IN THE DARK

Chevron's Misrepresentations in Public Filings Regarding its $19.04 Billion Environmental Liability in Ecuador

Revised and Updated

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Summary

Chevron Corp. ("Chevron") is currently in default of a $19.04 billion civil judgment over environmental contamination left in Ecuador when it operated there under the Texaco brand from 1964 to 1992. Chevron's refusal to comply with its court-ordered legal obligation in Ecuador forced the plaintiffs in 2012 to file enforcement actions targeting approximately $20 billion in Chevron assets located in Canada, Brazil and Argentina. Rather than disclose the risks faced by Chevron due to its default of the Ecuador Judgment, CEO John Watson and his senior management have chosen to keep their shareholders and the financial markets in the dark by misrepresenting basic facts in its public disclosures. Examples of this "in the dark" strategy include:

- **Materially downplaying risks posed by enforcement actions:** Watson and Chevron are grossly misleading investors on how enforcement actions pose threats to company operations and business relationships including, most prominently, the embargo of its assets in Argentina;

- **Refusal to disclose required loss contingency:** Chevron continues to keep its investors guessing about the risk and range of loss the company faces, despite the Ecuador judgment being upheld on appeal with quantifiable assets at risk of seizure;

- **Misrepresenting facts in the court record:** Chevron tends to exaggerate the significance of what the company deems "victories" in the Ecuador litigation while ignoring adverse rulings, such as recent losses relating to a key defense in five U.S. appellate courts and the U.S. Supreme Court;

- **Selective disclosure of merits of Ecuador judgment:** To maintain its highly questionable fraud narrative (see below), Chevron has often repeated statements about the Ecuador judgment that are either demonstrably false or materially misleading; and

- **Mischaracterization of the Ecuador judgment as a fraud:** Chevron tries to justify its refusal to comply with the Ecuador judgment by falsely claiming the lawsuit is a product of fraud, despite overwhelming evidence submitted by the company at trial that pointed to its own guilt.

Given the need to protect the investing public from securities fraud, any of the above examples should be worthy of investigation by the Securities and Exchange Commission, the agency in the U.S. responsible for regulating the public markets. The cumulative list represents a stunning portrait of a company that ignores its obligation to provide full, true and plain disclosure of material facts as required by law.

Background

Chevron is the defendant in an environmental litigation brought by 30,000 rainforest residents in Ecuador over contamination of their ancestral lands. The case, *Aguinda v. ChevronTexaco,* originally was filed in 1993 in U.S. federal court but was transferred to Ecuador in 2002 at Chevron's request. On February 14, 2011, the Superior Court of Nueva Loja in Ecuador issued a decision ordering the company to pay $8.646 billion (all figures USD) in actual damages, an additional $8.646 billion in punitive damages (which could be waived if Chevron apologized for the contamination), and an additional amount equal to ten percent (10%) of the actual damages ($864.6 million) to be paid to the plaintiffs' representative group pursuant to an Ecuadorian "citizen suit" provision similar to those found in numerous U.S. environmental and civil rights statutes.[1] Both parties appealed the decision in Ecuador. On January 3, 2012, the Ecuador appeals court unanimously confirmed the lower court ruling and upheld the entirety of the judgment.[2] In July 2012, the final judgment amount against Chevron was assessed at $19.04 billion. Interest is accruing on the judgment.

Because Chevron refused to post a bond to suspend enforcement, the Ecuador appellate court finalized the judgment for enforcement against Chevron assets anywhere in the world. On May 30, 2012, the rainforest communities in Ecuador filed their first judgment enforcement action targeting assets of Chevron subsidiaries in Canada, estimated to be worth up to $15 billion. In June 2012, the plaintiffs filed a second enforcement action in Brazil, where Chevron subsidiaries have at least $3 billion in assets. (Chevron is also facing a $22 billion liability in Brazil for misleading authorities regarding an offshore spill in November 2011.[3]) On October 15, 2012, the trial court in Ecuador issued an asset seizure order covering an estimated $200 million worth assets in Ecuador (belying the company's longstanding boast that it had safely removed all its assets from Ecuador),[4] plus ordering a freeze on the company's assets in Argentina and Colombia pursuant to an international treaty called the *Latin American Convention on the Execution of Preventative Measures*.

