ANNEX E: RESPONSE TO CLAIMANTS' ALLEGATIONS REGARDING MESSRS. CALMBACHER AND CABRERA

I. The Calmbacher Reports Were Not Altered By The Plaintiffs, Constituted Only A Tiny Fraction Of The Evidentiary Record, And In Any Event Were Disregarded By The Lago Agrio Court On Chevron's Motion

1. Claimants concoct a sensationalized narrative surrounding the allegedly unauthorized submission of two expert reports filed in the Lago Agrio Litigation in the name of one of Lago Agrio Plaintiffs' experts, Dr. Charles Calmbacher. Claimants would like the Tribunal to (a) believe that Dr. Calmbacher, who had fee payment issues with Plaintiffs' counsel, had uncovered no evidence whatsoever of pollution at the sites he inspected, and (b) therefore conclude that his expert reports noting the presence of pollution must have been falsified by the Plaintiffs prior to submission. Claimants' story is belied by witness testimony and documentary evidence.

2. As an initial matter, Dr. Calmbacher was one of many judicial inspection experts in the Lago Agrio Litigation.[1] In fact, the Lago Agrio record comprises more than 200,000 pages of evidence, tens of thousands of laboratory tests, more than 100 expert reports, and the results of more than 100 judicial field inspections.[2] Dr. Calmbacher was hired by the Lago Agrio Plaintiffs in July of 2004, and spent about a total of one month in Ecuador before he was fired.[3]

3. When Claimants' allegations are viewed through the prism of the actual evidentiary record, it is clear that they have failed to establish any unlawful conduct by the Plaintiffs, much less by Respondent.

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[1] Dr. Calmbacher was merely one of 106 experts to submit evidence and/or opinions to the Ecuadorian trial court. *See* R-534, Ecuadorian Plaintiffs' Objections to Order and Recommendation, filed in the United States District Court for the Southern District of Florida, June 26, 2012 at 10.

[2] *See* C-313, Aff.of Andrew Woods (Mar. 3, 2010) ¶¶ 8, 11; *see also* C-201, Report of Richard Stalin Cabrera Vega (Apr. 1, 2008) at 17-19, 21, 23 .

[3] *See* C-186, Calmbacher Dep. Tr. (Mar. 29, 2010) at 13:20-14:1; 29:6-10; 48:15-17; 49:2-20.

4. Dr. Calmbacher testified that he believes that the Plaintiffs altered his reports because the submitted reports are, according to him, different than the reports he authored.[4] For his part, Mr. Donzinger, who has not been shy in offering inculpatory testimony on other subjects,[5] unequivocally denied participating in any fraud, attempted fraud or any other misconduct as it relates to Dr. Calmbacher's reports.[6] The record therefore contains the testimony of two witnesses (Dr. Calmacher and Mr. Donzinger) with competing claims. In this respect, Claimants have failed to carry their burden.

5. Dr. Calmbacher had motive to lie. He sued Plaintiffs for nonpayment, expressed animus toward them for firing him, and warned that he would cause Plaintiffs' counsel professional and psychological harm if they did not accede to his demands.[7] In one email he threatened that he would not stop at anything to ensure reimbursement for his work: "I have not been paid for work performed up to the date you fired me . . . . Please simply pay up. Don't start a war. ***Wars have no rules and people can suffer irreparable professional, psychological and physical damage as a result. You don't want that***."[8]

6. Critically, Dr. Calmbacher's contemporaneous email correspondence materially contradicts his sworn deposition testimony: (a) Dr. Calmbacher testified in deposition that he never drafted the extension request that was filed with the Lago Agrio Court on November 11, 2004.[9] However, in a November 4, 2004 email he advised Plaintiffs' counsel that he was

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4 C-186, Calmbacher Dep. Tr. at 116-118.

5 *See, e.g.*, R-577, Donziger Dep. Tr. (Jan. 29, 2011) at 3658:11-18; R-608, Donziger Dep. Tr. (Jan. 18, 2011) at 3125:3-3130:13.

6 R-209, Donziger Dep. Tr. (Jan. 18, 2011) at 3154:3-9.

7 C-186, Calmbacher Dep. Tr. at 11:23-25; 85:17-20 (explaining that he was fired because he failed to submit his reports in a timely manner); *id.* at 64:21-23 (testifying that he had sued the Plaintiffs for payment). R-204, Email from C. Calmbacher to S. Donziger (July 28, 2005).

