Court File No. CV-12-9808-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

DANIEL CARLOS LUSITANDE YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJE PAYAGUAJE, SIMON LUSITANDE YAIGUAJE, ARMANDO WILMER PIAGUAJE PAYAGUAJE, ANGEL JUSTINO PIAGUAJE LUCITANTE, JAVIER PIAGUAJE PAYAGUAJE, FERMIN PIAGUAJE, LUIS AGUSTIN PAYAGUAJE PIAGUAJE, EMILIO MARTIN LUSITANDE YAIGUAJE, REINALDO LUSITANDE YAIGUAJE, MARIA VICTORIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRIA AGUINDA AGUINDA, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, SEGUNDO ANGEL AMANTA MILAN, FRANCISCO MATIAS ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUILA GREFA, FRANCISCO VICTOR TANGUILA GREFA, ROSA TERESA CHIMBO TANGUILA, MARIA CLELIA REASCOS REVELO, HELEODORO PATARON GUARACA, CELIA IRENE VIVEROS CUSANGUA, LORENZO JOSE ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, JOSE GABRIEL REVELO LLORE, LUISA DELIA TANGUILA NARVAEZ, JOSE MIGUEL IPIALES CHICAIZA, HUGO GERARDO CAMACHO NARANJO, MARIA MAGDALENA RODRIGUEZ BARCENES, ELIAS ROBERTO PIYAHUAJE PAYAHUAJE, LOURDES BEATRIZ CHIMBO TANGUILA, OCTAVIO ISMAEL CORDOVA HUANCA, MARIA HORTENCIA VIVEROS CUSANGUA, GUILLERMO VINCENTE PAYAGUAJE LUSITANTE, ALFREDO DONALDO PAYAGUAJE PAYAGUAJE, and DELFIN LEONIDAS PAYAGUAJE PAYAGUAJE

Plaintiffs

- and –

CHEVRON CORPORATION, CHEVRON CANADA LIMITED, and CHEVRON CANADA FINANCE LIMITED

Defendant

STATEMENT OF DEFENCE OF CHEVRON CORPORATION

I. Introduction

1. Chevron Corporation ("Chevron Corp.") admits the first sentence of paragraph 24 of the Amended Amended Statement of Claim and that it does not have and never has had assets in Ecuador.

2. Chevron Corp. denies all other allegations in the Amended Amended Statement of Claim.

3. The Ecuador judgment described in paragraphs 1 and 9 through 16 of the Amended Amended Statement of Claim (the "Ecuador Judgment") cannot be recognized or enforced in Ontario, or elsewhere in Canada, for several reasons:

   (a) The Ecuador court did not have jurisdiction over Chevron Corp.;

   (b) The Ecuador Judgment is based upon a law applied in a manner which retroactively created a cause of action against Chevron Corp. for which the Republic of Ecuador had previously issued a binding release;

   (c) Chevron Corp. was denied Canadian standards of fairness and natural justice throughout the Ecuador proceedings;

   (d) As found by the United States District Court for the Southern District of New York ("SDNY"),[1] the Ecuador Judgment was obtained by fraudulent means and rendered by a systemically corrupt and biased court; and

[1] *Chevron Corp. v Donziger et al*., 974 F Supp 2d 362 (S.D.N.Y. 2014). Appeal argued in the United States Court of Appeals for the Second Circuit on April 20, 2015 and presently under reserve. Fraud in the underlying proceedings has also been found in numerous other proceedings in the U.S. and elsewhere in the world. See for example *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); *In re Chevron Corp.*, Nos. 10-MC-21, 10-MC-22 JH/LFG (D.N.M. Sept. 2, 2010), at *1; *Chevron Corp. v. Page*, 768 F. 3d 332, 341 n.12 (4th Cir. 2014). In addition, in a May 13, 2015 opinion, the Deputy Attorney General of Brazil recommended that the Superior Court of Justice in Brazil not recognize or give effect to the Ecuador Judgment in view of fraud and "deplorable acts of corruption" in violation of both international and Brazilian public order. *Aguinda Salazar, et al. v. Chevron Corp.*, Superior Court of Justice No. 8,542/EC at e-STJ p.22,193 (Opinion No. 2811/2015 (Federal Public Prosecutor, May 13, 2015) (pages e-STJ fls. 22,178/22,193 of the electronic case records available at www.stj.jus.br).

(e) Any recognition and enforcement of the Ecuador Judgment would constitute a violation of the obligations of the Republic of Ecuador ("the ROE") under international law;

all of which offends Canadian standards of natural justice and public policy for the recognition and enforcement of foreign judgments.

4. The plaintiffs are bound by the factual findings made by the SDNY, including *inter alia* that "... [the Ecuador judge] agreed with [plaintiffs' counsel] to fix the case for a payment of $500,000 paid out of any judgment proceeds, ... [plaintiffs' counsel] drafted all or most of the Judgment, and [the Ecuador judge] signed their draft without consequential modification as part of the *quid pro quo* for the promise of $500,000."[2]

II. Roles of TexPet and Petroecuador in Ecuadorian Operations

5. In 1964, the ROE granted exploration and production rights (the "Concession") to Texaco Petroleum Company ("TexPet"), a fourth-level subsidiary of Texaco Inc. ("Texaco"), and Gulf Ecuatoriana de Petroleo S.A. ("Gulf Oil") in the Oriente region of Ecuador. TexPet served as the initial operator for the consortium (the "Consortium") which was owned in equal shares by TexPet and Gulf Oil.