On November 7, 2012, the Commercial Court of Justice in Argentina, acting under the aforementioned treaty, froze Chevron assets worth an estimated $2 billion. The court garnished 40% of Chevron's key revenue streams, meaning that millions of dollars are now flowing into a court-supervised escrow account. On January 30, 2013, a three-judge panel in Argentina unanimously upheld the freeze order[5] meaning that it will remain in place for many more months, pending a possible appeal to the Argentine Supreme Court or the outcome of the recognition action in Argentina.

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[1] A summary of the judgment is available here: http://chevrontoxico.com/assets/docs/2011-02-14-

[2] An English translation of the judgment is available here: http://chevrontoxico.com/assets/docs/2012-01-03-appeal-decision-english.pdf (hereafter, "Ecuador Judgment")

[3] http://www.bloomberg.com/news/2012-05-10/chevron-brazil-spill-shows-drillers-still-trip-in-crises.html

[4] http://chevrontoxico.com/assets/docs/2012-10-15-order-freezing-chevrons-assets-in-ecuador.pdf

[5] http://www.globalpost.com/dispatch/news/afp/130201/argentine-court-rules-against-chevron-ecuador-amazon-case

In addition to the estimated $20 billion in Chevron assets now exposed to possible seizure or freeze orders, Chevron's litigation position has worsened considerably in the United States. In October 2012, the U.S. Supreme Court refused to hear Chevron's challenge to a unanimous appellate court decision that had nullified the crown jewel of Chevron's defense strategy – an illegal "injunction" from a New York trial judge that had purported to block worldwide enforcement of the Ecuador judgment.[6] The injunction was premised on a false narrative, pieced together from distorted snippets of documents and videos, that the company was the victim of an elaborate "fraud." This chimera has now come apart at the seams, with no less than 19 U.S. courts refusing to rule in Chevron's favor that the Ecuador judgment was illegitimate.[7]

An earlier version of this report issued in April 2012 by the same author warned shareholders and the investor community that the Ecuador judgment posed a serious risk to the company's financial position and global asset base.[8] At the time, Chevron refused to characterize such risk as a material liability or to calculate a range of loss, despite the precision of the judgment amount and the company's mandatory disclosure obligations. One year later, it is simply undeniable that the risk to Chevron has grown substantially: nearly $20 billion of the company's assets in four countries are now the subject of seizure actions, and significant Chevron assets in Argentina have been frozen. Yet in the company's recently filed 2013 Proxy Statement and Annual Report (filed as the '2012 Form 10-K'), Chevron maintained that there is "no basis for management to estimate a reasonably possible loss (or a range of loss)" associated with the Ecuador judgment. By way of comparison, BP calculated a specific range of loss in 2010 for the Deepwater Horizon spill long before any legal cases against it were resolved. The evidence strongly suggests Chevron is openly lying to its shareholders and to regulators.

In response, a growing number of institutional Chevron shareholders have demanded more fulsome and honest disclosure from the company about the Ecuador liability. Last May, Chevron shareholders representing over $580 billion in assets under management urged CEO Watson to rectify the company's misleading disclosures and to consider all options to end the controversy, including settlement.[9] At Chevron's 2012 annual meeting, 38% of Chevron shares (representing $73 billion of Chevron stock) embraced a resolution to strip Watson of his dual CEO/Chair roles largely because of ongoing risk created by the Ecuador lawsuit.[10] Two other shareholder resolutions at the annual meeting citing the Ecuador liability also received significant support[11] and have been re-filed for the 2013 annual meeting.[12] Chevron's refusal to meet with shareholders concerned about the risk created by the Ecuador case has lead to a series of formal

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[6] http://www.bbc.co.uk/news/world-us-canada-19892561,
[7] http://chevrontoxico.com/assets/docs/2012-chevrons-losses.pdf
[8] See here: http://chevrontoxico.com/news-and-multimedia/2012/0417-chevron-misleading-investors-over-ecuador-environmental-judgment
[9] http://www.osc.state.ny.us/press/releases/may12/investor_letter.pdf
[10] http://www.chevron.com/documents/pdf/chevron2012proxyvotingresults.pdf
[11] *Ibid.*
[12] Chevron 2013 Proxy Statement: http://www.chevron.com/documents/pdf/Chevron2013ProxyStatement.pdf (hereafter, "Proxy Statement")

requests by a number of shareholders and by a member of the United States Congress that the SEC investigate Watson and his management team to determine whether they are misleading regulators and investors.[13]

One possible reason for management's refusal to rectify its misleading disclosures comes from recent public statements that suggest company executives, including Watson, have become so emotionally invested in inflicting retribution on the plaintiffs that they have lost the ability to rationally appreciate the extant risk and guide the company responsibly. In a recent live-streamed interview at the Council on Foreign Relations, Watson vehemently insisted he could not simply "settle the problem and move on" because the plaintiffs were "criminals" and that if Chevron settled with them "they will laugh at me."[14] The problem may be compounded by the fact that Watson and other Chevron executives have numerous personal conflicts of interest regarding the Ecuador litigation. For example, as Chevron's Chief Financial Officer in 2000, Watson played a key role in vetting the merger with Texaco, and responsibility for failing to appreciate the extent of the Ecuador liability arguably lies with him personally.

