# ANNEX D: RESPONSE TO CLAIMANTS' "GHOSTWRITING" ALLEGATIONS

1. In their most serious allegation, Claimants accuse Judge Zambrano of issuing under his own name a 188-page Judgment authored by the Lago Agrio Plaintiffs. In support of this accusation, Claimants ask this Tribunal to (a) impute to emails and other communications connotations that are both speculative and indeed belied by their contexts and (b) fill the multiple voids in their story by importing the most malign inferences. Claimants bear a heavy burden to prove their allegations; they must do so by clear and convincing evidence.[1] Indeed, especially where a party attempts to prove its case by circumstantial evidence — as Claimants attempt to do here — the tribunal must "assess whether or not the evidence produced by the Claimant is sufficient to exclude any reasonable doubt."[2] But short of granting Claimants the benefit of every doubt — a presumption to which they are not entitled — they have not met their burden.[3]

## I. Even With Access To All Of The Lago Agrio Plaintiffs' Files, Claimants Cannot Prove The Most Basic And Fundamental Aspects Of Their Ghostwriting Allegations

2. To dispel any serious consideration that the Lago Agrio Plaintiffs may have ghostwritten the Judgment or otherwise participated clandestinely in its drafting, one need only note what Claimants have *not* shown, and cannot show. This omission is particularly glaring in view of the fact that Claimants have had access to the entirety of the Plaintiffs' lead-attorney's case file, including all of his co-counsel and client correspondence, documents, text messages, and his personal diary — even emails and metadata from forensic reconstruction of his computer

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[1] CLA-232, *EDF* Award at ¶ 221 (the party alleging bribery must do so by "clear and convincing evidence"); RLA-332, *Case concerning Oil Platforms* Judgment, Separate Opinion of Judge Higgins, ¶ 33 (stating that there is "a general agreement that the graver the charge the more confidence must there be in the evidence relied on").

[2] CLA-81, *Bayindir* Award at ¶ 143.

[3] The Republic continues to review the voluminous record that Chevron and the Lago Agrio Plaintiffs created in Ecuador as well as the astronomical amount of discovery Chevron has received through its efforts in the United States. The Republic's review is not complete.

hard drive and web-based email accounts. Through an unprecedented campaign of U.S. discovery, Claimants forced Steven Donziger, the alleged "mastermind" behind the Plaintiffs' "plot," to turn over all of his documents, all of his computer hard drives, and to give Chevron access to all of his email accounts used during the Lago Agrio Litigation. This included all his outgoing and incoming documents and, unlike in traditional U.S. discovery, the judge refused to exempt from production traditionally privileged inter-attorney, attorney-client, draft expert witness material, lawyer thought processes, investigational work product and even highly personal documents.

3. As a result, not only were Claimants afforded complete access to attorney Donziger's files, but after what undoubtedly was a meticulous and extraordinarily costly review of this remarkable universe of documentary evidence, Chevron deposed Mr. Donziger under oath on those documents for *seventeen* full days (the norm is seven hours). In similar discovery proceedings brought against Plaintiffs' other lawyers, scientific support teams and expert witnesses, Claimants received full access to hundreds of thousands of other legal and scientific documents and internal communications that they had authored, and literally months of their deposition testimony. Thus, extensive discovery was obtained under subpoena from Plaintiffs' legal and technical support team members, including: Stratus Consulting (environmental consultants), Ann Maest (scientific expert), Douglas Beltman (scientific expert), Joseph Berlinger (filmmaker), Michael Bonfiglio (film producer), Andrew Woods (intern), Brian Parker (intern), Aaron Page (junior attorney), Laura Garr (intern), Alberto Wray (attorney), Cristobal Bonifaz (attorney), Daria Page (junior attorney), William Powers (scientific expert), Charles Calmbacher (former scientific expert), Carlos Emilio Picone (scientific expert), Daniel Rourke (scientific expert), Jonathan Shefftz (scientific expert), Richard Kamp (scientific expert), Charles

Champ (scientific expert), Lawrence Barnthouse (scientific expert), Mark Quarles (scientific expert), Douglas Allen (scientific expert), Robert Paolo Scardina (scientific expert), ELAW (environmental consultancy), H5 (environmental consultancy), Vinchent Uhl (environmental consultant), the Burford Group (litigation funders), and the Weinberg Group (expert consultancy).[4] All-in-all Claimants have received over fifty orders requiring members of the Lago Agrio Plaintiffs' attorneys, their experts, their interns, and almost everyone even remotely connected with them, to turn over millions of pages of documents.

4. Despite having received a virtual blank check for discovery, literally unprecedented and unfettered court-ordered access to review nearly every page of the Lago Agrio Plaintiffs' internal communications and documents, Claimants have not produced a single document — no email, text message, excerpt from a deposition, or other document — proving its allegation that Judge Zambrano's decision was written by the Lago Agrio Plaintiffs' legal team. They have not found a single copy of any document, or portion of any document purporting to be a draft judgment. Nor have Claimants found — despite having unfettered access to all emails and other documents written by Mr. Donziger — any references to drafting a judgment for the Lago Agrio Court. Nor can they point to any communication discussing drafting such a judgment in Plaintiffs' possession. Chevron has built its case based on innuendo and inference, not evidence.

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4 The only U.S. counsel from whom Claimants have not received complete discovery is Joseph Kohn. But Kohn has repeatedly denied ghostwriting the Judgment and has offered to disclose his complete file but has been unable to because U.S. Courts have upheld the Lago Plaintiffs' rights to protect those documents as privileged. Kohn's willingness to disclose all of his records though surely indicates that there are no references to drafting the final Judgment or any drafts of that final Judgment in his files. It is again simply not credible to believe that Kohn would be willing to commit career suicide by exposing his own involvement in ghostwriting the Lago Agrio Judgment. Kohn has been unequivocal about his motivations; he considers himself a model attorney in his firm and his city, and has openly sought elected office in Philadelphia. If Kohn's files demonstrated his involvement in fraud on the scale Claimants allege, his career in law or in politics would be over, forever.

5. This otherwise inexplicable inability to find supporting documents has not muted Claimants' allegations. Instead, they point to internal discussions among Plaintiffs' counsel, which according to sworn testimony and the context of the complete communications merely contemplate the drafting and filing of a proposed judgment.[5] Proposed judgments are typical in U.S. litigation and most other common law jurisdictions (as this Tribunal recognized at the Hearing on Provisional Measures),[6] so it is hardly an indictment of the Plaintiffs that they considered filing a proposed judgment but then decided not to. The record shows that they opted instead to make their argument in their closing written submissions, i.e., their *alegatos*, a tactical choice well within the latitude of legal discretion.

6. Nor have Claimants found — having had complete access to all of Stratus Consulting's emails, drafts and other documents — any references in their production to Plaintiffs' drafting a judgment, or any documents purporting to be a draft judgment or a portion thereof. In their submissions to Mr. Cabrera, the Lago Agrio Plaintiffs allegedly relied extensively on Stratus Consulting to draft all of the technical and damages aspects of those submissions — including multiple drafts exchanged with multiple people from consultants to attorneys.[7] In stark contrast to their prior utter reliance on Stratus, Claimants would have this Tribunal accept that the Plaintiffs, when ghostwriting the Judgment, would deem themselves competent without Stratus' handholding. But it is hardly credible that the same lawyers who relied on Stratus Consulting so extensively would suddenly believe that no input was needed from them in crafting a reasoned judgment.