6. In 1973, the ROE, through its state-owned oil agency, Petroecuador (formerly known as Corporación Estatal Petrolera Ecuatoriana ("CEPE")), obtained a 25% interest in the Consortium leaving TexPet and Gulf Oil each with a 37.5% interest. By 1976, Petroecuador acquired Gulf Oil's interest thereby becoming the majority stakeholder in the Consortium with a 62.5% interest.

7. In 1990, Petroecuador replaced TexPet and became the sole operator of the Consortium. In 1992, when the Concession contract expired and the ROE refused to extend it, Petroecuador took over TexPet's interest entirely. Since then, Petroecuador has been the sole owner and operator in the former Concession area.

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[2] *Chevron Corp. v. Donziger*, 974 F Supp.2d 362, 534-535 (S.D.N.Y. 2014).

8. From 1964 until 1992, the Consortium generated over $20 billion for the ROE and $500 million in profit for TexPet.

III. Remediation, Settlements and Releases of TexPet and its Affiliates

9. During the period of transition between 1990 and 1992, TexPet consented to a request by the ROE that it work with Petroecuador to conduct an environmental audit of the Consortium's oil production sites in the Concession area. It was agreed that Petroecuador would share responsibility for any necessary remediation identified in the audit in proportion with its majority ownership interest. TexPet and the ROE hired two separate independent consulting firms to perform the audits. The audits recommended that certain remedial actions be taken.

10. In 1994, following receipt of the preliminary findings of the environmental audit, the ROE informed TexPet that Petroecuador would not participate in jointly funding the environmental remediation work, insisting instead that the parties identify a set of remediation obligations for TexPet corresponding to TexPet's ownership share in the Consortium.

11. On or about December 14, 1994, TexPet entered into a Memorandum of Understanding ("MOU") with the ROE and Petroecuador to perform specified remedial environmental work and to carry out certain "socio-economic compensation projects" taking into consideration the inhabitants of the Oriente region. In exchange, TexPet, Texaco and related companies were to receive a "full and complete release of TexPet's obligations for environmental impact arising from the operations of the Consortium, based on the full completion of the remedial work agreed upon."

12. On or about March 23, 1995, the ROE, Petroecuador and TexPet agreed to the scope of work to be performed by TexPet, identifying the particular sites and projects that would constitute TexPet's remediation obligations consistent with its former 37.5% interest in the Consortium.

13. Shortly thereafter, on or about May 4, 1995, the parties executed a Contract for Implementing Environmental Remediation Work and Release From Obligations, Liability and Claims (the "1995 Settlement Agreement") for the express purpose of "releas[ing] and discharg[ing] all of [TexPet's] legal and contractual obligations and liability for the environmental impact arising out of the Consortium's operations."

14. In consideration for TexPet's agreement to perform the defined "Environmental Remedial and Mitigation Work" and to provide "socio-economic compensation" for the affected communities, the ROE and Petroecuador immediately "release[d], acquit[ted] and forever discharge[d]" TexPet, Texaco and their respective "agents, servants, employees, officers, directors, legal representatives, insurers, attorneys, indemnitors, guarantors, heirs, administrators, executors, beneficiaries, successors, predecessors, principles and subsidiaries" (collectively, the "Released Parties") from all claims for environmental impact, "past, present, future, known or unknown" arising directly or indirectly from the operations of the Consortium, except for those arising from TexPet's obligations under the 1995 Settlement Agreement itself. It was agreed that a final release would be provided upon TexPet's completion of its remediation work.

15. Between 1995 and 1998, ROE inspectors from the responsible government ministries and agencies (including the Ministry of Energy and Mines and Petroecuador) oversaw, inspected, and approved the remediation work performed on TexPet's behalf. The ROE inspectors fully documented their approval in 52 detailed reports (called *actas)* which confirmed TexPet's completion of each remediation task.

16. In 1998, TexPet completed all of the agreed upon remediation work to the satisfaction of the ROE and Petroecuador, at a cost to TexPet of US$40 million. The final release contemplated by the 1995 Settlement Agreement was executed on September 30, 1998 by the ROE and Petroecuador and delivered to TexPet (the "Final Release").

17. Under Article 19(2) of the then existing Ecuador Constitution, authority to redress environmental harms on behalf of the Ecuadorian people was held exclusively by the government of the ROE. Article 19(2) imposed a "duty [on] the State" to "oversee the

preservation of nature" and to guarantee all Ecuadorians "[t]he right to live in a pollution-free environment." Thus, when TexPet's remediation work was completed and the Final Release issued, the ROE expressly represented that it was releasing, and did release, any and all public claims for environmental harm under any theory of law.

18. The 1995 Settlement Agreement also obligated TexPet "to continue negotiations" with the municipalities of Joya De Los Sachas, Orellana, Shushufindi and Lago Agrio which had each sued TexPet in 1994 seeking to protect "the health of citizens [and] the rivers of [their] communities." The suits of each of these municipalities were settled in 1996 in consideration for TexPet financing specified "social interest works". TexPet and the other Released Parties (described as TexPet's agents, employees, executives, directors, legal representatives, insurers, lawyers, guarantors, heirs, administrators, contractors, subcontractors, predecessors, successors, affiliates, subsidiaries, and other related companies) were released from all claims related to the Consortium's operations, "especially concerning damages possibly caused to the environment" in each municipal jurisdiction. In concluding these settlements, the municipalities represented that they had consulted with the entities and organizations representing the community.