1. Refusal to Disclose the Material Impact of Enforcement Actions

In its 2012 annual report on Form 10-K, Chevron acknowledged the enforcement actions and the October 15, 2012, embargo order from Ecuador to seize Chevron assets in Ecuador, Argentina and Colombia. However, in terms of analysis of these actions, Chevron reiterated its position that it is unable to assess the risk posed by the judgment because:

> Chevron cannot predict the timing or ultimate outcome of the appeals process in Ecuador or any enforcement action. Chevron expects to continue a vigorous defense of any imposition of liability in the Ecuadorian courts and to contest and defend any and all enforcement actions.[15]

Chevron's mandated disclosure omits any discussion or analysis of the impact of the enforcement actions, which stands in direct contrast to statements company officials have made about the threat enforcement posed to company plans. On November 26, 2012, Chevron General Counsel R. Hewitt Pate travelled personally to The Hague to plead in front of a Bilateral Investment Treaty (BIT) arbitration panel to grant the Company some relief over the "serious consequences" the Argentina embargo posed during the pendency of Chevron's attempts to deal with this through Argentina's courts.[16] After the Argentina appeal court upheld the embargo, Ricado Aguiree, Chevron's manager for planning and commercial operations in Argentina elaborated these serious consequences in an interview with *Agence France-Presse* stating, "If the freeze is upheld... it would affect all

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[13] http://www.law360.com/environmental /articles/348936/sec-should-probe-chevron-over-18b-ruling-house-rep-says

[14] http://www.cfr.org/business-and-foreign-policy/case-us-multinationals/p29551 (Note: Watson's comments on the Ecuador case begin at just before the 30 minute mark.)

[15] Chevron Corp. Form 10-K for the year-end December 31, 2012 at p. FS-42 (hereafter "10-K")

[16] *Chevron Corp. and The Republic of Ecuador;* Fourth Interim Award on Interim Measures (PCA CASE NO. 2009-23) 7 February 2013 at 6 (hereafter, "BIT Interim Award").

of Chevron's activity in Argentina…[T]here will be no future for this company in this country, that is clear."[17] This statement is consistent with Chevron's own predictions of these impacts, as stated clearly in a sworn affidavit by Chevron Deputy Comptroller Rex Mitchell to New York federal court in 2011:

> The seizure of Chevron assets, such as oil tankers, wells, or pipelines, in any one of these countries, would disrupt Chevron's supply chain and operations; and seizures in multiple jurisdictions would be more disruptive…[The] Defendants' campaign to seek seizures anywhere around the world and generate maximum publicity for such acts ***would cause significant, irreparable damage to Chevron***. Unless it is stopped, Defendants' announced plan to cause disruption to Chevron's supply chain is likely to cause ***irreparable injury to Chevron's business reputation and business relationships that would not be remediable by money damages***.[18]

This 'irreparable injury' assessment has also been provided Chevron's lead outside counsel on the Ecuador matter, Randy Mastro, who recently pleaded before a New York judge that the risk of enforcement and seizure actions against Chevron is nothing less than a "nightmare" for the company. Mastro said:

> So we are definitely right now in a position of that nightmare is here, irreparable harm is imminent…[We] are facing the ultimate Sword of Damocles, and it is over our heads…The Sword of Damocles is not over our heads, it's touching our foreheads.[19]

Whether one characterizes the "serious consequences" as "irreparable harm" or the "Sword of Damocles", Chevron's internal assessment of the risks of enforcement clearly meets the materiality test for public disclosure. This test, as defined by the U.S. Supreme Court, requires disclosure of material information if investors would regard such information as altering the "total mix" of information required to make an informed investment decision.[20] By not disclosing these assessments of the grave risks Chevron faced from enforcement actions earlier, Chevron effectively prevented its shareholders from making an informed decision to sell their shares *before* the harm began to occur. Given that this harm is now occurring with Chevron officials stating that they will be forced to leave countries that have freeze orders in place (despite Chevron having already invested billions in Argentina with plans for billions more) this *prima facie* violation of the federal *Securities Act of 1934* merits immediate investigation.