8 R-204, Email from C. Calmbacher to S. Donziger (July 28, 2005) (emphasis added).

9 C-186, Calmbacher Dep. Tr. at 137:13-15.

"sending [to counsel] two copies of the request for extension," as well as sending the originals of the request to her office and hotel in Quito.[10] (b) Dr. Calmbacher testified in deposition that he had finished working with the Plaintiffs by November 2004.[11] But, his contemporaneous emails establish that he continued to correspond with Plaintiffs' counsel regarding the reports through March 2005.[12] (c) Most importantly, while Dr. Calmbacher testified in deposition that he did not uncover significant levels of pollution at the sites he visited, the test report Dr. Calmbacher *acknowledges* he signed reflects TPH measurements that exceeded the Ecuadorian standard by more than *seventy* times.[13]

7. Unsupported allegations by a terminated consultant with both an economic interest and a demonstrated animus toward the Plaintiffs cannot establish misconduct by the Plaintiffs, especially in light of Dr. Calmbacher's multiple misrepresentations while under oath.

8. Of course, had Dr. Calmbacher's testimony even been accurate, which the weight of the evidence refutes, neither he nor Claimants have ever alleged (much less offered evidence suggesting) that any representative of the Republic was complicit in any way. To the contrary, the Lago Agrio Court — *at Chevron's request* — chose to ignore Dr. Calmbacher's reports in reaching its decision.[14]

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10 R-149, Email from C. Calmbacher to M. Pareja (Mar. 4, 2004); *see also* R-206, Memorandum from A. Woods to S. Donziger (April 23, 2010), Exhibit 7.

11 C-186, Calmbacher Dep. Tr. at 62:19-24.

12 R-206, Memorandum from A. Woods to S. Donziger (April 23, 2010), Exhibits 2 & 3.

13 *Compare* C-186, Calmbacher Dep. Tr. at 115:15-24 *with* R-206, Memorandum from A. Woods to S. Donziger (April 23, 2010) at 3, Exhibit 5 (explaining that the chemical sampling results from August 2004 for Sacha 94, which were signed by Dr. Calmbacher, reflected a TPH value of 73,000 ppm, exceeding the Ecuadorian legal norm of 1,000 ppm by a multiple of 73.).

14 C-931, Lago Agrio Judgment at 48-49. The materiality of Calmbacher's allegation, even if credited, was doubted by Judge Kaplan in the RICO proceedings. R-535, Opinion on Partial Summary Judgment Motion, Case No. 11:1-cv000691, July 31, 2012 at 89.

II. Claimants' Accusation That The Republic Knew Of Or Colluded In Plaintiffs' Drafting Of The Cabrera Report Is Demonstrably False

9. While Claimants make certain allegations of fact which the Republic has not disputed as it relates to Richard Cabrera, they distort and then exaggerate the record in their failed effort to implicate the Lago Agrio Court. Claimants argue that the Ecuadorian Court worked hand-in-glove with the Plaintiffs to appoint a global expert whom everybody knew would rule against Chevron. However, they have adduced no evidence supporting the proposition that (a) the Court either conspired with the Plaintiffs to reach a predetermined verdict or (b) was otherwise complicit in or had knowledge that the Plaintiffs intended to or did actually prepare parts of Mr. Cabrera's reports.[15] Indeed, as will be shown below, Claimants have failed to show that Judge Yanez, much less his successor, Judge Zambrano, ever engaged in any activity that was illegal or improper with respect to Mr. Cabrera or his appointment.

A. The Lago Agrio Court's Appointment Of Mr. Cabrera As Global Damages Expert Was Proper In All Respects

10. To sensationalize their story, Claimants suggest that as far back as 2006 Plaintiffs conspired with the Lago Agrio Court to appoint a global expert that they knew would "submit a falsified and fraudulent expert report."[16] As support for this proposition, Claimants submit only another unsubstantiated contention — that the Court, with the specific intent of furthering the alleged conspiracy, both (a) granted the Plaintiffs' request to withdraw their request for additional judicial inspections and (b) appointed Mr. Cabrera as the global expert. As shown below, the Lago Agrio Court's decisions were entirely regular.

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15 Even Claimants have admitted that the Lago Agrio Court and the Ecuadorian Government were not complicit in but merely *victims* of Plaintiffs' counsels' alleged fraudulent conduct. *See* R-598, *Proceedings Reveal New Evidence of Fraud and Plaintiffs' Undisclosed Links to Ecuadorian Court Expert Richard Cabrera*, Chevron Press Release, May 24, 2010 (wherein Chevron's Vice President and General Counsel, Hewitt Pate, stated that the "misconduct of the plaintiffs' lawyers and Cabrera constitutes a fraud against Chevron, against the Ecuadorian courts system, and against the Government of Ecuador.").