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[5] R-273, Donziger Dep. Tr. (July 19, 2011) at 4757; *see also* R-274, Page Dep. Tr. (Sept. 15, 2011) at 170 ("Q. Did Kohn Swift & Graf ever create a draft of a Lago Agrio judgment? A. Not that I'm aware of.").

[6] Interim Measures Hearing Tr. (Feb. 11, 2012) at 141 (President Veeder recognizing that submission of "proposed findings of fact and proposed conclusions of law" "happens in many jurisdictions").

[7] *See, e.g.*, Claimants' Merits Memorial ¶¶ 226-235; Claimants' Supplemental Merits Memorial ¶ 93.

7. It is a rare occurrence for a prosecutor to bring murder charges, much less to obtain a conviction, absent a dead body. Here, there is no draft judgment in the possession of the Plaintiffs; there is no email transmitting a draft judgment from the Plaintiffs to the Court; there is no email even discussing any of the logistics of drafting a judgment; and there is no email referencing that a draft judgment was ever provided to the Court or would be surreptitiously sent to the Court. Claimants would have this Tribunal instead believe that the attorneys who discussed their communications with Mr. Cabrera in excruciating detail and with many different members of their team suddenly avoided all electronic communications for over a year and a half to discuss and draft a 188-page judgment. Unexplained omissions can sometimes be as probative as actual events. Sherlock Holmes famously solved a fictional case by drawing a shrewd conclusion from the curious circumstance of the dog *not* barking in the night.[8] The curious circumstance here is: so much discovery has failed to corroborate Claimants' "ghostwriting" theory. Isn't this the dog not barking in the night?

## II. Claimants' Allegations Concerning The Fusion Memo Fall Apart Upon Examination

8. As noted, Claimants cannot prove the most basic element of their allegations — that the Lago Agrio Plaintiffs' representatives drafted the judgment — and instead can offer only circumstantial evidence grounded in unreliable academic theories.

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[8] Doyle, Arthur Conan, "Silver Blaze" in The Memoirs of Sherlock Holmes (1892). The watch dog made no noise, because no stranger was there.

> Gregory (Scotland Yard detective): "Is there any other point to which you would wish to draw my attention?"
>
> Holmes: "To the curious incident of the dog in the night-time."
>
> Gregory: "The dog did nothing in the night-time."
>
> Holmes: "That was the curious incident."

As explained by Holmes: "I had grasped the significance of the silence of the dog, for one true inference invariably suggests others. . . . Obviously the midnight visitor was someone whom the dog knew well. It was Straker who removed Silver Blaze from his stall and led him out on to the moor."

9. Claimants point to multiple paragraphs from the Judgment that largely mirror portions of the Lago Agrio Plaintiffs' Fusion Memo, idiosyncratic citations and references from the Fusion Memo, and out-of-order numbering similar to that found in the Fusion Memo.[9] Claimants cite to various expert reports they commissioned to support their assertion that "scientific evidence proves that the authors of the Judgment relied on (and copied verbatim) the Plaintiffs' internal legal and technical documents, which were never submitted into the court record or made public."[10] But contrary to Claimants' suggestion, the best available evidence shows that Plaintiffs' "internal documents" relied upon by Judge Zambrano in fact were openly submitted to the court and made public.

### A. Claimants Cannot Prove The Fusion Memo Is Not In The Official Trial Record

10. As a threshold matter, Claimants have not even established the predicate fact on which their argument is based, namely, that the Fusion Memo is not in the official trial record. Claimants' sole evidence for their claim that the memo is not in the record is the expert report of Prof. Patrick Joula.[11] Prof. Juola claims that he performed an analysis of the entire Lago Agrio record using Optical Character Recognition (OCR),[12] and that his analysis unearthed neither the Fusion Memo nor portions thereof in that record.[13]

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[9] Claimants' Supplemental Merits Memorial ¶ 6.

[10] *Id.* ¶ 6. Claimants also cite to the Expert Report of Robert A. Leonard to show that the Fusion Memo was relied upon by the Court. That the Court relied on documents submitted to it is not improper; it is to be expected. Nor is there any aspect of the Fusion Memo that added to Plaintiffs' arguments already in the record. In fact, the Lago Agrio Plaintiffs largely tracked the substance of their Fusion Memo argument in their *alegato*, which was submitted to the Court on December 17, 2010. R-195, Lago Agrio Plaintiffs Legal Report (Alegato) filed in Lago Agrio Litigation – Part Two at 102-06.

[11] Claimants' Supplemental Merits Memorial ¶ 6, n.15.

[12] Claimants have not provided the Republic with a copy of the record that Prof. Juola examined so there is no way for the Republic to independently verify that the record he analyzed is coextensive with the actual Lago Agrio Record.

[13] *See* C-1007, Declaration of Patrick Juola, Ph.D., Dec. 20, 2011, at 3-4.

11. But this conclusion was countered by Professor Fateman, one of the Lago Agrio Plaintiffs' computer experts, who opined that "it is quite implausible that an effective computer search of the lower court record could be done."[14] As Professor Fateman explained, OCR technology works well with "clean freshly typeset copy," but as even a cursory review of the Lago Agrio Record shows, the record is anything but clean freshly typeset copy.[15] In his declaration, Prof. Fateman listed his results obtained by using Prof. Joula's OCR methodology on the Lago Agrio Record, contrasting them with Prof. Joula's results.

| **Results of OCR** | **Actual Text** |
|---|---|
| .·’C;O:R E;,.8,UJlERIOR’.D·E,,..j:US·TIEIA : ‘Il·E·’··.:I\IUEVA’ :tOJA” .....•.... | CORTE SUPERIOR DE JUSTICIA DE NEUV A LOJA. |
| TEXPET con CH~~ó;0’-?:>,-”‘.”, CORPORATJON. .( ~.,.,” ‘1,: | TEXPET con CHEVRON CORPORATION |

12. As Professor Fateman explained, to perform a search using OCR technology one must first feed the documents at issue through OCR recognition software. That software attempts to recognize shapes formed by dark lines (which the human brain recognizes as letters) and to convert those shapes into letters. As can be seen from the examples above, OCR software is far from perfect at this task, even though the same effort is fairly simple for human readers. Based on his expertise and review of the record, Prof. Fateman concluded that "it would be inappropriate to assert that material claimed to be unfiled could not possibly be present in the lower court record."[16]

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14 R-655, Decl. of Richard J. Fateman, Ph.D. (Feb. 22, 2012) ¶ 28.

15 *Id.* ¶ 18.

16 *Id.* ¶ 29.

### B. Evidence Shows The Fusion Memo Was Publicly Submitted To The Court

13. But even if the Fusion Memo cannot be found in the official Lago Agrio trial record, it cannot be concluded solely on such basis that its absence either logically or legally necessitates a finding of unlawful conduct, much less a criminal conspiracy. To the contrary, the Lago Agrio Plaintiffs' communications and the trial court record establish a far less suspicious — and far more likely — explanation.

