

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

Revised and Updated

by Graham Erion*

January 2013

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

Summary

A report issued in April of 2012 warned shareholders and the investor community that a \$19.04 billion final judgment against Chevron in Ecuador posed a serious risk to the company's financial position and global asset base. At the time, Chevron refused to characterize such risk as a material liability or calculate a range of loss, despite the precision of the judgment amount and the company's mandatory disclosure obligations. The judgment derives from a court finding that Chevron created an environmental disaster when it operated in Ecuador under the Texaco brand from 1964 to 1992.

Nine months later, it is simply undeniable that the risk has grown substantially: over \$15 billion of Chevron assets in four countries are now the subject of seizure actions, and \$2 billion of Chevron assets in Argentina already have been frozen and are unavailable to the company or its subsidiaries. Yet Chevron insisted in its third quarter disclosure that there is "no basis for management to estimate a reasonably possible loss (or a range of loss)" associated with the final Ecuador judgment. (By comparison, BP calculated a specific range of loss in 2010 for the Deep Water Horizon spill long before any legal cases against it were resolved.) The thin reed of credulity that Chevron was stretching last April has now resoundingly snapped. The evidence strongly suggests the company is openly lying to its shareholders and to regulators.

A growing number of institutional Chevron shareholders have demanded more fulsome and honest disclosure from the company about the Ecuador liability. In May, Chevron shareholders representing over \$580 billion in assets under management urged Watson to rectify the company's misleading disclosures and to consider all options to end the controversy, including settlement.¹ At the 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 problems with the Ecuador lawsuit.² Two other shareholder resolutions at the Chevron annual meeting citing the Ecuador case also received significant support.³ Chevron management subsequently refused to grant a meeting to shareholders concerned about the Ecuador case, leading to a series of formal 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.⁴

* Graham Erion has an LL.M. (*Kent Scholar*) from Columbia University in New York and a LL.B. from Osgoode Hall Law School in Toronto, Canada. Prior to advising the rainforest communities in Ecuador, he practiced corporate and securities law at two major Canadian law firms. He is licensed to practice law in Ontario and New York.

¹ http://www.osc.state.ny.us/press/releases/may12/investor_letter.pdf

² <http://www.chevron.com/documents/pdf/chevron2012proxyvotingresults.pdf>

³ *Ibid.*

⁴ <http://www.law360.com/environmental/articles/348936/sec-should-probe-chevron-over-18b-ruling-house-rep-says>

Background

Chevron is the defendant in a 19-year litigation brought by 30,000 rainforest residents over environmental contamination in Ecuador. The case, *Aguinda v. ChevronTexaco*, originally was filed in the Southern District of New York in 1993 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 in actual damages, an additional USD \$8.646 billion in quasi-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 Claimants' representative group pursuant to an Ecuadorian "citizen suit" provision similar to those found in numerous U.S. environmental and civil rights statutes.⁵ Both parties appealed the decision in Ecuador. On January 3, 2012, the Ecuador appeals court confirmed the lower court ruling and upheld the entirety of the judgment.⁶ In July 2012, the final judgment amount against Chevron was assessed at \$19.04 billion.

Because Chevron refused to post a bond to suspend enforcement, the Ecuador appellate court finalized the judgment that can now be enforced against Chevron assets anywhere in the world. On May 30, the rainforest communities in Ecuador filed their first judgment enforcement action targeting assets of Chevron subsidiaries in Canada, estimated to be worth more than \$12 billion. In June, 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 a spill in November 2011.⁷) On October 15, the trial court in Ecuador issued an asset seizure 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),⁸ 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 hundreds of millions of dollars is now flowing into a court-supervised escrow account instead of Chevron's coffers. As the Argentina order applies to the entire amount of the Ecuador judgment (\$19.04 billion), any additional investments Chevron makes in Argentina – including a

⁵ A summary of the judgment is available here: <http://chevrontoxico.com/assets/docs/2011-02-14-summary-of-judgment-Aguinda-v-ChevronTexaco.pdf>. The court found actual damages to include \$5.4 billion for remediation of soil, \$600 million for addressing groundwater contamination, \$200 million for restoration of native flora and fauna, \$150 million for delivery of potable water, \$1.4 billion to augment the healthcare system to respond to health issues (excluding cancer), \$800 million to address past and future excess cancer deaths in the affected area and \$100 million to address cultural impacts of the indigenous groups.