19. In addition to the national and municipal governments, the provincial governments of Sucumbios and a consortium of municipalities from Napo Province also settled threatened claims against TexPet on behalf of their residents and issued binding releases in favour of the Released Parties.

20. Pursuant to the express provisions of the Ecuadorian Civil Code, the settlements described in paragraphs 9 through 19 had the force and effect of *res judicata* as final judgments between the parties.

IV. The *Aguinda* Action in New York

21. In the meantime, in 1993, a putative class action was filed in the SDNY in the names of seventy-six Ecuadorian citizens purporting to represent 30,000 residents of the Oriente region: *Aguinda v. Texaco, Inc.,* No. 93 Civ. 7527 (S.D.N.Y.) (the "*Aguinda* Action").

The plaintiffs in the *Aguinda* Action claimed monetary damages for alleged personal injuries and property damage caused by the operations of the Consortium in the former Concession area and sought vaguely defined "equitable relief". They were represented by Cristobal Bonifaz ("Bonifaz"), a lawyer of Ecuadorian descent practicing in Massachusetts, Joseph Kohn ("Kohn"), a lawyer from Philadelphia, and Steven Donziger ("Donziger"), a lawyer from New York.

22. Texaco moved to dismiss the *Aguinda* Action on grounds of the plaintiffs' failure to join the ROE, international comity and *forum non conveniens*. The ROE initially supported Texaco's *forum non conveniens* position, submitting its own *Amicus Curiae* brief. The motion material included a letter dated June 10, 1996 from Ecuador's Ambassador to the United States, Edgar Terán, addressed to the motion Judge asserting that "the Government of Ecuador considered the suit an affront to Ecuador's national sovereignty." Later that year, the SDNY granted the dismissal on *forum non conveniens* grounds. The *Aguinda* Action plaintiffs appealed that decision.

V. Reversal of ROE Position and Enactment of the *Environmental Management Act*

23. During the same time frame, in exchange for a reversal of the ROE's position and intervention on behalf of the plaintiffs, Kohn and Bonifaz negotiated a waiver of all rights against Petroecuador, which was by then the sole owner and operator in the former Concession area. The waiver included a provision requiring the *Aguinda* Action plaintiffs to reject and refuse to collect any amount owing should Texaco successfully sue Petroecuador or any other Ecuadorian public sector institution.

24. On July 30, 1999, influenced by Bonifaz and organizations representing the *Aguinda* Action plaintiffs, the ROE enacted the *Environmental Management Act*, Law 99-37, published in R.O. No. 245, July 30, 1999 ("EMA") which created a new private right of action to redress public environmental harms. Under the EMA, any judgment is awarded to the "community", with the party bringing the action eligible to receive ten percent of the judgment under Article 43.

VI. Dismissal of the *Aguinda* Action

25. In 2002, the United States Court of Appeals for the Second Circuit affirmed the dismissal of the *Aguinda* Action on grounds of *forum non conveniens*. Texaco had earlier offered an undertaking to consent to jurisdiction in Ecuador, waive its limitations defence and to satisfy a final judgment, if any, entered against it by the *Aguinda* Action plaintiffs for their individual claims in Ecuador, but subject to its right to defend against recognition and enforcement on grounds permitted by the *Recognition of Foreign Country Money Judgments Act,* N.Y. C.P.L.R. Article 53. The *Aguinda* Action plaintiffs rejected this offer, and no court mentioned or otherwise adopted it in granting or affirming Texaco's motion for *forum non conveniens*. Instead, in June 2001, Texaco and the *Aguinda* Action plaintiffs executed a stipulation agreeing to the following conditions only: (1) that Texaco would waive any statute of limitations defense for a limited time; (2) Texaco would consent to personal jurisdiction in Ecuador and agree to accept service of process there; and (3) discovery obtained in the *Aguinda* Action could be used in Ecuadorian proceedings. On June 21, 2001, this stipulation was entered as an order of the district court. On appeal, the Second Circuit noted this order and slightly modified the particulars of the statute of limitations waiver given the administrative task of obtaining authorizations for thousands of individual plaintiffs filing in Ecuador.[3]

VII. Reverse Triangular Merger of Chevron Corp. and Texaco

26. On October 9, 2001, while the *forum non conveniens* dismissal of the *Aguinda* Action was under appeal, a subsidiary of Chevron Corp. merged with Texaco and thus, Texaco and TexPet became indirect subsidiaries of Chevron Corp. Following this transaction, Chevron Corp., Texaco and TexPet continued as separate legal entities and they have remained so ever since.

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[3] *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 475, 478-79 (2d Cir. 2002).

VIII. The Ecuador Action and Judgment

27. In 2003, forty-two of the *Aguinda* Action plaintiffs and six others commenced a different action against Chevron Corp. in the municipality of Nueva Loja (Lago Agrio, Province of Sucumbios) in Ecuador: *Maria Aguinda et al v. Chevron*, Case No 2003-002 ("Ecuador Action"). The plaintiffs in the Ecuador Action were represented by Bonifaz and Donziger and other lawyers in the United States and Ecuador working with them. Pablo Fajardo ("Fajardo") became local Ecuadorian counsel in 2006.