14. On at least six occasions, Plaintiffs' internal communications reveal their affirmative intent to submit (transparently and openly) materials to the Court, including legal arguments regarding the legal effect of Chevron's merger with Texaco. From at least as early as October 2005, Plaintiffs discussed among themselves an intent to submit the Fusion Memo and its accompanying exhibits to the court during one of various judicial inspections. On October 12, 2005, Aaron Page, then a law school student interning with the Lago Agrio Plaintiffs' attorneys, established the Plaintiffs' plan for addressing the legal effect of Chevron's merger with Texaco on the record during one of the judicial inspections. Mr. Page had begun what he called then the "affadavit's [sic] of foreign law" that he proposed Pablo Fajardo submit to the Court in writing or at least read at a judicial inspection.[17] While Mr. Page recognized that they would not be able to complete that project by the October 19, 2005 inspection at Guanta Production Station, Plaintiffs planned to "stir [Chevron] into providing some more information and arguments in response" to Plaintiffs' position on the legal effect of the merger, so that the Plaintiffs would know "what they have up their sleeve before . . . submit[ting] [their] more

[17] R-656, Email from A. Page to S. Donziger, *et al.*, October 13, 2005 [DONZ00085932] Both sides' counsel were present at all judicial inspections and were free to ask questions, cross-examine witnesses, and make statements to the Judge during these occasions, which common law attorneys would analogize to being "in open court." *See* C-1367, Lago Agrio Clarification Order of the Judgment, May 4, 2011 at 22.

detailed legal arguments."[18] Far from acting surreptitiously, the very premise of Plaintiffs' legal strategy was to discuss the issues raised in the Fusion Memo openly, with Chevron's counsel present, so that they could elicit Chevron's responsive arguments.

15. In November 2006 the Plaintiffs planned to "stir the pot" further regarding the "fusion" of Texaco and Chevron in the course of responding to the Judge's request for evidence at the Auca 01 or Cononaco 6 Judicial Inspection.[19]

16. Finally, during the June 2008 Aquarico judicial inspection, Plaintiffs argued the legal effect of the Chevron-Texaco merger directly to the Court, of course in the presence of Chevron's cadre of counsel, who attended every judicial inspection. At the Aquarico inspection, Plaintiffs' counsel accordingly implemented Mr. Page's original plan by submitting their documentary evidence on Fusion, and as their internal communications indicate, simultaneously submitting the Fusion Memo itself. Therefore, on June 9, three days before the Aquarico inspection, Plaintiffs prepared a final version of the Fusion Memo[20] and a list of accompanying exhibits to be submitted.[21] At the June 12 judicial inspection, both parties discussed with the Judge the Chevron-Texaco merger and its legal implications for the case.[22] The court docket notes submission by Pablo Fajardo at the inspection site of all of the Fusion Memo's accompanying exhibits.[23] In fact, each of these exhibits referenced in the Fusion Memo was docketed in the record, even though the memo itself apparently was not, thereby at the worst

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[18] *Id.*

[19] R-832, Email from P. Fajardo to S. Donziger, *et al*., Nov. 9, 2006 (discussing plan for Yuca 2, Auca 01, and Cononaco 6 inspections).

[20] R-657, Email from G. Erion to S. Donziger, June 9, 2008.

[21] R-658, Email between Steven Donziger and Juan Pablo Sáenz, June 9, 2008 (discussing merger documents to be submitted).

[22] R-660, Lago Agrio Record, Cuerpo 1309 at 140787-814 (Acta from JI of Aguarico 2).

[23] R-530, Lago Agrio Record, Cuerpo 1308 at 140701 ("Protocolizacion" attaching Fusion Memo exhibits).

suggesting some administrative hiccup.[24] The Fusion Memo exhibits submitted at the Aquarico 2 judicial inspection are the very exhibits cited in the Lago Agrio Judgment in the legal discussion of "lifting the corporate veil" — the same discussion that Claimants allege was copied from the unfiled Fusion Memo.[25]

17. Of particular note, Claimants allege that the Lago Agrio Plaintiffs, in 2011, relied on a November 2007 version of the Fusion Memo in their alleged surreptitious writing of the Lago Agrio Judgment.[26] As Claimants know, though, the Lago Agrio Plaintiffs had multiple versions of the Fusion Memo, including the 2008 version submitted at the Aquarico 2 JI, and a 2011 version that was circulated in preparation for the Plaintiffs' *alegato*.[27] What Claimants would have this Tribunal believe is that despite having more up-to-date versions of the Fusion Memo, the Lago Agrio Plaintiffs searched their files to find the 2007 version of the Fusion Memo and then used the outdated version in secretly drafting the ultimate Judgment. As Occam's Razor would hold, it is far more likely that the Lago Agrio Court relied on the 2008 version of the Fusion Memo submitted to the Court at the Aquarico 2 JI, and that a clerical mistake kept it from being lodged as an official part of the record.

18. That at least a handful of documents — out of many tens of thousands of documents — may not have been docketed as part of the official trial record is readily apparent. For example, the *Crude* outtakes show that both parties routinely engaged in substantive *legal* discussions (in addition to the taking of evidence) with the Court during the judicial inspections.

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[24] *Id.*

[25] C-931, First Instance Judgment by the *Lago Agrio* Court, *Aguinda v. Chevron*, Feb. 14, 2011 at 8 (citing to Fusion exhibits starting at 140700); *id.* at 9 (citing 140747 and 140748); *id.* at 10 (citing 140750); *id.* at 11 (citing 140766, 140767, 140768; *id.* at 13 (citing 140770, 140759, 140761, 140768); *id*. at 15 (citing 140759).

[26] Report of Robert A. Leonard, Ph.D., Jan. 5, 2012 at 9, 13 *et seq*.

[27] R-566, Fusion Memo Versions Chart, Dec. 12, 2012, filed in *Chevron Corp. v. Donziger, et al.*, Case No. 11-cv-691.

And as part of the legal discourse, counsel for both parties provided the Court, and presumably each other, with documents — a few of which may inadvertently not have made it into the official record.

19. For instance, in the *Crude* outtake from Sacha Sur, Mr. Alejandro Ponce Villacís can plainly be seen openly providing a document to the court.[28] Later, in another outtake from the same judicial inspection, the parties' counsel can be seen debating the legal effect of the Chevron-Texaco merger.[29] Similarly, at the judicial inspection of Cononaco 6, Mr. Pablo Fajardo handed a document to Chevron's counsel, Mr. Adolfo Callejas, (at 5:00) and then Mr. Callejas handed it to the court (at 8:40).[30] In neither case, however, does the trial record note the Court's receipt of the document from a party.

20. The Ecuadorian legal system is not the first legal system to have lost one or more filed documents. The fact that paper filing systems are inefficient and are prone to lose documents is one of the reasons many U.S. Court jurisdictions — but not all — are moving to electronic filing systems.[31] Losing filed documents is a frequent enough occurrence in the United States that many states and the Federal Government have enacted laws to help parties and the courts deal with the missing documents.[32]

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[28] R-840, Crude Outtakes at 30:40.