16 Claimants' Merits Memorial ¶ 223.

1. Plaintiffs Had The Right Under Ecuadorian Law To Withdraw Their Earlier Request For Judicial Inspections In Favor Of Examinations Performed By A Global Expert

11. Under Ecuadorian law, and as explained in the *Amicus Curiae* brief filed by Professors Larrea, Sotomayor, Vila, and Melo in support of Plaintiffs' motion, Plaintiffs retained the right under Ecuadorian law to withdraw their inspections request under numerous legal theories.[17]

12. **First**, litigating parties in Ecuador, as is true in most judicial systems, have control over the evidentiary aspects of a lawsuit.[18] In other words, a plaintiff ordinarily carries a certain burden of proof, and it is up to the plaintiff to decide how to prove its case. It is the plaintiff's prerogative of determining on what type of evidence, and what quantum of evidence, it wishes to rely upon in carrying its burden. And if the plaintiff chooses to prove a case with less (rather than more) evidence, it is neither the court's nor the defendant's prerogative to instruct the plaintiff on how the latter should present its case.[19]

13. **Second**, Chevron had no legal right to insist that the inspections be completed. The inspections were requested by the Plaintiffs and were "exclusively in [their] procedural

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[17] *See* C-194, Amicus Curiae Brief, filed in the Lago Agrio Litigation on July 21, 2006 at 3-4. Because one of the twelve authors of the amicus brief, Gustavo Larrea, has served as an attorney for President Correa, the Claimants reflexively suggest that the submission of the brief demonstrates a governmental effort to pressure the judiciary. *See* Claimants' Merits Memorial ¶ 295. Claimants, of course, fail to note that the brief was submitted well before Mr. Correa was elected as President — at a time when no one expected him to prevail — and that there is absolutely no indication that Mr. Larrea's efforts were on behalf of Mr. Correa.

[18] *See* C-194, Amicus Curiae Brief at 4; *see also* RE-9, Andrade Expert Rpt. ¶ 34 (citing RLA-198, Ecuadorian Code of Civil Procedure, arts. 113, 114).

[19] *See* C-194, Amicus Curiae Brief at 5 (stating that there is no procedural rule prohibiting such waiver); *see also* RLA-163, Ecuadorian Civil Code, art. 11 ("Rights conferred by law may be waived, provided that they only regard the individual interest of the waiving party and that their waiver is not prohibited"); C-1081, Email from A. Wray to P. Fajardo, March 4, 2006 ("[T]there are no [legal] impediments for a party to relinquish evidence that it has previously requested…. [I]n practice it is common that a party withdraws evidence in civil matters."). Ironically, Claimants cite this email to show that the court knew that it was legally bound to continue the inspections. Claimants' Supplemental Merits Memorial ¶ 90. This exhibit fails to support Claimants' allegation.

interest."[20] Under Article 11 of the Ecuadorian Civil Code, "anyone may waive his rights, provided that such waiver is not prohibited and that it affects only the personal interest of the parties making such waiver."[21] Here, Chevron could not have been affected by the Plaintiffs' waiver because (a) the inspections were used to prove the *Plaintiffs'* case; (b) Chevron challenged the judicial inspections when Plaintiffs requested them;[22] and (3) Chevron had its own independent right to seek judicial inspections (but chose not to at these sites).[23] The only "real" interest Chevron had in forcing the completion of yet more judicial inspections appears to have been delay; the pace of judicial inspections was so slow that completion of the additional inspections would have extended the litigation by at least several more years. According to the professors who authored the *amicus* brief, at "the average rate that has been maintained over these last few years, it could be assumed that conducting these waived inspections could end up taking about four more years and costing several more hundreds of thousands of dollars."[24]

14. **Third**, the forced continuation of the judicial inspections would have violated the Plaintiffs' Constitutional right to be afforded certain procedural guarantees, namely promptness,

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[20] C-194, Amicus Curiae Brief at 4. All of the sites whose inspection was waived by the Plaintiffs were exclusively requested by them. Every site inspection that Chevron requested for its case-in-chief was performed. *See* R-606, Donziger's Response to Chevron's Statement of Material Facts, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Nov. 8, 2012 at 129. *See also* RE-9, Andrade Expert Rpt. ¶ 33 (stating that the Protocol governing the procedural aspects of the judicial inspections was a non-binding document, which was understood to be a mere guideline by both Chevron and the Lago Agrio Plaintiffs).