28. It is the Ecuador Action that culminated in the Ecuador Judgment that the plaintiffs in this action now seek to have recognized and enforced in Ontario.

29. In contrast to the *Aguinda* Action, the plaintiffs in the Ecuador Action did not seek damages for personal injuries or for individual property damage. Rather, relying on a retroactive application of the EMA, they claimed costs for remediating broadly defined environmental damages on behalf of the communities allegedly affected by TexPet's participation in the Consortium up until 1992 - and for which the ROE had previously issued the binding Final Release, as had the relevant municipalities. The complaint asked that any funds awarded for remediation, as well as the ten percent available under Article 43 of the EMA, be delivered to the Frente de la Defensa de la Amazonia (the "ADF"). Donziger and the Plaintiffs' Ecuador counsel controlled, and still control, the ADF.

30. The Ecuador Action was brought against Chevron Corp. as the sole defendant even though it had never operated or owned assets in Ecuador, nor participated in any way in the Consortium. Neither TexPet nor Texaco was included as a defendant.

31. Chevron Corp. promptly contested the jurisdiction of the Ecuador court. However, citing special rules of procedure, the court required Chevron Corp. to participate under protest for the duration of the Ecuador Action. At no time did Chevron Corp. acquiesce to the jurisdiction of the Ecuador court.

32. On February 14, 2011, Judge Nicolas Augusto Zambrano Lozada ("Judge Zambrano") of the Provincial Court of Sucumbios signed the Ecuador Judgment purporting to award the Plaintiffs the amount of US$8.646 billion with provision for an additional award of punitive damages in the same amount unless Chevron Corp. apologized within 15 days. Chevron Corp. declined to do so. Consequently, with 10% added pursuant to Article 43 of the EMA, and an additional .1% added for legal fees and costs, the total amount of the Ecuador Judgment became US$19,041,414,529.

33. The US$8.646 billion in damages was awarded to "the community" for alleged environmental remediation, health care costs and damages to indigenous cultures, all of which was covered and released by the 1995 Settlement Agreement and the Final Release.

34. The Ecuador Judgment was affirmed by the Appellate Division of the Provincial Court of Justice of Sucumbios on January 3, 2012. The Appellate Division held that it had no competence to rule upon Chevron Corp.'s contention that the Ecuador Judgment was procured by the fraud and corruption of the plaintiffs and their counsel, noting that those issues were being litigated in the United States. On January 13, 2012, at the prompting of the Ecuadorian plaintiffs, the Appellate Division purported to clarify its decision saying that it had considered some of Chevron Corp.'s allegations and did not find that they constituted evidence of irregular conduct. Again, however, the Appellate Division "stay[ed] out of [the] accusations [of fraud by the plaintiffs or their representatives], preserving the parties' rights to ... continue the course of the actions that have been filed in the United States of America."

35. The US proceeding to which the Appellate Division referred was the SDNY action referred to in paragraphs 3 and 4 which had by then been brought by Chevron Corp. against the Plaintiffs, their counsel and others asserting that the Ecuador Judgment was procured by fraud and seeking to prevent them from enforcing it and thereby profiting from their misconduct.

36. On November 12, 2013, on Cassation appeal, the National Court of Justice of Ecuador dismissed the punitive damages award "since punitive damages are not contemplated under Ecuadorian law and public apologies are not admissible nor, therefore, is any award for that concept", but otherwise affirmed the judgment of the Appellate Division. The National Court of Justice of Ecuador, stating that it reviews only legal arguments and does not re-evaluate evidence, refused to consider Chevron Corp.'s contention that the Ecuador Judgment was the product of fraud and corruption of the plaintiffs, plaintiffs' counsel, experts, and judges, noting that such allegations should be decided by authorities with jurisdiction.

37. With the additional ten percent provided under the EMA, legal fees and costs, the Ecuador Judgment now totals approximately US$9.51 billion.

IX. Pressure Tactics, Political Interference and Systemic Corruption

38. As was determined by the SDNY, the Ecuador Action was replete with political interference, organized pressure tactics intended to influence and intimidate the Ecuadorian judiciary, extortion, fraud and systemic corruption.

A. Pressure Tactics

39. The plaintiffs or their counsel organized what they called a "private army" to disrupt court proceedings and intimidate the judges, opposing counsel and witnesses. On numerous occasions, including October 21, 2003, July 3, 2007 and October 5, 2009, protests were staged at the Lago Agrio courthouse and at sites being inspected by the presiding judges and the parties for the purpose of pressuring the judges, Chevron's witnesses and counsel.

B. Political Interference

40. Plaintiffs' counsel continually sought out and relied upon political involvement in the judicial process. Members of the government, including Ecuador's President Rafael Correa and the Prosecutor General, Washington Pesántez, privately and publicly sided

with the plaintiffs and repeatedly conveyed the government's desire that Chevron Corp. be held liable.

41. In 2003, the Comptroller General of the ROE filed a *denuncia* against former government and Petroecuador officials and Rodrigo Perez Pallares and Ricardo Reis Veiga ("Perez" and "Veiga"), the lawyers responsible for executing the 1995 Settlement Agreement and securing the Final Release on behalf of TexPet, alleging that they had falsified public documents in relation to the 1995 Settlement Agreement and Final Release and had violated Ecuadorian laws.