[29] R-841, Crude Outtakes at 30:00.

[30] R-842, Crude Outtakes at 8:40.

[31] *See, e.g.*, R-661, McMilan, Walker, and Webster, A GUIDEBOOK FOR ELECTRONIC COURT FILING 111-12 (West 1998); R-572, Alan Carlson, *Electronic Filing and Service: An Evolution of Practice* (Justice Management Institute 2004) at 3, 46 (noting one of the benefits of electronic filing is reduction in lost documents); R-663, Electronic Case Filing, Southern District of New York ("Benefits of filing electronically using ECF include" avoiding "[s]torage of paper files that may be misplaced or lost").

[32] *See, e.g.*, RLA-397, 28 U.S.C. 1734 (titled "Court record lost or destroyed, generally"); RLA-398, 705 Illinois Compiled Statutes 85 (titled "Court Records Restoration Act").

21. The totality of the circumstances strongly suggest that the Fusion Memo was provided to the Court — and may have even been read to the Court — openly and in Chevron's counsel's presence. Its contents were clearly discussed, and its attachments indisputably made it into the record. The document itself was derived from public case law and texts. It had no "surprise value," and Plaintiffs therefore had nothing to gain by concealing the language from Claimants. In any event, these same arguments were later covered *in extenso* by both sides in their respective *alegatos*. Worst case, even if Claimants' expert is correct in finding that the Fusion Memo is not part of the *official* record, that falls far short of establishing that such document (or its relevant contents) was not provided to Chevron; nor does it establish that it was not viewed by both sides and discussed openly at a judicial inspection. Claimants' army of attorneys and experts cannot transform an administrative oversight into a crime by force of rhetoric.[33]

22. There are other examples of discreet clerical errors in this eight-year trial. On a single day, October 14, 2010, Chevron filed thirty-nine separate motions challenging one court order.[34] Only thirty-five of those motions appear in the official record.[35] Can an overwhelmed Court be blamed for not being able to administratively process every one of these repetitive

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33 As Claimants also know, both parties also had a practice of submitting to the Lago Agrio Court, as part of the judicial inspection process and sometimes as a complement to a motion, CDs and DVDs containing documentary evidence. *See*, *e.g.*, R-664, Lago Agrio Record, Cuerpo 1416 at 151470-71 (Chevron asking the Court to review and incorporate into the record the contents of a CD containing sampling data and quality control data related to those samples); R-665, Lago Agrio Record, Cuerpo 108 at 12008 (noting Chevron's submission of a CD and accompanying video to the court during the Sacha 14 JI); R-666, Lago Agrio Record, Cuerpo 108 at 12047 (Chevron submitting CD of video presented at Sacha 14 JI). While at times the Court added those discs to the Record, *see* R-667, Lago Agrio Record, Cuerpo 1076 at 117078 (incorporating transcript of Chevron's video submitted at the Lago Agrio 2 JI), it did not always do so. *See, e.g.*, R-668, Lago Agrio Record, Cuerpo 1416 at 151454-455 (Providencia noting CD submitted by Chevron but not yet included in record).

34 *See* C-644, Court Order, Provincial Court of Sucumbíos, Oct. 19, 2010 (addressing Chevron's thirty nine motions).

35 Cuerpo 1989 ends with Chevron's Motion filed at 5:44pm — the 35th of 39 it filed that evening. Cuerpo 1990 starts with the Court's Order addressing those 39 motions. *See*, *e.g.*, R-182, List of Motions Addressed by Court's Order of Oct. 19, 2010, 17H02M.

submissions? Even in the most efficient and industrious courts clerical glitches happen. In Lago Agrio, clerical mistakes are also reflected in the fact that, although each page is supposed to be sequentially numbered, in sections of the record only every other page is numbered — including the section of the record containing the Fusion Memo's exhibits.[36]

23. That the administrative support staff in a provincial trial court in an outpost of the Amazonian rain forest — where Chevron had insisted that the trial take place in preference to the New York federal court — had trouble with the volume of pleadings and evidence in this case is hardly surprising. This gargantuan proceeding, in contrast, generated about 250,000 pages — likely the largest record of any case in Ecuadorian jurisprudence and clearly 2000 times larger than the average case. Suffice it to say that clerical mistakes of this kind would not constitute reversible error in a domestic appellate court, and certainly not amount to a denial of justice constituting a breach of international law or a bilateral investment treaty.[37]

## III. Access To The Selva Viva Database Does Not Show Ghostwriting

24. Claimants also note that the Judgment refers to the Lago Agrio Plaintiffs' "Selva Viva database," which, according to Claimants, was not in the record. Claimants specifically point to a number of references in Judge Zambrano's decision to samples that include "_sv" or "_tx" suffixes as proof that Judge Zambrano had access to the Selva Viva Database, which also uses "_sv" or "_tx" suffixes. According to Claimants, this nomenclature was not used in the

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[36] R-669, Lago Agrio Record, Cuerpo 1309 at 140716-786 (including unnumbered pages). *See also, e.g.*, R-670, Lago Agrio Record, Cuerpo 1439 at 153734-737 (alternating with pages from roughly 60,000 pages earlier in the record).

[37] Claimants also allege that Judge Zambrano had access to "the Plaintiffs' unfiled index summary" because the Judgment contains "repeated errors and identical word bundles." SMM ¶ 8. But Claimants have not proven these "Index Summaries" are the Lago Agrio Plaintiffs' original work. It is far more likely that the Lago Agrio Plaintiffs received these excel spreadsheets from the Court, which maintained extensive spreadsheet records of the parties' filings. *See* R-833, Crude Outtakes at 29:15-42:00 (video of Mr. Fajardo submitting documents to the Court and showing the Court's index summary on the secretary's computer screen); R-834, Crude Outtakes at 7:00-7:34 (close-up video of the Lago Agrio Court's spreadsheet for tracking site inspections and expert reports).

official trial record and thus its use in the Judgment proves that Judge Zambrano had outside-the-record access to the Selva Viva Database.

25. In fact, the Selva Viva Database was merely a compilation of all the testing results — Plaintiffs' and Chevron's — from the judicial inspections filed with the court and sprinkled throughout the court record. Plaintiffs frequently employed this "sv" and "tx" nomenclature in court filings, and it consequently appears in the record numerous times.[38] It is far from surprising that the Plaintiffs used their own nomenclature. It is also unsurprising that Judge Zambrano used that nomenclature — he surely had no idea that using a party's sample name nomenclature would eventually be used as evidence of ghostwriting.