[21] C-194, Amicus Curiae Brief at 3 (citing a Supreme Court case for the proposition that the Lago Agrio Plaintiffs can legally waive their earlier requests for judicial inspections because the waiver implicates exclusively a strictly personal right)); *see also id.* (stating that the Plaintiffs elected to waive the remaining judicial inspections because they believed that their case "ha[d] already been proven, and [that] conducting new proceedings [was] not going to 'prove it more'"); C-716, Mr. Donziger's Diary, Jan. 24, 2006, at 200 [DONZ0002308] ("Since [Texaco] used all the same methods everywhere, and they admit to such, I just don't think we need to keep doing inspections in every [field] . . . . I don't think these inspections advance the case — in many respects, they slow it down and play into [Texaco's] hands . . . . They want to drag it out . . . [Texaco] prefers delay. Run numbers. Make at least 300m per year, pay lawyers 10m a year — with this rate of return they want to keep it going forever.").

[22] C-194, Amicus Curiae Brief at 4; *see also* C-197, Lago Agrio Court Order, Mar. 19, 2007 at 1-2.

[23] *See* C-197, Lago Agrio Court Order, Mar. 19, 2007 at 1, 3.

[24] C-194, Amicus Curiae Brief at 3.

efficiency, and economy.[25] Ecuadorian courts are bound to "ensure that court costs are not increased without any purpose and without any need," and that "all measures aimed at shortening and simplifying the lawsuit, [and] preventing its unreasonable prolongation" must be taken.[26] This is especially so when a plaintiff belongs to a low-income community. According to the professors who submitted the *amicus* brief:

> Allowing the prolongation of a suit with proceedings that have no probative value is paving the way for the immunity of the economically powerful, who can try to prolong a suit so that it becomes a competition of financial possibilities, for which reason, in view of this threat, the procedural guarantees and principles established in the Constitution play a very important role. In fact, for . . . low-income people and communities . . . the principles of procedural economy, promptness and efficiency are much more than empty phrases or simple statements of aspirations to be applied whenever convenient.[27]

15. Claimants of course ignore the practical impact of forcing the Plaintiffs to continue with the judicial inspections. Under the circumstances of this case — where Texaco had left the country fourteen years earlier and the litigation had already taken thirteen years — it would hardly have been unreasonable for the Plaintiffs to have concluded that continuing with the inspections would add nothing more to the evidentiary record, while unnecessarily prolonging the case by years and draining the Plaintiffs of their already-depleted resources.[28]

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25 *See id.* at 1 (citing the Constitution of Ecuador, arts. 23, 192, 193).

26 *Id.* (citing legal scholar Lino Palacio).

27 *Id.* at 2.

28 *See* C-193, FDA Press Release (June 14, 2006), *available at* www.texacotoxico.com ("Plaintiffs affected by Texaco's contamination today marched in Lago Agrio to demand speed in the trial filed against [Chevron] . . . to protest for the slowness of the process . . . . Texaco attempts to confuse the Court in order to conduct 80 more inspections, with only the purpose of prolonging the case."); *see also* C-1196, Email from S. Donziger to A. Wray, Sept. 24, 2004 ("The 'elephant in the room' is how we are going to end the inspections, and when we can start/finish the global peritaje. We have not been talking about this, but to me this overshadows much of what we are doing. If we do not decide on a targeted endpoint for the case soon that we can shoot for, this case risks lasting too long which benefits Texaco."); C-716, Mr. Donziger's Diary, May 13, 2006 at 69 [DONZ00027156] ("Big remaining issue: have inspections or wait and conserve resources. The money issue is killing us. Debts at 114,000, people waiting to get paid, they have families, not a good dynamic . . . Have to force issue with Joe, I think I am failing

The Court acted well within its discretion to afford the Plaintiffs the right to decide for themselves how best to present their case.

2. Mr. Cabrera's Appointment Was Proper Under Ecuadorian Law

16. Having decided that continuing the site examinations using a global damages expert was in fact proper, the Court in 2007 ordered the parties to attempt to agree on the appointment of such an expert.[29] Only because the parties failed to reach an agreement did the Court appoint Mr. Cabrera.[30] The Court's appointment of Mr. Cabrera as the global damages expert was lawful in all respects.