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[17] *Supra* note 5.

[18] *Chevron Corp. v. Steven Donziger, et al,* (S.D.N.Y., Case No. 11-CV-0691), *Declaration of Rex J. Mitchell in Support of Chevron Corporation's Motion for a Preliminary Injunction*, filed 5 Feb 2011 at paragraphs 7; 10. (Emphasis added) Available at: http://chevrontoxico.com/assets/docs/2011-02-15-mitchell-declaration.pdf

[19] *Chevron Corp. v. Steven Donziger, et al,* (S.D.N.Y., Case No. 11-CV-0691), moving party's oral argument, transcript pages 11-12; 73

[20] *TSC Industries, Inc. v. Northway, Inc*., 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed. 2d 757 (1976); *Basic Incorporated v. Levinson*, 485 U.S. 224. 108 S.Ct. 978, 99 L.Ed. 2d. 194 (1988).

2. Refusal to Disclose Possible Loss or Range of Loss

In addition to withholding material assessments of risks, Chevron also appears to be breaching securities regulations through its refusal to disclose possible future losses or a even a range of loss associated with the Ecuador judgment. In each of its public filings for the past four years, including the 2012 Annual Report, Chevron has maintained:

> Management does not believe an estimate of a reasonably possible loss (or a range of loss) can be made in this case. Due to the defects associated with the Ecuadorian judgment, the 2008 engineer's report on alleged damages and the September 2010 plaintiffs' submission on alleged damages, management does not believe these documents have any utility in calculating a reasonably possible loss (or a range of loss).[21]

Chevron continues to draw this conclusion despite the fact the $19.04 billion judgment rendered against it was affirmed on appeal and the recent seizure orders cover very precise amounts of assets. Moreover, Chevron's excuse for withholding this estimate due to so-called 'defective' documents is grossly misleading to shareholders and a probable securities law violation. As to the 'defects' associated with the Ecuadorian judgment, this decision has already been fully upheld on appeal in Ecuador so it is unclear what legal basis Chevron has to now claim it to be defective. As a general matter, enforcement jurisdictions do not allow defendants to re-litigate issues that were raised and addressed in the jurisdiction rendering the judgment, meaning that these claimed ambiguous 'defects' with the Ecuadorian judgment are unlikely to significantly alter the loss or range of loss Chevron faces from enforcement of the judgment.

As to the other documents claimed by Chevron to not provide utility in assessing a risk of loss, the weight of the evidence from the Ecuador judgment itself is that the Ecuador court *did not rely on the documents cited by Chevron.* For example, Chevron filed over 30 separate motions urging the Ecuador court not to rely on the 2008 expert report on damages (the so-called 'engineer's report' cited above); the court ultimately *granted* Chevron's wish and disregarded the report.[22] As to the 'September 2010 plaintiffs' submission on alleged damages, the judicial record from Ecuador clearly shows the judge did not rely on these findings.[23] Thus, Chevron has withheld crucial information from its shareholders over alleged defective documents that are legally irrelevant to the company's liability as found by the court, while refusing to disclose that the court disregarded the very reports about which it complains.

Chevron's refusal to disclose its probable loss from the Ecuador judgment also appears to be in violation of the loss contingency disclosure rules in the U.S. that are governed by the Financial Accounting Standards Board's 1975 Standard No. 5 – "Accounting for Contingencies". This standard requires an estimate from a loss contingency (which

[21] 10-K, *supra* note 15 at p. FS-43
[22] Ecuador Judgment, *supra* note 2 at page 51.
[23] See this report on how the Ecuador court did not rely on these reports and, instead, cited over 50 other expert reports including over 18 reports submitted by Chevron itself in assessing the $19B in damages: http://chevrontoxico.com/assets/docs/2013-05-expert-reports-cited-in-the-ecuador-judgment.pdf

includes litigation) if it is probable that an asset has been impaired or a liability has been incurred at the date of the financial statements *and* the amount of loss can be reasonably estimated.[24] It should also be noted from the FASB standard that the term "reasonably possible" refers to whether the chance of the future event occurring is more than remote but less than likely. Under the FASB standard, Chevron must provide a loss contingency for the Ecuador litigation given that the judgment has been affirmed on appeal and is now being enforced in jurisdictions that have quantifiable assets that risk being frozen or seized.