26. But even leaving this aside, the Court's alleged reliance on compilations not officially identified as part of the official court record — but compiling data that had been separately filed as part of that record — cannot give rise to a Treaty breach or a violation of customary international law unless it reflects such an egregious and overwhelming violation of Claimants' due process rights such that they were deprived of a fundamentally fair trial. As before, Claimants make the leap that because the Selva Viva data, in relevant part, are allegedly not identified in the official record, the Lago Agrio Plaintiffs must have ghostwritten the Judgment. In so concluding, Claimants infer that (1) the Plaintiffs did not share the Selva Viva data with anyone or otherwise sought to keep the data out of the record; and (2) the Plaintiffs drafted the Judgment in reliance on this data and somehow transmitted this proposed judgment to

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[38] R-671, Lago Agrio Record, Cuerpo 1292 at 139090 (containing 12 samples with "_sv" suffixes); R-836 Stratus Consulting, History of Contamination at Oil Wel Lago Agrio 11A, Oil Well Sacha 94, and Production Station Aguarico in the Napo Concession, Ecuador (2007), in Lago Agrio Record, Cuerpo.1746 at 184395 *et seq.*; *id*. at 184420 (5 samples); *id*. at 184421 (5 samples); *id*. at 184425 (2 samples); *id*. at 184438 (5 samples); *id*. at 184446 (2 samples); *id*. at 184474 (5 samples); *id*. at 184475 (4 samples). These were duplicated in English. R-837, Lago Agrio Record, Cuerpo 1746 at 184516, 184517, 184521, 184534, 184542, 184565, 184566.

the Court with no trace of the communication. Claimants again fall far short of proving their contentions or satisfying their high burden of proving corruption.

27. While the Republic does not know whether, or how, the Court received the Selva Viva data, logic surely is not on Claimants' side. If a party were to ghostwrite the Lago Agrio Judgment, the most critical requisite would be to identify and cite only the evidence in the trial record. Claimants instead suggest that the alleged co-conspirators were so farsighted that they accomplished their ghostwriting goal while avoiding any email or other communication referencing the plot, yet at the same time were so careless that they had the ghostwritten document cite documents not part of the record — documents that Claimants allege in the RICO action the authors *knew* were not in the record.

28. We have already shown that the parties submitted documents to the Judge "in the field" during the judicial inspection process, and routinely submitted CDs and DVDs to the court, both during the judicial inspection process and as an adjunct to their motions practice, though the documents frequently were not identified as part of the trial record. Chevron never objected to this practice, and instead actively participated in it.

29. Nor would it have been improper for either party to provide facts and data to Mr. Cabrera for his consideration. Both parties had the legal right to communicate with the expert to provide information to the expert for his consideration.[39] While Claimants contend that the Lago Agrio Plaintiffs went too far and effectively drafted Cabrera's report for him, Claimants have never taken the position that the parties were prohibited from communicating with court-appointed experts or from providing him with information for his consideration. And if the

[39] R-599, Aff. of Dr. Farith Ricardo Simon, Feb. 16, 2011, filed in *Chevron Corp. v. Donziger, et al.*, Case No. 1:11-cv-691, at ¶¶ 4-5, 7-8 (attesting to the legality and commonality for parties to communicate and meet with court-appointed experts and to advocate their positions).

Plaintiffs transmitted data to Mr. Cabrera, there would have been nothing wrong with Judge Zambrano requesting — or Mr. Cabrera providing at the conclusion of his work — a copy of all of his raw data compilation.

30. The Court's presumed receipt of the Selva Viva data cannot be a basis to conclude that the Judgment was ghostwritten or that the proceedings were unfair. In his 188-page decision, Judge Zambrano identified many, many dozens of exhibits that he had considered. If among the 200 or more exhibits cited by the Court there in fact exist two (or even more) documents *not* reflected in the docket entries, that would indicate only that the Court may have received and considered documents that the court clerk should have recorded and identified. That may constitute a clerical error, but it surely does not establish fraud or a violation of international law.

31. In this regard it is important to understand what the Selva Viva Database is, and is not. In 2005, when the judicial inspections had begun, the Plaintiffs realized they needed to create a master database of all sampling data collected. To that end the Plaintiffs hired an outside consultant who input all of Chevron's data and the Plaintiffs data into a unified Access database named the "Selva Viva Database."[40] Eventually that database took two forms, the original Access database and later a collection of Microsoft Excel spreadsheets.[41] Both forms of that database contained the same information, i.e., only raw sampling data, no argument or other text.

32. As Claimants have admitted in New York, the validity and integrity of the Selva Viva Database's data collection is not in dispute — it accurately and thoroughly reflects both sides' sampling results. As a result, regardless of how Judge Zambrano received the Selva Viva

[40] R-672, Email from S. Donziger to L. Carvajal, *et al.*, July 3, 2007 [DONZ00062506].

[41] *Id*.

Database, Claimants were not prejudiced because Judge Zambrano had an easy method to access both sides' sampling data.

## IV. Claimants' Stylistic Analysis Of The Judgment Is Pseudo-Science And Is Discredited Around The World

33. Claimants rely on the Expert Report of Prof. Gerald McMenamin to conclude that "Judge Zambrano did not write the Judgment."[42] Prof. McMenamin claims to have analysed "seven patterned and re-occurring markers of writing style" to conclude that "'it is highly probable that Judge Zambrano did not author a significant amount of the [Judgment].'"[43] At the outset, Prof. McMenamin's methods and conclusions are highly suspect. In some U.S. courts for instance, Prof. McMenamin's field of study is not even accepted as reliable and therefore such experts have been barred from submitting their opinions to the trier of fact.[44] And, even when the experts and expertise are accepted, courts frequently do not allow the experts to offer an opinion on authorship.[45]

34. As one poignant example of why Prof. McMenamin's stylistic analysis is often deemed unreliable and excluded from U.S. Courts, in the RICO action in New York, Chevron

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42 Claimants' Supplemental Merits Memorial ¶ 10.

43 *Id.* ¶ 10.

44 *See*, *e.g.*, RLA-328, *United States v. Lewis*, 220 F.Supp.2d 548, 552-53 (S.D.W.Va.2002) (finding that proponent of forensic document expert had failed to establish testimony's reliability); RLA-326, *United States v. Saelee*, 162 F.Supp.2d 1097, 1105-06 (D.Alaska 2001) (excluding handwriting expert testimony in its entirety as inherently unreliable).

45 RLA-399, *Wolf v. Ramsey*, 253 F.Supp.2d 1323, 1347-48 ("while Epstein can properly assist the trier of fact by pointing out marked differences and unusual similarities between Mrs. Ramsey's writing and the Ransom Note, he has not demonstrated a methodology whereby he can draw a conclusion, to an absolute certainty, that a given writer wrote the Note"); RLA-400, *United States v. Van Wyk*, 83 F.Supp.2d 515, 524 (D.N.J.2000) (allowing an expert to testify about "the specific similarities and idiosyncrasies between the known writings and the questioned writings, as well as testimony regarding, for example, how frequently or infrequently in his experience, he has seen a particular idiosyncrasy"); RLA-401, *United States v. Rutherford*, 104 F.Supp.2d 1190, 1194 (D.Neb.2000) (limiting a forensic document examiner's testimony to "identifying and explaining the similarities and dissimilarities between the known exemplars and the questioned documents"); RLA-402, *United States v. Hines*, 55 F.Supp.2d 62, 68 (D.Mass.1999) (permitting forensic examiner to testify about unique features common or absent in the writings).

submitted the expert report of Professor M. Teresa Turell, who opined on the authorship of the Judgment. In her expert report Prof. Turell concluded that "[t]he written style of some sections of JUDGMENT exhibit linguistic syntactic markers and parameters similar to those found in the style of two sets of texts (academic and legal) written by lawyer [Alejandro] Ponce [Villacis]."[46] But lawyer Ponce, as Prof. Turell calls him, joined his father's law firm, Quevedo Ponce — one of the primary law firms Chevron has retained — in January 2009.[47] Although Alejandro Ponce Jr. once acted as an attorney for the Lago Agrio Plaintiffs, it hardly seems credible that Chevron would continue to retain a firm employing one of the attorneys that it believed covertly drafted the Judgment as part of an illicit plot to extort billions of dollars from the company. Not only is Ponce Jr. now an attorney with Chevron's Ecuadorian law firm, but at least one of the documents Prof. Turell used to identify Ponce Jr. as an author of the Judgment was actually written by his father, Ponce Sr., while his father was working for Chevron.