17. Rather than appoint Fernando Reyes as the global expert, as Plaintiffs had expected, the Court concluded that it was constrained by an earlier agreement by the parties to appoint an expert already used by the Court.[31] The Court therefore selected Mr. Cabrera to serve as the global expert from a pool of seven independent experts that the Court had previously

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here."); *id.*, Jan. 18, 2006 at 206 (DONZ00023089] ("I am still going to push this, because this case will never end . . . . I am also going to ask [Luis Yanza] that we only do one inspection per week to save money."); *id.*, Jan. 12, 2006 at 96 [DONZ00027156] (explaining how Luis Yanza had to pay "out of his own pocket the rent at the Frente house after the money ran out," and how the "phone was cut off because the money ran out."); C-1260, Email from J. Mutti to S. Donziger, Aug. 18, 2006 ("You're right about the lack of momentum . . . [it] has a lot to do with money. Even the guards asked me this morning if we're going under.").

29 *See* C-196, Lago Agrio Court Order, Jan. 22, 2007 at 1. During the original proof period in October 2003, the Court granted the Plaintiffs' request to appoint a global expert to determine the damages caused by Texpet's oil extraction operations between 1964 and 1992. *See* C-382, Plaintiffs' Motion to the Lago Agrio Court, June 21, 2010 at 2; C-176, Lago Agrio Court Order, Oct. 29, 2003 at 6-7; C-494B, Lago Agrio Plaintiffs' Motion re Procedures for Evidence, Oct. 29, 2003. Chevron declined to request any such expert, denying instead the existence of any contamination.

30 C-197**,** Lago Agrio Court Order, Mar. 19, 2007 at 2; *see also* C-382, Plaintiffs' Motion to the Lago Agrio Court, June 21, 2010 at 2-3. Chevron proposed John Connor, and the Plaintiffs proposed Luis Villacreces. *Id*. at 4-5.

31 C-716, Mr. Donziger's Diary, Feb. 7, 2007 at 134 [DONZ00027256] ("[T]he judge feels bound by an agreement [Ecuadorian Plaintiff attorney Alberto] Wray made with [Chevron counsel Adolfo] Callejas in the first inspection to use peritos already appointed by the court. I thought we had worked this out with the judge, and that Fernando Reyes would be appointed the perito. . . . Now, the judge feels he cannot do that. This is a function of T[exaco]'s pressure campaign – Callejas submitted 30-pages of crap yesterday morning.").

appointed in the trial.[32] Mr. Cabrera thereafter served as a court-appointed expert to evaluate the scope and extent of contamination in the Concession area allegedly caused by Texaco as operator of the Consortium and to assess the cost of remediating the same.

18. Claimants attack Mr. Cabrera's appointment on several grounds; namely, that it violated two specific Ecuadorian Code provisions, and that his appointment was the product of "collusion" between the court and the Plaintiffs.

19. Specifically, Claimants contend that Mr. Cabrera's appointment violated Articles 252 and 292 of the Ecuadorian Code of Civil Procedure. At the time in question, Article 252 provided: "The judge will select and appoint a single expert among the registered experts before the respective superior courts. However, the parties may agree to select the expert or ask the court for the appointment of two or more experts to handle the matter. This agreement will be binding on the judge."[33] Article 292 provides: "Petitions that . . . have the purpose of altering the meaning of the judgments, orders or decrees, or delay the progress of the litigation, or maliciously injure the other party, shall be dismissed and sanctioned."[34]

20. Mr. Cabrera's appointment violated neither Article. First, Claimants allege that because Mr. Cabrera was neither nominated by both parties nor on a list of experts registered with the local Superior Court, the Lago Agrio Court could not have appointed him as the global damages expert under Article 252. Claimants' allegation is incorrect. Despite the mandate

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32 C-382, Plaintiffs' Motion to the Lago Agrio Court, June 21, 2010 at 5 (stating that Mr. Cabrera was appointed by the Court to serve as an expert for three judicial site inspections in 2006); *see also* R-497, Donziger Dep. Tr. (Dec. 8, 2010) at 985:4-986:18.

33 RLA-431, Ecuadorian Code of Civil Procedure, art. 256. Article 256 was repealed by provision No. 16 of the 2009 Organic Code of the Judiciary. It was replaced by Article 252, which reads: "The judge shall designate just one expert, whom he or she shall choose from among those on the list to be provided by the Judiciary Council. However, the parties may, by mutual agreement, choose the expert or request designation of more than one for the proceeding, which agreement shall be binding on the judge." C-260, Code of Civil Procedure, Art. 252. The only difference between these two articles, therefore, is the replacement of the text "before the respective superior courts" with the text "from among those on the list to be provided by the Judiciary Council."

