulous tactics, and a global media and political campaign fueled by falsehoods meant to force companies into large settlements is not likely to make the world a better place for anyone. This is not a model of litigation that should be replicated.

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79. *Id.* at 2:10-2:26.

80. Fraudulent Case, *supra* note 68, at 2:27-2:35.