42. In August 2006, after two investigations had been conducted, the District Prosecutor concluded that there was no evidence of civil, administrative or criminal liability on the part of Perez, Veiga or the others and that TexPet had satisfied the requirements of the 1995 Settlement Agreement and been properly released.

43. ROE President Correa assumed office on January 15, 2007. On or about February 15, 2007, President Correa and his cabinet were presented with a "talk about the case", following which President Correa appointed a commission to monitor it.

44. On or about March 20, 2007, President Correa publicly offered the Plaintiffs "all the support of the National Government", including assistance in gathering evidence.

45. On or about March 21, 2007, Manuel Pallares, a former government and Petroecuador official, Maria Eugenia Yepez, a media consultant, and perhaps others, all working for the plaintiffs, met with President Correa and other government officials to further discuss the Ecuador Action. President Correa reiterated the government's support for the plaintiffs' case, which was to include a call to the presiding judge. He also stated the Final Release had to be nullified by whatever means.

46. At or about the same time, Fajardo met with the Prosecutor General and asked that he re-open the criminal investigation in order to put pressure on Chevron Corp. by various means. Despite the conclusions reached by the District Prosecutor in 2006, in April 2007, President Correa publicly asked the Prosecutor General to re-open the criminal

case against TexPet's lawyers, Perez and Veiga, and others who were involved with the execution of the 1995 Settlement Agreement and Final Release.

47. In March 2008, a new prosecutor appointed by President Correa commenced a criminal investigation against nine individuals, including Perez and Veiga. The criminal charges were maintained for three years. After the Ecuador Judgment was issued, the charges were dismissed.

48. On numerous other occasions and throughout the pendency of the Ecuador Action, including the appeals, government officials including the President himself, the Attorney General and the Ecuadorian Foreign Ministry declared "Texaco", "Chevron" and "Chevron-Texaco" guilty. President Correa used public radio and television addresses to express his support for the plaintiffs' case and condemning those who spoke out against it. President Correa continues to express support for the plaintiffs and publicly promote the Ecuador Judgment through his *Mano Sucia* ("Dirty Hand") campaign.

49. During the same time period, the President purged the Ecuador courts and Judicial Council and replaced them with his supporters. In total, the President dismissed approximately 442 judges and suspended an additional 334 judges. The President's interference is politically motivated: judges at various levels of the Ecuador judiciary have been, in a variety of cases, dismissed, suspended and sanctioned for rulings which were contrary to the Government's position. The President's public and private support for the plaintiffs and his campaign against Chevron Corp. ensured that Chevron Corp. would not receive a fair trial.

C. Extortion, Fraud and Systemic Corruption

50. Unbeknownst to Chevron Corp. at the time, plaintiffs' counsel conspired together and with others to fraudulently manipulate expert evidence and also repeatedly engaged in improper *ex parte* communications with the Ecuador judges for the purpose of gaining unfair and illegal advantages, including by using extortion and bribery.

1. Manipulation and Falsification of Expert Evidence

51. On or about February 14, 2005 and March 8, 2005, the plaintiffs filed falsified expert reports purportedly drafted by the plaintiffs' expert, Dr. Charles Calmbacher. Dr. Calmbacher's actual opinion was unfavourable to the plaintiffs' case, and he refused to alter his findings. Therefore, without Dr. Calmbacher's knowledge, plaintiffs' counsel altered his reports to state that he had found contamination requiring millions of dollars of remediation at the oil operations sites he had inspected and submitted these falsified findings over his signature. Dr. Calmbacher has disavowed the falsified reports.

52. Plaintiffs' counsel also interfered with the work of the court-appointed settling experts, whose job it was under the judicial inspection process underway at the time to independently review and resolve discrepancies in the opinions of the parties' respective experts.

53. In or about November 2005, plaintiffs' counsel agreed to pay two engineers, Fernando Reyes and Gustavo Pinto, to pretend to be independent and unbiased "monitors" of the settling experts when, in fact, they were working on behalf of the plaintiffs. In November 2005 and January 2006, Reyes and Pinto met with the settling experts and asked to see their draft reports. The settling experts refused to share draft reports and in February 2006, filed their first report in relation to one of the inspected sites identifying no evidence of contamination posing significant risk to human health or the environment.

54. Between approximately July and September 2006, and contrary to Ecuador criminal law, Fajardo threatened the then presiding Judge, German Yanez Ricardo Ruiz ("Judge Yanez"), with a civil complaint if he did not rule as the plaintiffs wished by cancelling the judicial inspection process. Plaintiffs' counsel sought an alternate global assessment process with Richard Stalin Cabrera Vega ("Cabrera") being appointed as the purported "independent" global assessment expert. In this way, the plaintiffs and their counsel sought to avoid the unfavourable opinions of Dr. Calmbacher and the court-appointed

settling experts, and to control the outcome of an alternative "independent" expert assessment.

55. Over Chevron Corp.'s objections and contrary to his own previous rulings on the request being made by plaintiffs' counsel, Judge Yanez cancelled the judicial inspection process and appointed Cabrera on March 19, 2007. He ordered Cabrera to conduct himself with complete impartiality and independence from the parties. However, in reality, plaintiffs' counsel and their consultants controlled every aspect of Cabrera's work.

56. Before Cabrera's formal appointment on March 19, 2007, plaintiffs' counsel met secretly with him on at least two occasions, including February 27 and March 3, 2007. The March meeting captured on videotape included plaintiffs' U.S. and Ecuadorian counsel as well as the plaintiffs' US environmental consultant. Together, they explained to Cabrera in detail how they would do his work and write his report.