34 RLA-198, Ecuadorian Code of Civil Procedure, art. 292.

provided for in Article 252 (then Article 256), in practice — for the Lago Agrio Litigation and every other litigation in the country — the only readily identifiable list of experts maintained by the State was in the Prosecutor General's office, *not* in the local Superior Court.[35] Thus, the Court's reliance on this list of experts did not reflect any disparate treatment for Chevron. To the contrary, the process of selecting experts in the Lago Agrio Litigation was no different from the processes used in other litigations across the country.[36]

21. Nor did the Court's appointment of Mr. Cabrera violate Article 292. Article 292 renders unlawful only those orders that "have the *purpose* of altering the meaning of the judgments, orders or decrees, or delay the progress of the litigation, or maliciously injure the other party." And while Claimants contend that Mr. Cabrera's appointment "caused undue prejudice to Chevron by curtailing its ability to defend itself,"[37] Article 292 is not even implicated unless Claimants can demonstrate that that was the Court's "purpose" in selecting Mr. Cabrera.

22. Putting aside the subsequent developments alleged by Claimants, there is no evidence that the Court considered Mr. Cabrera as anything other than a neutral and independent expert. Mr. Cabrera affirmed to the Court his neutrality and independence on several

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35 *See* RE-9, Andrade Expert Rpt. ¶ 39. Moreover, that this list should be used was initially contemplated in the October 29, 2003 Order, which provided "for purposes of designating the Experts, without prejudice to the parties' reaching an agreement in that respect regarding names or the number of experts, an official letter shall be sent to the State Prosecutor . . . asking them to remit to this Judgeship the list and CVs of the Experts qualified in the areas of applied ecology and environmental engineering." C-506, Chevron's Motion Rejecting Plaintiffs' Petition, Jan. 17, 2007 at 1 (citing C-176, Lago Agrio Court Order, Oct. 29, 2003 at 7).

36 RE-9, Andrade Expert Rpt. ¶¶ 39-40 (stating that every practitioner in Ecuador knew that the requirement that experts had to be listed on a roster filed with the local superior court was never implemented and that Claimants' allegation is novel and frivolous).

37 Claimants' Merits Memorial ¶ 223.

occasions.[38] Thus, Claimants' allegations that Mr. Cabrera was subsequently co-opted by the Plaintiffs, and that Mr. Cabrera eventually permitted Plaintiffs' experts to draft parts of his report fail to shed light on the propriety of the Court's *appointment* of Mr. Cabrera as the global damages expert.

3. Both Parties Lawfully Met *Ex Parte* With The Successive Judges Presiding Over The Lago Agrio Litigation

23. Claimants continually portray the Plaintiffs' meetings with the Lago Agrio Court as scandalous and conspiratorial by always describing them as being conducted in "secret." But as Chevron well knew at the time it begged the United States courts to dismiss the *Aguinda* case in favor of an Ecuadorian forum, Ecuadorian law permitted the parties to meet *ex parte* with the presiding judge. Not until March 9, 2009 did Ecuador prohibit such *ex parte* meetings.[39]

24. In the Lago Agrio Litigation, ***both*** parties regularly met *ex parte* with the judge before the practice was disbanded.[40] Donald Rafael Moncayo Jiminez, an Ecuadorian citizen who since 2005 worked for counsel for Chevron providing "logistical support" in the Lago Agrio case, affirmed under oath that he personally witnessed *at least seven times* Chevron's lawyers "meeting alone with the judges who heard the case without the presence of the plaintiffs' lawyers."[41] In his affidavit, Mr. Moncayo provides details concerning one *ex parte* meeting

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38 *See, e.g.*, C-365, Filing by R. Cabrera in the Lago Agrio Litigation, Mar. 4, 2009; C-366, Filing by R. Cabrera in the Lago Agrio Litigation, July 23, 2007; C-509, Filing by R. Cabrera in the Lago Agrio Litigation, Oct. 8, 2008; C-367, Filing by R. Cabrera in the Lago Agrio Litigation, Oct. 11, 2007.

39 *See* R-599, Aff. of Dr. Farith Ricardo Simon, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Feb. 16, 2011, ¶ 6.

40 *See* R-600, Page Dep. Tr. (Sept. 15, 2011) at 120:12-24; R-601, Donziger's Amended Answer to Plaintiff's Amended Complaint, Affirmative Defenses and Counterclaims, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Aug. 15, 2012, -, ¶¶ 172-176,.