By way of comparison, BP calculated a $37.2 billion loss contingency in its financial statements following the Deep Water Horizon spill in 2010—at a time well before there was any legal settlement for the many claims against the company.[25] In contrast, Chevron has continued to withhold a loss contingency despite having a precise enforceable judgment in place. The BP example also captures the material omission of Chevron's refusal to provide a loss estimate given that Chevron intentionally discharged 85 times more crude oil in the streams, rivers and soil of Ecuador's rainforest than BP accidentally spilled in the Gulf of Mexico.

Investors clearly deserve a more complete loss contingency calculation from Chevron that takes into account the size of the judgment, the seizure orders issued against the company, the likelihood of successful enforcement actions around the world, and how such actions could encumber Chevron assets and put the company at a competitive disadvantage when seeking new business around the world.

3. Selective Disclosure of Court Rulings

Chevron's misrepresentations also extend to its failure to properly disclose adverse court rulings in the Ecuador litigation in both the Annual Report and 2013 Proxy Statement. In fact, it appears Chevron deliberately "spins" or simply omits disclosure about unfavorable court rulings to minimize the negative impact.

For example, Chevron discloses in detail interim awards issued by the BIT arbitration panel that purport to direct the Republic of Ecuador (ROE) to take all measures necessary to suspend the enforcement and recognition of the judgment against Chevron.[26] Yet despite its detailed treatment of these interim awards, Chevron fails to disclose a number of necessary facts material to investors in evaluating Chevron's inference that this arbitration may limit Chevron's exposure to the $19.04 billion award. For instance, Chevron does not divulge that the arbitration panel itself ruled: "an award of damages expressed in tens of billions of US dollars could provide no adequate remedy, [even] if [Chevron's] full case were to prevail against the Respondent and if the Lago Agrio Judgment were in the meantime enforced and executed."[27] This passage itself belies any

[24] FAS 5 – Accounting For Contingencies at paragraph 8. Online: http://www.fasb.org/pdf/fas5.pdf
[25] http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7073667
[26] For further background on Chevron's illegitimate use of the BIT process in this instance, see letter from Andean Commission of Jurists to United Nations Secretary General Ban Ki-moon expressing alarm at Chevron's tactics, available here: http://chevrontoxico.com/assets/docs/2012-02-10-caj-letter-to-un.pdf
[27] BIT Interim Award, *supra* note 16 at paragraph 83.

assertion as to the relevance of the BIT proceedings to mitigate Chevron's threatened (and, at least in Argentina, realized) 'irreparable injury' from enforcement of the Ecuador Judgment the Company continues to refuse to pay. Moreover, Chevron's ability to 'prevail' against the ROE for any indemnity or damages is further weakened by the ROE's repeated refusal to abide by the BIT's rulings on the grounds that they violate Ecuador's Constitution and international law;[28] and, that the U.S. federal appellate court in New York twice has ruled that the investor arbitration has no bearing on the ability of the Claimants to enforce their judgment anywhere in the world.[29] Neither of these important facts are mentioned anywhere in Chevron's 446-word treatment of the BIT rulings in its 2012 10-K, nor does the Company mention that the Ecuador Appellate Court has cited these rulings in rejecting the interim awards.

In its 2013 Proxy Statement, Chevron continues its pattern of making misleading and false claims about the court record. For example, Chevron claims that "the suggestion that court proceedings have endorsed the Ecuador plaintiffs' position mischaracterizes the record…"[30] It is unclear what 'record' Chevron refers to, but the only courts to review the full evidence -- the Ecuador trial and appellate courts (who reviewed more than 62,000 chemical samples; 103 expert reports; and nearly 220,000 pages of evidence and arguments) – endorse the position of the affected communities that Chevron is liable for oil contamination and must pay for a cleanup. Courts in the U.S. also have endorsed this position on multiple occasions, including in the Courts of Appeal in the Second,[31] Third,[32] Fifth,[33] and D.C. Circuits[34] and even recently at the U.S. Supreme Court[35] in an October ruling that Chevron has since refused to mention in its detailed discussion of the Ecuador litigation. Given these rulings, the claim that court proceedings do not support the Ecuador plaintiff's position is demonstrably false.