⁶ An English translation of the judgment is available here: <http://chevrontoxico.com/assets/docs/2012-01-03-appeal-decision-english.pdf>

⁷ <http://www.bloomberg.com/news/2012-05-10/chevron-brazil-spill-shows-drillers-still-trip-in-crisis.html>

⁸ <http://chevrontoxico.com/assets/docs/2012-10-15-order-freezing-chevrons-assets-in-ecuador.pdf>

planned \$1.8 billion investment in building new oil wells over the next three years – will be subject immediately to the freeze order.⁹

In addition to the estimated \$15 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, in a heavily-publicized decision, 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 – an illegal "injunction" from a New York trial judge that had purported to block worldwide enforcement of the Ecuador judgment.¹⁰ 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.¹¹

Despite these numerous setbacks, Chevron has refused to materially amend its disclosure of the risks posed by the final Ecuador judgment. As the information below makes clear, Chevron's approach to its obligations in this area seems to become ever more outdated and distorted in each subsequent public filing. The failure of Chevron's management team to meet its legal obligations further exposes the company to possible regulatory investigations and additional liability for shareholders.

Recent public statements suggest that 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." (Watson also proclaimed that Chevron was "winning in the court of the public opinion" regarding the Ecuador matter even though recent news accounts document a strong downward trend line for the company.) 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 third quarterly report to the SEC for 2012, filed on November 6, Chevron noted that the plaintiffs filed enforcement actions to seize company assets in Canada and Brazil. It also noted the October 15th embargo order from Ecuador to seize Chevron assets in Ecuador, Argentina and Colombia. However, in terms of analysis of these actions,

⁹ <http://www.nasdaq.com/article/chevron-subsiidiaries-in-argentina-appeal-embargo-order-20121109-01176#.ULOp14bIFr4>

¹⁰ <http://www.bbc.co.uk/news/world-us-canada-19892561>,

¹¹ <http://chevrontoxico.com/assets/docs/2012-chevrans-losses.pdf>

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.¹²

Chevron's disclosure omits any discussion or analysis of the impact of the enforcement actions. In a different and less public context, however, Chevron has carefully considered the various risks posed by the Ecuadorian judgment and has assessed them to be very serious indeed. In 2011, Chevron Deputy Comptroller Rex Mitchell stated in a sworn affidavit to a New York federal court that:

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**.¹³

Yet this “irreparable harm” Chevron would suffer from enforcement actions and asset seizures has never been disclosed, much less discussed, in Chevron's filings to regulators. There is another vivid example of Chevron's dual track of disclosing its real risks to courts where few are watching, and hiding them in its public filings intended for investors and the financial markets. Chevron's lead outside counsel on the Ecuador matter, Randy Mastro, 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.¹⁴

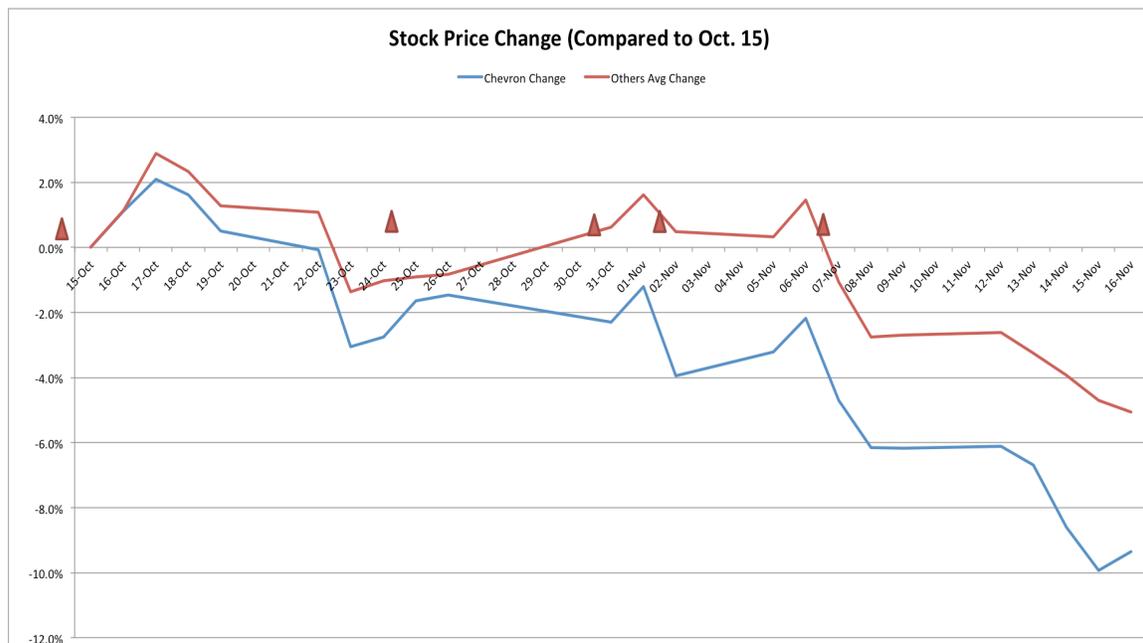
¹² Chevron Corp. Form 10-Q for the quarterly period ended September 30, 2012 (filed November 6, 2012) at p. 16 (hereafter “10-Q”)