57. On at least three occasions, including March 26, April 10, and June 4, 2007, Cabrera, Donziger, Fajardo, or combinations of them, also met or otherwise communicated in secret with Judge Yanez without Chevron Corp. or its counsel being present to ensure he did not appoint a second global expert and that Cabrera alone was sworn in.

58. The expert report ultimately filed by Cabrera in April 2008 was not written by him, but rather was the ghostwritten work of plaintiffs' counsel and the plaintiffs' own consultant, Stratus Consulting Inc. ("Stratus"). The ghostwritten report assessed more than US$16 billion dollars in alleged damages. Later, when confronted with documents from their own files, Stratus and Donziger admitted its ghostwriting.

59. To bolster the credibility of Cabrera's report, which they themselves had ghostwritten, plaintiffs' counsel and Stratus also prepared questions and objections to it, and then drafted Cabrera's responses thereto. The responses were signed by Cabrera and filed with the Ecuador court on November 17, 2008. The plaintiff-drafted Cabrera responses purported to accept some of the plaintiffs' "objections" as justifying an US$11 billion

increase in the assessment of damages. Stratus separately issued a report in its own name endorsing Cabrera's opinion.

60. Payments were made by or on behalf of the plaintiffs to Cabrera using what they referred to as their “secret [bank] account” so the payments would not be traced back to the plaintiffs or their counsel. A bank account in the name of the ADF at Banco Pichincha was used to make payments to Cabrera including by way of an account-to-account transfer of US$33,000 on August 17, 2007, with such payments being prohibited by Ecuadorian law and beyond any entitlement Cabrera might have had as the court-appointed and "independent" global assessment expert. Plaintiffs' counsel also paid Cabrera through the court process, and allowed Chevron Corp. to do the same, knowing that Cabrera was not doing the work he had purportedly been appointed by the court to do.

2. Fraudulent Effort to Cleanse the Ghostwritten Cabrera Reports

61. In or about 2009, Chevron Corp. brought a series of discovery motions in the U.S. under 28 U.S.C. 1782 seeking to obtain evidence of the fraud and corruption it suspected had occurred in the Ecuador Action. During the same time frame, and with the assistance of Patton Boggs, a U.S. law firm, plaintiffs' counsel retained the Weinberg Group to help them cleanse the impropriety of the Cabrera reports. The Weinberg Group found new experts and oversaw, and in some instances participated in, the writing of new reports purporting to reflect independent opinions which could be used to both corroborate and minimize the potentially damaging effects of the tainted Cabrera reports. The reports were drafted in approximately one month. None of these experts ever visited Ecuador or performed any tests or sampling of their own.

62. On or about September 16, 2010, the Ecuador court allowed reports bearing the names of purported experts, Douglas Allen, Jonathan Shefftz, Robert Scardina, Daniel Rourke, Lawrence Barnthouse and Carlos Picone, to be filed by plaintiffs' counsel, despite the fact that the evidentiary period and the expert assessment process was over. None of these experts inspected the oil field operations or remediation sites or collected

samples of their own. Instead, plaintiffs' counsel provided them with Cabrera's ghostwritten findings, without telling them that the work was that of plaintiffs' counsel and Stratus.

3. *Ex Parte* Communications and Bribery of Judges

63. Six judges presided at various times over the trial in the Ecuador Action. Judge Alberto Guerra Bastidas ("Judge Guerra") presided from May 13, 2003 until February 4, 2004 when he was replaced by Judge Efrain Novillo Guzman ("Judge Novillo"). Judge Novillo was replaced by Judge Yanez on February 2, 2006. Judge Yanez was removed from the case on October 3, 2007. Judge Novillo presided again until August 25, 2008, at which time he was replaced by Judge Juan Evangelista Nunez Sanabria who, in turn, was replaced by Judge Zambrano on October 21, 2009. Judge Leonardo Ordóñez Piña ("Judge Ordóñez") presided over the trial from March 12, 2010 until October 11, 2010, at which time Judge Zambrano returned and presided until the date of judgment.

64. Just as they had communicated in secret with Judge Yanez before his removal from the case, as particularized in paragraphs 54 and 57 above, starting on or about March 1, 2008, Donziger and Fajardo began to communicate in secret with Judge Guerra in anticipation he might be re-assigned to preside over the trial. However, Judge Guerra was removed from his office as a judge on June 17, 2008 by the ROE.

65. Subsequently, between September and November 2009, Donziger, Fajardo and Luis Yanza ("Yanza"), a representative of the ADF, began to meet with Judge Zambrano and the former Judge Guerra. Judge Guerra agreed to secretly draft court orders for the plaintiffs in the Chevron case in the name of Judge Zambrano in exchange for $1,000 per month. Plaintiffs' counsel, Yanza or both agreed to provide the money.

66. On at least four occasions, including October 29, November 26 and December 22, 2009 and February 4, 2010, withdrawals of US$1,000 were made from a bank account opened by plaintiffs' counsel in the name of Selva Viva Cia Ltda. to fund payments to Judge Guerra. For each withdrawal there was a corresponding deposit into a bank account maintained by Judge Guerra.

67. Ultimately, in exchange for US$500,000, payable upon enforcement of the Ecuador Judgment, Judge Zambrano allowed plaintiffs' counsel to draft the Ecuador Judgment itself.