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[28] Chevron investors might also be interested to know that Ecuador's government is on solid legal ground in rejecting interference by the arbitration panel in its sovereign judicial system. Its position on the matter is exactly the same as that taken by the United States government, which rejects orders from international bodies that require it to violate the separation of powers doctrine and interfere in its judiciary. See, e.g., *Medellin v. Texas*, 552 U.S. 491 (2008) (order of the International Court of Justice does not require President, or give him authority, to act beyond traditional separation of powers bounds; *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3 (Jan. 5, 2001) (noting U.S. position that "the claim is not arbitrable because the judgments of domestic courts in purely private disputes are not . . . within the scope of [international arbitration]").

[29] See, e.g., *Chevron Corporation v. Naranjo*, Docket Nos. 11-1150-cv (L) 11-1264 (Con), (2d Cir. Jan. 26, 2012), at 27: "The [Lago Agrio Plaintiffs] hold a judgment from an Ecuadorian court. They may seek to enforce that judgment in any country in the world where Chevron has assets"; and *Republic of Ecuador v. Chevron Corporation*, Docket Nos. 10-1020-cv (L) 10-1026 (Con), (2d Cir. March 17, 2011): "Plaintiffs are not parties to the [Bilateral Investment Treaty], and that treaty has no application to their claims, their dispute with Chevron therefore cannot be settled through BIT arbitration."

[30] 2013 Proxy Statement, *supra* note 12 at page 71.

[31] *Chevron Corp. v. Naranjo,* 667 F. 3d 232 (2d Cir. 2012)

[32] *In re Application of Chevron Corp.*, 650 F.3d 276 (3d Cir. 2011)

[33] *Chevron Corp. v. 3TM Int'l, Inc.* No. 10-20389 (5d. Cir 2010.)

[34] *Chevron Corp. v. Weinberg Group* No. 11-7097 (D.C. Cir. 2012)

[35] *Chevron v. Naranjo*, 11-1428 .See also, Greg Stohr "Chevron Rebuffed by Top U.S. Court on Ecuador Award" *Bloomberg.* 9 October 2012. Online: http://www.bloomberg.com/news/2012-10-09/chevron-rebuffed-by-top-u-s-court-on-ecuador-award.html

4. Misrepresentations as to Legal and Factual Merit

Even though the Ecuador rainforest communities filed their claims in 1993, it was not until 2008 that Chevron first disclosed its potential liability from the action. In its public filings since that time, Chevron has repeated the exact same paragraph to explain why it believes the Ecuador judgments lacks legal merit:

> As to matters of law, the company believes first, that the court lacks jurisdiction over Chevron; second, that the law under which plaintiffs bring the action, enacted in 1999, cannot be applied retroactively; third, that the claims are barred by the statute of limitations in Ecuador; and, fourth, that the lawsuit is also barred by the releases from liability previously given to Texpet by the Republic of Ecuador and Petroecuador and by the pertinent provincial and municipal governments.

There is substantial and irrefutable evidence that these assertions are either demonstrably false or misleading.

a) The Ecuador court lacks jurisdiction over Chevron

This argument is demonstrably false as evidenced by the fact Chevron submitted to jurisdiction in Ecuador and fully litigated the case there. Further, Chevron made repeated promises to a U.S. federal court that it would abide by the Ecuador court's jurisdiction when the case was first litigated in the United States.[36] On June 21, 2001, Chevron signed a stipulation that proves the company voluntarily subjected itself to the jurisdiction of Ecuador's courts as a condition precedent for the removal of the case from the U.S.[37] The U.S. Second Circuit Court of Appeals reconfirmed Ecuador's jurisdiction over Chevron in a March 2011 ruling, noting that "Texaco assured the district court that it would recognize the binding nature of any judgment issued in Ecuador." The opinion from the Second Circuit then concluded,

> As a result, that promise, along with Texaco's more general promises to submit to Ecuadorian jurisdiction, is enforceable against Chevron in this action and any future proceedings between the parties, including enforcement actions, contempt proceedings, and attempts to confirm arbitral awards.[38]

Even more recently, Judge Lewis A. Kaplan in New York – who has consistently ruled in Chevron's favor – specifically rejected Chevron's jurisdictional claim in July 2012:

> Chevron's own evidence shows that Chevron did far more before the Lago Agrio court than contest personal jurisdiction…Chevron thus has failed to show that it is entitled to judgment as a matter of law foreclosing recognition or enforcement of the Judgment on the ground that the Ecuadorian court lacked jurisdiction over its

[36] See, e.g., http://www.texaco.com/sitelets/ecuador/docs/motions_to_dismiss.pdf
[37] *Aguinda v. Texaco*, 303 F.3d 470 (2d Cir. 2002) at 478-478.
[38] *Republic of Ecuador v. Chevron Corporation*, *supra* note 29 at p. 6.