¹³ *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>

¹⁴ *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

Whether one characterizes the risk 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.¹⁵ By not disclosing its true appreciation of the “Sword of Damocles” risk Chevron faced from enforcement actions before those actions were initiated, Chevron effectively prevented its shareholders from making an informed decision to sell their shares *before* the harm began to occur. This is at minimum a *prima facie* violation of the federal Securities Act of 1934.

Though any number of factors can affect a company’s stock price, it is notable that Chevron stock significantly under-performed its three closest industry peers (ExxonMobil, BP and Shell) in the month immediately following the release of the asset seizure/freeze order on October 15. Chevron’s stock dropped more than 10% during this period, or double the drop of its three closest peers, as illustrated by the following graph.



Source: Yahoo! Finance

In this time period, investors finally had access to public information about the “irreparable damage” posed by the seizure/freeze order that Chevron already had quietly admitted in court. For example, *Platts Oilgram*, a leading oil industry trade publication, reported on November 13, 2012 that Chevron’s plans for major new investments in Argentina - including the drilling of 120 new oil wells over the next three years at a cost of \$1.8 billion – could be scuttled by the new embargo. Platt’s also reported that the freeze order in Argentina could have a “major impact on Chevron becoming a partner

¹⁵ *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).

with YPF in Vaca Muerta,” according to the former national energy secretary of the country.¹⁶

Chevron also misleads its shareholders when it claims it “has no assets in Ecuador.”¹⁷ This assertion was exposed to be a complete falsehood when the Ecuador trial court in fact seized valuable Chevron assets in the form of bank accounts, licensing and royalty revenue streams, and a \$96 million arbitration award receivable by Chevron from Ecuador’s government.¹⁸ While \$200 million may not normally be considered material to a company with roughly \$250 billion in annual revenue, it could be very material to the ability of the plaintiffs to potentially fund further enforcement and collection efforts to collect the full amount of the \$19.04 billion judgment. Given the larger context, \$200 million in assets is likely more than enough to alter the “total mix” of information investors would want when evaluating whether there are “no assets in Ecuador” available to the plaintiffs.

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, 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...the highly uncertain legal environment surrounding the case provides no basis for management to estimate a reasonably possible loss (or a range of loss).¹⁹

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. Chevron’s only excuse for withholding this estimate relies on its self-serving assessment of “defects” in the Ecuador judgment itself, including a 2008 expert report on damages submitted to the Ecuador court that Chevron claims was fraudulent. But both the Ecuadorian trial court and appellate panel considered all of Chevron’s arguments on the same alleged “defects” and rejected Chevron’s contentions. 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 the alleged “defects” on which Chevron relies will play little or no role in the enforcement stage of the process now underway.

Even with its “defects” excuse, Chevron still appears to be in violation of the loss contingency disclosure rules in the United States that are governed by the Financial

¹⁶ “Chevron’s Argentina units appeal embargo case” *Platts Oilgram* online:

<http://chevrontoxico.com/assets/docs/2012-11-platts-articles.pdf>

¹⁷ 10-Q, *supra* note 12 at p. 16.

¹⁸ *Supra* note 8

¹⁹ 10-Q, *supra* note 12 at p. 15.