35. If Claimants' own expert is to be believed, *Chevron's* current attorney(s) in fact ghostwrote the Judgment. And if Claimants' expert is in error, then her report serves as evidence of the exceedingly subjective nature of this "expertise." Not surprisingly, Claimants have elected not to share Prof. Turell's report with the Tribunal.

36. Even if Prof. McMenamin's analysis were reliable, he reaches his conclusions only by ignoring the more likely explanations. It may be, for example, that Judge Zambrano did not write the entirety of the Judgment personally but that he instead incorporated earlier work of other judges sequentially assigned to the case, perhaps along with the work of their law clerks

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[46] R-673, Report of Teresa Turell, Feb. 14, 2011, filed in *Chevron Corp. v. Donziger, et al.*, Case No. 11-CIV-0691 at 44.

[47] R-531, Excerpts of Procedural Order 1, *Chevron Corp. v. Ecuador*, PCA Case No. 34877 (May 22, 2007) (listing Alejandro Ponce Martinez and Quevedo & Ponce as representing Chevron Corp.). *See* R-532, Firm Biography of Alejandro Ponce Villacis.

and his own law clerks. Or he may have adopted the styles of the parties' voluminous submissions, at least to the extent he relied on them. In either event, Prof. McMenamin's analysis fails to establish either that Chevron has not received a fundamentally fair trial or that the case is being adjudicated on a basis other than applicable law.

## V. Claimants' Allegations That The Judge Could Not Have Read The Entirety Of The Relevant Record Are Legally Irrelevant

37. Claimants rely on Dr. Rayner's expert report to conclude that there is no possibility that Judge Zambrano could have read all 237,000 pages of the record and then written a 188-page single spaced Judgment in the two-month period in which Claimants contend it took him.[48] This allegation is as easily dismissed as Prof. McMenamin's above, and for similar reasons.

38. First, there is no rule that prohibited Judge Zambrano from reviewing relevant portions of the Record before he issued his *autos para sentencia* order, closing the evidentiary phase of the case. Indeed, he had previously served a rotation as the presiding judge (from Fall 2009 to Spring 2010), so he was not unfamiliar with the case when he re-assumed the role of presiding judge in 2010.[49] Nor is there any prohibition in Ecuadorian law precluding a judge from beginning to draft a judgment covering those individual issues on which he had previously made a tentative decision. Nor is a judge barred from adopting portions of a draft decision, or the resolution of individual issues to be ultimately covered in a decision, drafted by another judge who previously presided over the case. The Court, where rotation of presiding judges is the norm, is considered a unified body under Ecuadorian law.

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48 Claimants' Supplemental Merits Memorial ¶ 15.

49 *Id.* ¶ 105.

39. In no system of jurisprudence is a trier of fact (whether judge or jury) required to read every page of every document in the record before making findings of fact. Courts are entitled to rely on the litigants' briefs or *alegatos* for summation of and citation to relevant portions of the record on which findings may reliably be made. This Tribunal will no doubt appreciate that litigants routinely fill trial court records with irrelevant and/or duplicative material, whether in the form of pages before and after relevant sections of documents, large repetitive submissions, or highly technical documentation supporting conclusions drawn by experts. Courts are also entitled to assess which facts are not seriously contested and separate them from legitimately disputed propositions. The same applies to the parties' exposition of governing law reflected in their respective legal briefs.

40. The Lago Agrio Litigation was no exception, and indeed Claimants here were chastised multiple times for filling the record with duplicate submissions.[50] A review of the record also demonstrates the degree to which Chevron in particular filled the record with duplicative material. For instance, Chevron seems to have duplicated entire *cuerpos* (bound volumes containing approximately 100 pages of the record), e.g., *cuerpo* 1439 seems to be duplicated by Chevron in *cuerpo* 1441 and then again at *cuerpo* 1443.

41. Similarly, Chevron dumped massive amounts of technical data on the Court. For example, in a Section 1782 action to obtain discovery from Claimants' "independent" laboratory, Chevron claimed that all of the Level 4 Reports[51] that Chevron received for each sample and that the Republic requested in the discovery action had been submitted in Lago Agrio.[52] When those

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[50] *See* Respondent's Track 2 Counter-Memorial on the Merits Section II.B.2.b.

[51] Level 4 Reports are the scientifically detailed reports created by testing companies that document every step of the testing process for each sample tested. Typically, these reports are hundreds of pages each.

[52] R-677, Chevron Corp.'s Anticipated Objections to the Subpoena Proposed by the Republic of Ecuador and Dr. Diego García Carrión, *In Re Application of the Republic*, Case No. 4:11-mc-00088-RH-WCS (Nov. 3, 2011) at 4

reports were eventually produced, they amounted to tens-of-thousands of pages that spanned twenty-two CDs. In any event, the supposed relevance and materiality of these reports was summarized in Chevron's court filings. Similarly, both parties put both English and Spanish translations of many documents originally created in English into the record. At the end of the day it is next to impossible to determine exactly what percentage of the record was superfluous, but no court could reasonably be expected to read line-by-line and digest the contents of twenty-two CDs filled with highly technical data or read both English and Spanish versions of documents.

42. Skimming portions of the record that a judge or panel has deemed irrelevant to its ultimate determination, and relying on the parties' briefs to summarize data, is hardly uncommon. For example, by rough count the *Commercial Cases* BIT tribunal was faced with a record of more than 200,000 pages that was not complete until the Republic's final post-hearing submission on December 10, 2010. Based on Claimants' expert's analysis, each tribunal member then was required to spend more than 425 8-hour days, or more than fourteen months, just reading the record. And, as of the date of the filing of this Counter-Memorial, the record in this Arbitration is approximately 130,000 pages which will, if nothing further is filed, require 270 8-hour days of review according to Claimants' expert. Claimants' analysis is transparently superficial.

## VI. Claimants' Misquotations And Unsupported Inferences From The Plaintiffs' Internal Communications Do Not Show Ghostwriting

43. Claimants' failure to find a draft or copy of the allegedly ghostwritten judgment in the files of counsel for the Lago Agrio Plaintiffs, or in the files of any of their experts, or any

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(objecting to requests for reports because they "would require the production of documents already on file with the Sucumbíos Provincial Court of Justice in Ecuador").

references to the submission of a draft judgment to the Court *ex parte* is telling. All they can come up with is the fact that the Judge's secretary may have failed to lodge a couple of documents as part of the official record. Having scoured the millions of Plaintiffs' internal documents in their possession, they resort to twisting the meaning of a few in an attempt to support their accusations.