person.[39]

Chevron's continued assertion in its public filings that the Ecuador courts have no jurisdiction over the company, after four rulings to the contrary in U.S. courts, is misleading.

b) Ecuador's environmental law cannot be applied retroactively

This assertion is demonstrably false and has been dismissed by every court to hear it. The key misrepresentation by Chevron is its failure to disclose that the Claimants are using the referenced law, the 1999 Law of Environmental Management ("Ley de Gestión Ambiental"), for its *procedural provisions only*, rendering the retroactivity question moot. As a general matter of law in Ecuador (and the U.S.), a statute used for procedural purposes does not raise concerns regarding retroactivity except in rare circumstances inapplicable here. In Ecuador, that country's highest court has ruled in the *Delfina Torres* decision that the 1999 law can be applied retroactively - a decision Chevron fails to disclose, even though it was cited in the judgment against the company.

c) Claims barred by the statute of limitations

Chevron's assertion that the *Aguinda* claims are barred by the statute of limitations is also demonstrably false, as the company waived these defenses in the same Stipulation where it agreed to submit to jurisdiction in Ecuador as a condition of the removal of the case from U.S. federal court.[40] It is well-settled law that a statute of limitations defense, once waived, cannot be reasserted without the consent of the opposing party.[41] As such, the company's assertion that the *Aguinda* claims are barred by the statute of limitations is demonstrably false. The Ecuador courts also rejected this assertion when it was raised by Chevron.

d) The claims are barred by a release

Chevron's assertion that the plaintiffs' claims were barred by a release given to Texaco by the Republic of Ecuador is false. The cited legal release from Ecuador's government expressly carves out the private claims being litigated in the *Aguinda* lawsuit (which were pending in U.S. federal court at the time the release was negotiated). The plain language of the Memorandum of Understanding between Texaco and the Republic of Ecuador incorporates this express "carve out" language:

> "The provisions of this [MOU] shall apply without prejudice to the rights possibly held by third parties for the impact caused as a consequence of the operations of the former Petroecuador-Texaco consortium."

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[39] *Chevron Corp. v. Steven Donziger* Opinion on Partial Summary Judgment Motion (31 July 2012) at p 75.
[40] *Aguinda*, 303 F.3d 470,475.
[41] 56 Am.Jur., Waiver, s 24; *Gilbert v. Globe & Rutgers Fire Ins. Co*., 91 Or. 59, 174 P. 1161, 178 P. 359, 3 A.L.R. 205 (holding that where a party intentionally relinquishes a known right by waiver, he cannot, without consent of his adversary, reclaim it)

Even Texaco's principal attorney who negotiated the agreement, Rodrigo Perez Pallares, acknowledged in sworn testimony in the U.S. that the release carves out third party claims of the type being litigated in the *Aguinda* case. The plaintiffs in *Aguinda* were not a party to the release, and the Ecuadorian Constitution bars the government from releasing the claims of private parties. No court in either Ecuador or the U.S. ever has accepted Chevron's claim that the release bars the *Aguinda* lawsuit. Chevron clearly misrepresents the scope of the release in its filings.

e) Misrepresentations as to the so-called "remediation"

In addition to its misrepresentations as to the legal merits of the case, Chevron has continued to distort the evidentiary record -- in particular, by hiding the inadequate and possibly fraudulent nature of the "remediation" the company performed to secure its limited release from the Government of Ecuador:

> With regard to the facts, the company believes that the evidence confirms that Texpet's remediation was properly conducted and that the remaining environmental damage reflects Petroecuador's failure to timely fulfill its legal obligations and Petroecuador's further conduct since assuming full control over the operations.[42]

Chevron's claim that the remediation was "properly conducted" is factually untrue according to the evidence at trial. The Ecuador court's judgment considered the remediation issue at length and concluded "the environmental conditions are similar in all sites even though in these the aforementioned remediation labors have taken place."[43]

5. Mischaracterizations of the Lawsuit as a Fraud

Perhaps the most misleading of Chevron's claims is the repeated characterization of the Ecuador judgment as a product of fraud and misconduct. Chevron makes this claim throughout its public filings and emphasizes the point heavily to shareholders in the 2013 Proxy Statement:

> Your Board believes that the Ecuador litigation and related actions against Chevron are a fraudulent and extortionate scheme… we believe that the Ecuador court's judgment against the Company is illegitimate and the product of fraud on the part of the plaintiff s' lawyers and some members of the Ecuador judiciary.[44]