4. Ghostwriting the Ecuador Judgment Itself

68. On February 14, 2011, just four months after he reassumed jurisdiction over the case, Judge Zambrano issued an $18.2 billion judgment in the plaintiffs' favour. However, as the RICO court found, the Ecuador Judgment "includes substantial passages and references that do not appear anywhere in the [Ecuador] Record, but that do appear verbatim or in substance in a number of documents from the [plaintiffs'] files"[4] The plaintiffs' "fingerprints," as the RICO court termed them, "are all over the judgment."[5]

69. The plaintiffs' "fingerprints" are all over the Ecuador Judgment because they secretly wrote it. In late January or early February 2011, Judge Guerra met with Fajardo at Zambrano's apartment; Guerra was instructed to revise a draft of the Ecuador Judgment which had been prepared by plaintiffs' counsel. Judge Guerra made minor revisions to the draft to make it seem more like a judgment issued by an Ecuador court. It was not, however, altered substantively. Less than two weeks later, after further edits by the plaintiffs' attorneys, Judge Zambrano issued the judgment as his own.

70. The Ecuador Judgment was signed by Judge Zambrano, but the decision was not his own. The Ecuador Judgment was not the work or decision of an impartial judge or the product of a fair process.

X. The Ecuador Judgment Cannot be Recognized or Enforced in Ontario

71. The Ecuador Judgment cannot be recognized or enforced in Ontario or elsewhere in Canada.

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[4] *Chevron Corp. v. Donziger*, 974 F Supp.2d 362, 526 (S.D.N.Y. 2014)
[5] *Id.* at 492.

A. The Ecuador Court did not Have Jurisdiction over Chevron Corp.

72. The Ecuador Judgment does not meet the basic legal requirements for recognition and enforcement because it was not issued by a court of competent jurisdiction.

73. While the Ecuador Court would have had authority under Ontario law to assume jurisdiction over TexPet when the Ecuador Action was commenced, the plaintiffs chose not to name that company as a defendant in the Ecuador Action, and instead to name only Chevron Corp. Consistent with the conditions agreed to in the *Aguinda* Action, Texaco, Inc. informed the Ecuadorean plaintiffs that Texaco Inc. had appointed an agent to receive process in Ecuador, but the plaintiffs never availed themselves of this opportunity.

74. The Ecuador court did not have proper authority to assume jurisdiction over Chevron Corp. in the Ecuador Action because:

(a) Chevron Corp. is incorporated under the laws of Delaware with its registered office in San Ramon, California.

(b) Chevron Corp. does not, and never has, resided or conducted any business in Ecuador. It has never had assets there.

(c) Texaco and TexPet became only indirect subsidiaries of Chevron Corp. in 2001, long after TexPet ceased its operations in Ecuador. Texaco and TexPet are legally separate entities from Chevron Corp. which had no involvement whatsoever in the Consortium. There was and remains no basis upon which to disregard their separate corporate personalities and pierce the corporate veil.

(d) Chevron Corp. did not ever attorn or consent to the jurisdiction of the Ecuador court and there was no real and substantial connection between Chevron Corp. and Ecuador or the subject matter of the Ecuador Action

that would have permitted the Ecuador court to assume jurisdiction *simpliciter* over Chevron Corp. under Ontario law.

B. The Foreign Law Upon Which the Judgment is Based and its Retroactive Application is Repugnant to Canadian Concepts of Justice

75. To recognize and enforce the Ecuador Judgment would be contrary to Canadian public policy which embodies notions of fundamental justice and morality. The Ecuador Judgment is founded upon a law enacted and retroactively applied to contrive a claim against Chevron Corp. from which it, as a principal of TexPet within the meaning of the Final Release, had previously been released by the very legislative authority enacting the law.

76. At the time the 1995 Settlement Agreement was reached and the Final Release issued on behalf of the ROE and Petroecuador, Ecuadorian citizens did not have any private right to assert claims to redress public, environmental harms. The ROE - the only party that had the legal right to do so - fully and finally released TexPet and the other Released Parties, including Chevron Corp., from liability for the claims upon which the Ecuador Judgment was based.

77. In an arbitration commenced by Chevron Corp. and TexPet against the ROE pursuant to the Bilateral Investment Treaty (the “BIT”) between the United States and the ROE, the tribunal issued a Partial Award on September 17, 2013, interpreting the 1995 Settlement Agreement and Final Release. The tribunal confirmed that Chevron Corp. and TexPet were both "releasees" and that the Settlement Agreement and the Final Release had "the legal effect under Ecuadorian law [of] precluding any 'diffuse' [environmental] claim" against Chevron Corp. and TexPet made by the ROE or "by any individual not claiming personal harm." The Ecuador Judgment only concerns diffuse rights.

78. That the Ecuador courts failed to dismiss the case against Chevron Corp. on the basis of the 1995 Settlement Agreement and Final Release is repugnant to Canadian concepts of fundamental justice and morality and offends public policy.