### A. Donziger And Fajardo's August 2008 Email Communication Offers No Evidence Of Ghostwriting

44. Claimants first cite to a short portion of an August 2008 internal email exchange between attorneys Donziger and Fajardo. First, the meaning of the abstracted phrase "work[ing] with the new judges" from Mr. Fajardo's email is far from self-indicting. Claimants can only speculate that a negative connotation should be superimposed onto this informal email snippet. Second, the full text of the email reveals that Mr. Fajardo's reference was a direct response to Mr. Donziger's plea to work out a plan to "speed things up."[53] Even then, it took three more years before a decision was issued.

### B. Donziger's Strategic Plan Shows That The Plaintiffs Did Not Ghostwrite The Judgment

45. Claimants next cite to Steven Donziger's email entitled "Strategic Plan for 2009/Ecuador," in which he includes the words "reasoned opinion" in a list related to the word "order."[54] But again there is absolutely no indication that Mr. Donziger intended to *draft* that "reasoned opinion." Claimants' speculation is uncorroborated by evidence that Mr. Donziger's intention was for the Plaintiffs' defense team to ghostwrite anything for the Court. Nothing in the transcripts of seventeen days of deposition testimony from Mr. Donziger, and nothing in the

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53 C-993, Email between P. Fajardo and S. Donziger, Aug. 9, 2008 [DONZ00047253].

54 Claimants' Supplemental Merits Memorial ¶ 16 (citing C-1137, Email from S. Donziger to himself, Jan. 5, 2009 [DONZ00049360]).

universe of emails and other evidence, shows that that is what Mr. Donziger had in mind. Indeed, there is a much more likely explanation than the one offered by Claimants. By that time, Chevron already had challenged prospective enforcement through this Arbitration of any judgment that the Court might render. A reasoned opinion was important because it was clear that Chevron would appeal and then challenge enforcement of any adverse decision. It was to be expected that Mr. Donziger would work to get the court to issue a reasoned opinion. Any lawyer in a case such as that would be expected to work diligently to obtain not only a favorable decision, but a defensible decision, once it is clear that his adversary is likely to appeal.

46. Not only is there no evidence that Mr. Donziger sought to draft the Judgment, but the context surrounding the quoted phrase suggests just the opposite. For example, if he were drafting the Judgment, there would have been no reason to "*ask for* bond and interest to run." In that event, Plaintiffs instead would simply have drafted the Judgment to include an award of post-judgment interest and a provision dealing with the bond required for appeal.

### C. A First Year Law Student Intern Did Not Ghostwrite The Judgment

47. Claimants cite to an email from Mr. Fajardo to Mr. Donziger which states that Brian Parker, an intern with Plaintiffs' legal team, would work on "a research assignment for our legal alegato *and the judgment*, but without him knowing what he is doing."[55] Claimants' narrative weaves this otherwise innocuous reference to a *research assignment* into their conspiracy theory, contending that the Plaintiffs trusted the drafting of the final judgment — in what was then a $27 billion case — to an unpaid first year law student who had volunteered to work on the case over the summer. Again, Claimants present no evidence from the record to support their interpretation. A more plausible reading is that Mr. Fajardo was referring to the

[55] *Id.* ¶ 16 at 10 (citing C-995, Email from P. Fajardo to S. Donziger, June 5, 2009 [DONZ00051338]).

fact that their summer intern knew very little and had almost no relevant factual background or legal experience. Moreover, as Mr. Parker testified in a deposition taken by Claimants during the summer of 2009, he worked on "a memo regarding the adequacy of Ecuador's judiciary," "a chart regarding the health effects of toxins found in petroleum and chemicals used to extract petroleum," "a memo regarding Chevron's tactics internationally in response to human rights allegations," "a memo regarding the public statements of US politicians regarding pending litigation."[56] Even including his work during 2010, Mr. Parker worked only on documents that were ultimately publicly submitted for filing in the Lago Agrio Court, including a report titled "Cultural Damages Caused to Indigenous Communities in the Ecuadorian Amazonia" and "a portion of the alegato finale."[57] According to his testimony, at no time did he work on drafting the Judgment. Claimants' contrary contention is unsupported and should be rejected.

**D. *Delfina Torres Vda. de Concha v. Petroecuador***

48. Claimants rely on an internal email from Mr. Fajardo attaching the Ecuadorian case *Delfina Torres Vda. de Concha v. Petroecuador,* in which an Ecuadorian court entered judgment against PetroEcuador for environmental damage. Claimants suggest that because Mr. Fajardo circulated this email with his assessment of the case and an ellipsis, and because the Judgment ultimately discussed the *Delfina Torres* case, that the ellipsis in the email must refer to ghostwriting.[58] But the Plaintiffs' internal communications reference many dozens of cases and

[56] R-680, Parker Dep. Tr. (Aug. 5, 2011) at 124:10-23.

[57] *Id*. at 149:24-150:1, 159:3.

[58] Claimants' Supplemental Merits Memorial ¶ 16 at 11 (citing C-1138. Email from P. Fajardo to S. Donziger, *et al*., June 18, 2009 [DONZ00051506]).

authorities and theories.[59] That one case is also mentioned by the Court means only that the Court also recognized its significance.

49. Prior to the Judgment, *Delfina* was the leading example (and probably the only example) of an Ecuadorian court issuing damages for oil-related environmental pollution. As a consequence, the *Delfina* case had been cited repeatedly by Ecuadorian courts and litigants as precedent in this legal area. For example, Martha Escobar referenced *Delfina* in her deposition in the related AAA Litigation in November 2006.[60] Chevron included the case in its *alegato* filed in the Lago Agrio Litigation.[61] Similarly, Dr. Alejandro Ponce-Villacis (Ponce Jr.) noted and discussed the case in his declaration filed on December 18, 2006.[62] Indeed, Pablo Fajardo had been including it in letters to the U.S. House of Representatives since June 2009,[63] and included references to it in filings in the Lago Agrio case at least as early as July 13, 2005.[64] The fact that this case is cited throughout Ecuadorian jurisprudence and in the Record is a far more likely explanation for its inclusion in Mr. Fajardo's email, and in the Judgment, than some elaborate ghostwriting plot.

**E. *Andrade v. Conelec***

50. Claimants rely on another email that shows that Mr. Fajardo received — and then forwarded to his team — an excerpt from an Ecuadorian Supreme Court decision called *Andrade*

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59 Ms. Fach, one of the external attorneys advising the Lago Agrio Plaintiffs specifically advised the Plaintiffs to provide as much authority as possible; Plaintiffs internal documents reflect this strategy. "If he is going to rule against the company and wants to substantiate his judgment . . . the judge would be very thankful if you offer him the greatest number of legal doctrine and case law references that support his position. . . . Thus in the text of the final argument [alegato] . . . I would include the greatest numbers of legal doctrine references as possible." R-490, Email from K. Fach to S. Donziger (Sep. 11, 2010) at 2.