Accounting Standards Board's 1975 Standard No. 5 – “Accounting for Contingencies”. This standard requires an estimate from a loss contingency (which 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.²⁰ 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 clearly must provide a loss contingency for the Ecuador litigation. The Ecuador judgment was affirmed on appeal and is now enforceable. The possibility of enforcement is certainly more than remote, especially given that a freeze order has been issued covering Chevron assets in Argentina. And once again, in settings that are not readily accessible by investors, Chevron has in fact calculated an estimate of loss related to the Ecuador judgment -- albeit for the absurdly low amount of \$200 million. This estimate proves that Chevron can engage in loss contingency calculations, though this figure could amount to perjury considering that Chevron already has spent several times this amount on its legal defense, and already has \$200 million of company assets in the process of seizure in Ecuador with billions more frozen or in the process of potentially being 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.²¹ By contrast, Chevron has continued to withhold a loss contingency despite having a precise enforceable judgment in place. The BP example captures the irrationality of Chevron's \$200 million loss estimate; 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. Yet BP has publicly estimated \$37 billion in loss contingency, which is approximately 185 times greater than what Chevron has estimated in Ecuador.

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 fact, it appears Chevron deliberately “spins” or even lies about unfavorable court rulings to minimize the negative impact. It is indisputable that Chevron has not disclosed the extent to which its litigation position has worsened considerably in recent months.

²⁰ FAS 5 – Accounting For Contingencies at paragraph 8. Online: <http://www.fasb.org/pdf/fas5.pdf>

²¹ <http://www.bp.com/generarticle.do?categoryId=2012968&contentId=7073667>

For example, Chevron discloses in detail an interim award issued by a private investment arbitration panel that purports to direct the Republic of Ecuador to take all measures necessary to suspend the enforcement and recognition of the judgment against Chevron.²² However, Chevron fails to disclose that the rainforest communities are not a party to this proceeding and are not bound by the ruling. Chevron also fails to disclose that there is a dispute about whether the arbitration panel has the legal authority to act in this fashion; that the Republic of Ecuador has repeatedly refused to comply with the ruling on the grounds it violates Ecuador's Constitution and international law; 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 rainforest communities to enforce their judgment anywhere in the world.²³ The Ecuador Appellate Court cited these rulings in rejecting the interim award; though this also has not been disclosed by Chevron. These developments are material to investors in evaluating Chevron's claims that the investment arbitration limits Chevron's exposure to the \$19.04 billion award.²⁴

Chevron also appears to be misleading investors regarding the merits of its civil *Racketeer Influenced and Corrupt Organizations* (RICO) lawsuit in New York against the Ecuadorian plaintiffs and their counsel. Chevron has continued to state in its public filings that it is using RICO to seek relief that includes "a declaration that any judgment against Chevron in the Lago Agrio litigation is the result of fraud and other unlawful conduct and is therefore unenforceable."²⁵ While the company later admits that the Second Circuit Court of Appeals dismissed its claim in its entirety, it still claims in the same filing that it is still "seeking" the very relief that was deemed illegal.

Worse still, Chevron refused to disclose that the U.S. Supreme Court summarily rejected its appeal of the Second Circuit's ruling on October 9, 2012, or nearly a month before the release of the third quarter 10-Q. This means that Chevron has no ability to use its RICO claims as a basis for injunctive relief on enforcement, despite its claims to investors that it is still seeking such relief. Given Chevron's internal assessment of the risks associated

²² 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>

²³ 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."

²⁴ 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]").

²⁵ 10-Q, *supra* note 12 at p. 16.

with judgment enforcement – “irreparable injury...not remediable by money damages” – it is a material omission to not disclose the Supreme Court’s decision foreclosing the possibility of injunctive relief to block asset seizure actions.

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.²⁶ 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.²⁷ 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.²⁸

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. Kaplan ruled:

²⁶ See, e.g., http://www.texaco.com/sitelets/ecuador/docs/motions_to_dismiss.pdf

²⁷ *Aguinda v. Texaco*, 303 F.3d 470 (2d Cir. 2002) at 478-478.

²⁸ *Republic of Ecuador v. Chevron Corporation*, *supra* note 12 at p. 6.