Chevron CEO John Watson has also repeated such claims on quarterly earnings calls with analysts, claiming the lawsuit is "an elaborate fraud…[and] a collaboration between corrupt plaintiffs' lawyers in the U.S. and a corrupt judiciary in Ecuador.**"**[45] Watson clearly has leveraged his personal credibility to signal to Chevron's investors that the

[42] 10-K, *supra* note 15 at p. 16.
[43] Ecuador Judgment, *supra* note 2 at p. 105.
[44] Proxy Statement, *supra* note 12 at 71.
[45] Chevron Q4 2011 Earnings Conference Call Transcript, Jan. 27, 2012.

lawsuit in Ecuador does not have merit and, by extension, they should discount the risk to the company.

Yet the evidence that Chevron submitted to Ecuador's courts during the trial directly contradicts this position and again reveals how the company is misleading its investors with its fraud narrative. Chevron submitted more than 50,000 chemical sampling results to the Ecuador trial court and its own data proved that 79% of its well sites remain contaminated in violation of Ecuadorian legal norms, and 91% violate international legal norms. Data from Chevron auditor Fugro-McClelland and two other court-nominated Chevron experts corroborated these extraordinarily high levels of contamination.[46] The court in Ecuador relied on these submissions in finding Chevron culpable and directly cited Chevron's own expert reports on at least 18 separate occasions,[47] including Chevron's expert, Gerardo Barros whose calculations of soil remediation costs was cited by the judge to arrive at the damages figure of $5.4 billion.[48] Thus, far from being an "elaborate fraud," the Ecuador court's findings were based to a great degree on Chevron's own evidence, a fact Watson has continued to hide from investors.

The other key omission in Chevron's fake fraud narrative is the fact that 19 different U.S. trial courts have specifically rejected Chevron's attempts to obtain rulings that the Ecuador judgment was somehow fraudulent or illegitimate.[49] Below are excerpts from some of these rulings that refute the company's assertions:

- In the District of Vermont, a judge conducted a review of Chevron's so-called fraud evidence and concluded "the Court is satisfied that no evidence of fraud, false pretenses or undue influence appears."[50]
- In the District of Massachusetts, the court rejected Chevron's claims and also noted "that several other district courts have expressly denied the applicants' requests to invoke the crime-fraud exception with respect to other respondents."[51]
- In Ohio, a court threw out Chevron's fraud allegations against one of the plaintiffs' experts, ruling "there is no factual basis for Chevron's assertion that Mr. Barnthouse was involved in any alleged ongoing fraud."[52]
- In Tennessee, a court found that Chevron's allegations were "*quickly spiraling out of control*" and rejected the attempt to obtain discovery via the "fraud" claims.[53]
- At the Fifth Circuit Court of Appeals, a Judge labeled Chevron's fraud claims "hyperbole" and accused the company of "*making a mountain out of a molehill*."[54]

[46] http://chevrontoxico.com/assets/docs/2012-01-evidence-summary.pdf
[47] *Supra* note 23
[48] Ecuador Judgment, *supra* note 2 p. 180
[49] *Supra* note 7
[50] *Chevron Corp. v. Allen*, No. 2:10-mc-00091, Dkt. 38 at 13 (D. Vt. Dec. 2, 2010)
[51] *Chevron Corp. v. Bonifaz*, No 10-mc-30022, Dkt. 47 at 20-21 (D. Mass. Dec. 22, 2010)
[52] *Chevron Corp. v. Barnthouse*, No. 1:10-mc-00053, Dkt. 36 at 21 (S.D. Ohio Nov. 26, 2010)
[53] *Chevron Corp. v. Quarles*, No. 3:10-cv-00686, Dkt. 108, Order at 2 (M.D. Tenn. Sept. 21, 2010)

Conclusion

As Chevron faces a $19 billion liability for deliberately contaminating the rainforest of Ecuador, the company has a legal obligation to investors to disclose accurate and reliable information about the potential loss the company faces. With enforcement actions underway and billions of dollars of strategic Chevron assets subject to seizure, the risk of "irreparable harm" from the judgment is no longer a possible future event. Rather than provide such information, Chevron continues to present false and misleading information to the investing public to downplay the risk from the Ecuador litigation, perhaps to artificially prop up its share price, or, in the case of John Watson, to keep his job.

[54] *Chevron Corp. v. 3TM Int'l, Inc.* No. 10-20389 (5th Cir.) at 34-35