41 R-601, Donziger's Amended Answer ¶ 173; R-602, Donald Rafael Moncayo Jimenez Decl. in Support of Lago Agrio Plaintiffs' Motion to Quash ¶¶ 2-6, filed in *In re Application of Chevron Corp. (Stratus)*, Case No. 1:10-cv-00047-MSK-MEH, Aug. 27, 2010. Mr. Moncayo testified that as "part of [his] work, [he] present[ed] the papers of the lawsuit and other documents to the Court. On occasions, [he] also [went] to Court to observe and supervise the activity related to the Lago Agrio case." R-602, Moncayo Decl. ¶ 2.

where he witnessed and overheard Chevron attorneys Callejas, Racines, and Novillo meeting in Judge Novillos offices to discuss Mr. Cabrera.[42]

25. Another eyewitness, Robinson Yumbo Salazar, an Ecuadorian citizen who spent every workday from April 2006 to April 2007 in the "corridors of the Provincial Court of Justice of Sucumbíos" "observing and supervising the activities related to . . . the Lago Agrio case," testified that "on multiple occasions" he too personally witnessed Chevron's lawyers, along with their technical personnel and security guards, "meeting alone with the judge in charge of the case, without the presence of the plaintiffs' lawyers."[43] He affirmed:

> I especially remember two cases where I saw Iván Alberto Racines, a lawyer of Chevron in the Lago Agrio case, and other lawyers of Chevron whose names I do not remember, meeting with Doctor Germán Yánez Ruiz, who was the judge of the case at the time. These meetings were without the participation of the Plaintiffs' representatives in the Lago Agrio case.[44]

26. Further, Claimants quote Mr. Donziger as characterizing a colleague's meeting with a judge as "dangerous,"[45] suggesting that Mr. Donziger knew or understood that the meeting was somehow inappropriate. The full transcript makes clear that Mr. Donziger was concerned not because he considered such meetings inappropriate, but because Texaco could distort the meetings and say "look, [Plaintiffs] are manipulating the court" or "the court is under political pressure."[46] In Mr. Donziger's view, and consistent with Ecuadorian law, *ex parte*

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42 R-601, Donziger's Amended Answer ¶¶ 173-74 .

43 *Id.* ¶ 172; R-604, of Robinson Yumbo Salazar Decl. in Support of Lago Agrio Plaintiffs' Motion to Quash, filed in *In re Application of Chevron Corp. (Stratus)*, Case No. 1:10-cv-00047-MSK-MEH, Aug. 27, 2010, ¶¶ 2-4.

44 R-601, Donziger's Amended Answer ¶ 172 (citing Yumbo Salazar Decl. ¶ 5).

45 Claimants' Merits Memorial ¶ 215.

46 C-360, *Crude* Outtakes, March 6, 2007 at CRS211-01-01.

meetings were perfectly lawful and "[p]ressure mobilizations are good" so long as they "respect[] the independence of the judiciary . . . [and] of the judges."[47]

27. That the Plaintiffs met with Judge Yánez before the court appointed Mr. Cabrera (just as Chevron met with the Judge) does not mean the court was conspiring with either party.[48] Nothing in the *Crude* excerpts, Mr. Donziger's diary, or the Plaintiffs' internal files that have been produced to Chevron supports a finding that the court understood that Mr. Cabrera was or would be anything but independent and impartial.

28. To the contrary, contemporaneous documents unequivocally show that instead of working with the Plaintiffs to appoint a biased expert, the Court was acting independently and often in a way that threatened to undermine Plaintiffs' alleged goals.[49] In an email exchange between counsel for Plaintiffs, Mr. Donzinger wrote to a colleague, Aaron Page, that "everything is up in the air" and that "things are so mysterious here . . . the judge is not doing what we thought he would do, but it is unclear what he is doing and it is unclear if what he is doing is going to hurt us or help us. so me being the control freak, i am having a hard time with it. this is like magical realism. i feel like i am living in a novel. but I am suffering."[50]

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47 *Id.*

48 Claimants state that "Judge Yánez appointed Cabrera with the knowledge that he was controlled by the Plaintiffs and this his 'global assessment report' would be far from impartial." Claimants Supplemental Merits Memorial ¶ 191; *see also id.* ¶¶ 198, 202 (articulating the same theory).

49 Claimants quote at length from Mr. Donziger's diary, often to show him boasting about Plaintiffs' purported stronghold on the court. *See, e.g.*, Claimants' Supplemental Merits Memorial ¶¶ 91, 111. But Mr. Donziger's boasts are time and again refuted by his own doubts and admissions that he and his co-counsel have no influence at all.