60 R-55, Escobar Dep. Tr. (Nov. 21, 2006) at 52:5-8.

61 C-1213, Chevron Initial Alegato, Jan. 6, 2011 at nn. 751, 765, 864.

62 R-105, Decl. of Alejandro Ponce-Villacis (Dec. 18, 2006) at ¶ 5.

63 R-682, P. Fajardo Letter to U.S House of Representatives, June 2009 [DONZ00051382].

64 R-838, Lago Agrio Record at 73587.

*v. Conelec*.[65] They allege that the excerpt sent to and forwarded by Mr. Fajardo "contains numerous mistakes not found in any published version of the court opinion itself," all of which were repeated "verbatim" in the Judgment.[66]

51. In his brief mention of the case in the "trust" section of his Decision, Judge Zambrano was not purporting to quote from *Conelec* when he used "condena" in his paraphrase rather than the word "sentencia" as appears in the Offical Register version of the opinion. The fact that the Fajardo email also uses the word "condena" is more likely coincidental than conspiratorial — particularly when elsewhere in the Judgment[67] Judge Zambrano does actually quote at length from *Conelec* with respect to whether a finding of negligence was required before Chevron could be held liable — a proposition and discussion nowhere mentioned in the Fajardo email and establishing beyond dispute that Judge Zambrano had reviewed the actual text of the *Conelec* decision.[68] At the end of the day, all that this Fajardo email proves is that he received the *Conelec* case from someone who found it in the same source — the source with minor differences from the official version — that the Lago Agrio Court did.

### F. Communications Regarding The Plaintiffs' "Key" Meeting Reflects Plaintiffs' Counsel Lack of Knowledge Of the Court's Intentions

52. Claimants allege that a "key" meeting among the Lago Agrio Plaintiffs' lawyers taking place on June 19, 2009 outlined the details of the Judgment.[69] But that email reveals nothing illicit, only that Plaintiffs' lawyers were planning their next steps once the Court issued

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65 Claimants' Supplemental Merits Memorial ¶ 16 at 10 (citing C-997, Email from P. Fajardo to S. Donziger, *et al*., June 18, 2009 [DONZ00051504]).

66 *Id*.

67 C-931, Lago Agrio Judgment, First Instance Judgment by the Lago Agrio Court, *Aguinda v. Chevron*, February 14, 2011, at 174-75.

68 *Id*.

69 Claimants' Supplemental Merits Memorial ¶ 16 at 10.

its long-overdue judgment. Plaintiffs' lawyers in their inner deliberations clearly mis-prophesied that a judgment was "imminent," but this fact only illustrates that the Judgment was not in their hands. Indeed, if Plaintiffs lawyers' truly had been drafting the Judgment, they would surely have been able to predict with greater accuracy when the Judgment would issue.

### G. The Plaintiffs' Original Strategy To Submit A Proposed Order — Even Though Never Submitted — Does Not Mean They Ghostwrote The Judgment

53. Claimants cite to a series of emails to and from Joseph Kohn — former Editor-in-Chief of the Villanova Law Review (1981-1982), Member of the Third Circuit Task Force on Selection of Class Counsel (2001-2002), Member of the Pennsylvania House of Delegates, and former Nominee for the Democratic Party for Attorney General of Pennsylvania (1992 and 1996) — and lead partner of his Philadelphia law firm, Kohn, Swift & Graf. Like everyone else associated with Mr. Donziger, Claimants contend that Mr. Kohn and his colleagues participated in the drafting of the Judgment.

54. Instead, as Mr. Donziger testified at deposition, the Kohn firm retained him at an early stage to represent the Plaintiffs when their action was first pending in New York. When the suit was dismissed in New York and re-filed in Ecuador, he and the Kohn firm "had discussions about how the process worked [in Ecuador] and whether the Alegato [Plaintiffs' closing brief] might be similar to proposed findings of fact/conclusions of law [as per U.S. practice] that could potentially be adopted."[70] More specifically, Mr. Kohn later wrote, "we need to be involved in the preparation of the final submission and *proposed judgment*, the major task we have all agreed . . . repeatedly our firm would work on."[71] That Mr. Kohn and his firm discussed the possibility of drafting a proposed judgment to be duly filed with the Lago Agrio

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70 R-273, Donziger Dep. Tr. (July 19, 2011) at 4757.

71 R-839, Email from Kohn to Donziger, *et al.* (Aug. 7, 2009) (emphasis added).

Court does not make those discussions illicit.[72] In any event, Plaintiffs ultimately decided not to draft or file a proposed judgment.

### H. Donziger's Reference To The "Other Project" Is Not A Reference To Ghostwriting But To One Of The Other Projects He Wanted To Accomplish

55. Claimants allege that Mr. Donziger's reference in an email to the "other project" is actually a clandestine reference to ghostwriting the Judgment.[73] But this fanciful interpretation is belied by Donziger's own contemporaneous and quite divergent use of the phrase "other project." In his diary, Mr. Donziger described these other projects: creating a "legal entity to handle non-case related stuff — from the Fiscalia, to lawyer complaints, to the peripheral stuff that will keep Texaco off guard and consume resources and energy, like they are trying to do with us."[74]

### I. Fajardo's Belief In 2009 That Plaintiffs Would Ultimately Prevail Does Not Mean That Their Lawyers Ghostwrote The Judgment

56. In December 2009, Mr. Farjardo stated that he was "99.99 percent sure" that "the plan for the judgment will be fulfilled." To Claimants, this is the ultimate evidence that the Lago Agrio Plaintiffs were drafting the Judgment. But as Mr. Donziger testified, this was a reference to his "plan to get the case finished," to get a timely judgment, not a reference to some secret plan to undertake the task of writing the Court's Judgment.[75] Both Donziger and Fajardo

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[72] This is a prime example of Claimants' shifting evidence as Respondents are able to analyze its efficacy. Claimants raised this same allegation before in their letter of Jan. 4, 2012, relying on a different email than they do in this submission. Respondent researched that first email and explained to this Tribunal in its letter of Jan. 9, 2012 why that email from Mr. Kohn did not support Claimants' allegations. Now that their first attempt failed, Claimants now offer another email from Mr. Kohn to Mr. Donziger as supposed proof — this new attempt is equally unconvincing. C-994, Email from J. Kohn to S. Donziger, *et al.*, Aug. 7, 2009 [WOODS-HDD-0148433]. Claimants no longer rely on that email.

[73] Claimants' Supplemental Merits Memorial ¶ 16 at 11 (citing C-1142, Email from P. Fajardo to S. Donziger, *et al.*, Oct. 25, 2009 [DONZ00052960]).

[74] C-716, Donziger Diary at 1.

[75] R-273, Donziger Dep. Tr. (July 19, 2011) at 4789-91.

obviously believed in the righteousness of Plaintiffs' cause, and foresaw eventual victory — hopefully before their financing ran out. That they had conversations on this subject does not mean they ghostwrote any part of the Judgment. All parties to litigation have internal discussions of their prospects of winning, and it is not uncommon for a lawyer to get carried away with a prediction about the court's pending decision. Claimants have presented here one instance of such a prediction and impose upon it a meaning that is neither natural nor likely. Claimants are left trying to satisfy their heavy burden through speculation; this they cannot do.