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 person.²⁹

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 *Aguinda* plaintiffs are using the referenced law, the 1999 Law of Environmental Management ("Ley de Gestion 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.³⁰ It is well-settled law that a statute of limitations defense, once waived, cannot be reasserted without the consent of the opposing party.³¹ 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 given Texaco by the government of Ecuador and PetroEcuador

Chevron's assertion is grossly misleading. 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

²⁹ *Chevron Corp. v. Steven Donziger, et. al*; Opinion on Partial Summary Judgment Motion (31 July 2012) at page 75.

³⁰ *Aguinda*, 303 F.3d 470,475.

³¹ 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)

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.”

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) “Texpet, a subsidiary of Texaco Inc., was a minority member of this consortium with Petroecuador, the Ecuadorian state-owned oil company, as the majority partner”

While this statement is technically correct, this characterization of the relationship between Texpet and Petroecuador is materially misleading to investors as Chevron has refused to disclose that Texpet was the exclusive “operator” of the consortium. This is an undisputed fact and a key legal distinction for assigning liability as the Ecuadorian court found when it ruled that Chevron, as the operator of the concession and the designer of all production infrastructure, can be held liable for 100% of the damage, not the 37.5% that Chevron claims corresponds to its ownership share in the consortium.

f) 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.³²

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.”³³

³² 10-Q, *supra* note 12 at p. 16.

³³ Ruling of Presiding Judge Nicolas Zambrano Lozada, Provincial Court of Sucumbios, 14 February 2011, p.34 and p.104-106.

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. It also conveys this sentiment directly to investors at every opportunity, such as the last time Chevron CEO Watson joined a quarterly earnings call with analysts. On that call, Watson stated:

Now, when it comes to Ecuador, that has been in the news as well... And I think it's generally acknowledged that this case is a product of fraud. Most of us know that. This is a collaboration between corrupt plaintiff's lawyers in the U.S. and a corrupt judiciary in Ecuador.³⁴

During the same conference call, Watson also referred to the case as "an elaborate fraud" and said the judgment was the product of "collusion."³⁵ Watson clearly has leveraged his personal credibility to signal to Chevron's investors that the 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. 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.³⁶ 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 18 different U.S. trial courts have specifically rejected Chevron's attempts to obtain rulings that the Ecuador judgment was illegitimate.³⁷ Below are excerpts from just five 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."³⁸
- 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."³⁹
- Another ruling in Massachusetts rejected Chevron's claims and found that Chevron "has not shown Respondent engaged in or intended any criminal or fraudulent activity."⁴⁰

³⁴ Chevron Q4 2011 Earnings Conference Call Transcript, Jan. 27, 2012. (emphasis added.)

³⁵ *Ibid.*

³⁶ source from Evidence Summary

³⁷ <http://chevrontoxico.com/assets/docs/2012-chevrons-losses.pdf>

³⁸ *Chevron Corp. v. Allen*, No. 2:10-mc-00091, Dkt. 38 at 13 (D. Vt. Dec. 2, 2010)

³⁹ *Chevron Corp. v. Bonifaz*, No 10-mc-30022, Dkt. 47 at 20-21 (D. Mass. Dec. 22, 2010)

- In Ohio, a court threw out Chevron’s fraud allegations against one of the plaintiff’s experts, ruling “there is no factual basis for Chevron’s assertion that Mr. Barnhouse was involved in any alleged ongoing fraud.”⁴¹
- 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.⁴²

In addition to the above district court rulings, four appellate courts have rejected Chevron’s fraud claims, with one judge in the Fifth Circuit Court of Appeals labeling Chevron’s fraud claims “hyperbole” and accusing the company of “*making a mountain out of a molehill*.”⁴³ As noted above, even the Supreme Court of the United States has refused to rule on Chevron’s fraud claims, but the company has refused to fully disclose to investors the wholesale nullification of the centerpiece of its legal strategy.

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 case and 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. It is something that is happening now. 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.

⁴⁰ *Chevron Corp. v. Shefftz*, No. 10-mc-10352-JLT, Dkt. 45 (D. Mass. Dec. 7, 2010)

⁴¹ *Chevron Corp. v. Barnhouse*, No. 1:10-mc-00053, Dkt. 36 at 21 (S.D. Ohio Nov. 26, 2010)

⁴² *Chevron Corp. v. Quarles*, No. 3:10-cv-00686, Dkt. 108, Order at 2 (M.D. Tenn. Sept. 21, 2010)

⁴³ *Chevron Corp. v. 3TM Int’l, Inc.* No. 10-20389 (5th Cir.) at 34-35