C. Enforcement of the Ecuador Judgment Would Constitute a Violation of the Obligations of the ROE Under International Law and Offend Canadian Public Policy

79. The arbitration referred to in paragraph 77 was commenced by Chevron Corp. as a result of the ROE's pattern of improper and fundamentally unfair conduct, contrary to its obligations under the BIT between the United States and the ROE. In its First and Second Interim Awards, the BIT tribunal ordered the ROE to prevent the Ecuador Judgment from becoming enforceable inside and outside of Ecuador. When the ROE failed to do so, the tribunal held that the ROE had breached its obligations under international law to comply with the arbitration awards issued, finding that the ROE had "violated the First and Second Interim Awards under the Treaty, the UNCITRAL Rules and international law in regard to finalisation and enforcement subject to execution of the [Ecuador] Judgment within and outside Ecuador, including (but not limited to) Canada, Brazil and Argentina." The tribunal held that the ROE is under a continuing legal obligation to suspend and prevent enforcement of the Ecuador Judgment.[6]

80. By its failure to comply with its treaty obligations and the BIT tribunal's decisions, the ROE is in violation of international law. To recognize and enforce the Ecuador Judgment in Ontario would be to assist the ROE in violating its international legal obligations which offends Canadian public policy.

D. The Ecuador Court Process was Contrary to Canada's Concept of Natural Justice

81. The processes and procedures adopted by the Ecuador courts throughout the Ecuador Action failed to satisfy even minimum standards of fairness.

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[6] *Chevron v. Ecuador*, PCA Case No. 2009-23, Fourth Interim Award on Interim Measures, 2/7/2013 (LEX1000038574)

82. Chevron Corp. was denied any meaningful opportunity to be heard by an impartial and unbiased court, including for the reasons particularized in paragraphs 5 through 70 above.

E. The Ecuador Judgment is a Product of Conspiracy, Fraud and Systemic Corruption

83. Having regard to all of the circumstances in which the plaintiffs obtained the Ecuador Judgment, including those particularized in paragraphs 5 through 70 above, the Ecuador Judgment cannot be recognized and enforced by this Court because it was procured by conspiracy, fraud and bribery. Much of the evidence of the fraud was unknown to Chevron Corp. prior to the issuance of the Ecuador Judgment, and in some cases not until after this Ontario action was filed against it. What was known and brought forth diligently before the Ecuador courts, was ignored.

84. Further, the Ecuador Judgment was rendered by a systemically corrupt and biased court that lacked independence and itself participated in the fraud. Members of the Ecuador judiciary were coerced, intimidated, extorted and ultimately bribed to find in the plaintiffs' favour. Throughout the proceeding, the Ecuador courts demonstrated bias and denied Chevron Corp. natural justice while the ROE breached its international treaty obligations under the BIT.

85. To recognize the Ecuador Judgment would be contrary to Canadian public policy which guards against the enforcement of a judgment rendered by a foreign court in these circumstances.

XI. The Plaintiffs Cannot Dispute the Findings of Fraud and Corruption Made by the SDNY

86. The Plaintiffs and their counsel were all party to, and either personally or through their privies actively participated in, the SDNY action in which the court was required to, and did, fully and finally determine many of the same factual issues as exist in this action.

87. It would be unfair and an abuse of this court's process to permit the plaintiffs to re-litigate those questions of fact that are in issue in this case and that have already been fairly decided by a court of competent jurisdiction between the same parties and their representatives elsewhere.

XII. Chevron Corp. is Not Estopped from Defending this Action

88. Contrary to the allegations made in paragraphs 5, 6, 7, 21 and 22 of the Amended Amended Statement of Claim, conditions of the *forum non conveniens* dismissal of the *Aguinda* Action do not preclude Chevron Corp. from defending this recognition and enforcement action on any grounds available under Canadian law.

89. The *Aguinda* Action was brought against a different defendant, by a different collection of plaintiffs, asserting a different cause of action, seeking different damages. Even if Chevron Corp. were bound in this case by any Texaco undertaking in the *Aguinda* Action, which is denied, the undertaking preserved the right to defend recognition and enforcement of any Ecuadorian judgment on the grounds permitted by the New York *Recognition of Foreign Country Money Judgments Act*. That legislation provides defences to foreign judgments on substantially the same grounds permitted under Canadian law.

90. In their Factum on the Appeal of Justice Brown's decision in the preliminary jurisdiction motion brought by Chevron Corp., the plaintiffs acknowledged Chevron Corp.'s right to contest the validity of the Ecuador Judgment on grounds allowed by the New York *Recognition of Foreign Country Money Judgment Act*. They specifically noted that Chevron Corp. could raise "defences of fraud in the procurement of the judgment and/or denial of natural justice".

XIII. The Shares and Assets of Chevron Canada Limited are not the Shares and Assets of Chevron Corp.

91. Contrary to the assertions made in paragraphs 4, 18, 19, 20, 23 and 26 of the Amended Amended Statement of Claim, Chevron Corp. does not own the shares of Chevron Canada Limited ("Chevron Canada") and, for the reasons set out in paragraphs 16

through 22 of the Statement of Defence of Chevron Canada, which are incorporated herein, there is no basis in fact or in law to reverse pierce the corporate veil of Chevron Canada and treat its assets as those of Chevron Corp.

92. Chevron Corp. does not dominate or control Chevron Canada and in any event, the plaintiffs expressly disavow any allegation of wrongdoing against Chevron Canada. The plaintiffs allege no deception or fraud nor any improper purpose whatsoever in the use of the multinational corporate structure which has been in place for decades, or the way in which Chevron Canada operates within it.

XIV. Relief Requested

93. Chevron Corp. asks that this action be dismissed with costs payable on a full indemnity basis.

October 2, 2015

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Court File No: CV-12-9808-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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