50 C-1264, email exchange between S. Donziger and A. Page, Feb. 7, 2007; *see also* C-917, Email from P. Fajardo to S. Donziger, L. Yanza, J. Prieto, J.P. Saenz and A. Anchundia, March 26, 2007 ("[T]he cook [judge] has the idea of putting in another waiter [global expert], to be on the other side. This is troublesome."). This email was written twenty-three days after the Plaintiffs met with Mr. Cabrera to discuss in Chevron's words "how they will collectively write the global assessment expert report." Claimants' Merits Memorial ¶ 295. The Lago Agrio Court was therefore clearly not conspiring with the Plaintiffs to secure their victory over Chevron by appointing Mr. Cabrera as the global expert.

29. While Claimants would have this Tribunal believe that the Plaintiffs used their "secret" meetings with the judges to influence the Court, the Plaintiffs themselves worried that they lacked any influence over the proceedings and that their advocacy was ineffective. Mr. Donziger once again turned to his diary to express his profound doubts about the Plaintiffs' ability to win the case:

> When Pablo [Fajardo] walks into the court, he is one of them, no different from the secretaries and clerks – a punk kid from the Amazon, with nothing to back him up, nothing to fear, no strings to pull.[51]

30. Additionally, the *Crude* outtakes on which Claimants so often rely conclusively show that Plaintiffs did not have any confidence in Judge Yánez, let alone some kind of "deal" with him. Mr. Donzinger explained in one outtake that Plaintiffs have "struggled every step of the way to get everything we've earned. Nothing, nothing has been given to us."[52] Mr. Donzinger subsequently notes that he is not worried that "this judge is . . . leaving [at] the end of the year. I've never trusted this judge . . . . [H]e's not a good judge . . . . So, as long as he moves the case forward, then hands the baton to the next guy who hopefully does have the capacity to deal with it, that's all we're asking for. I'd rather this judge not make the decision."[53] Notably, this conversation took place after Mr. Cabrera was appointed in March 2007.

31. Repeating their accusations over and over again does not render Claimants' allegations true. Claimants have failed to present a single piece of evidence that would suggest that the Lago Agrio Court knew that Mr. Cabrera would be anything but completely independent and neutral. While Claimants have in their possession Mr. Donziger's hard drives, his email

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51 C-716, Mr. Donziger's diary, July 25, 2006 at 169 [DONZ00027256]; *see also id.*, Jan. 18, 2006 at 204 [DONZ00023089] ("Sometimes I feel like the sheer weight and workload of this case is eating us alive, like the toxics are eating the jungle … with the final outcome uncertain.").

52 C-360, *Crude* Outtakes, June 13, 2007 at CRS361-11-01.

53 *Id.*

correspondence, draft pleadings, and even his personal papers, Claimants are unable to point to any of the *millions* of pages at their disposal showing that the Court intended Mr. Cabrera to act on Plaintiffs' behalf or otherwise participate in a conspiracy against Chevron.

4. Mr. Cabrera Was Not The Only Court-Appointed "Global" Expert

32. Given the inculpatory evidence gathered from the Plaintiffs it is no surprise that Claimants inflate Mr. Cabrera's role in the litigation. But the Lago Agrio Court also appointed three of *Chevron's* nominees as global experts, namely, Messrs. Muñoz, Bermeo, and Barros.

33. The Court selected Mr. Gerardo Barros as an expert to investigate and provide information on the "current use of the so-called pits in drilling and workover or maintenance work on oil wells in the different oil fields belonging to the Petroecuador-Taxaco [sic] Consortium through the State-owned company PETROPRODUCCIÓN, either directly or through specialized contractors."[54] His work was specific to the period 1992-2009.

34. The court selected Jorge Bermeo in 2009 to prepare a report detailing the fishing practices used in the Eastern Petroleum Region of the Ecuadorian Amazon to help it better assess the potential health effects on the people who used the waterways for drinking and fishing. Finally, the Court also appointed Marcelo Muñoz Herrería in 2009 to take samples at several Texaco stations and wells to assess potential environmental impact. Mr. Muñoz "was the only expert to take samples at [eight TexPet sites]."[55] Together, these experts (who were working concurrently with Mr. Cabrera), submitted at least 10 reports.[56]

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54 C-540, Lago Agrio Court Order, May 28, 2009 at 4.

55 R-195, Lago Agrio Plaintiffs' First Alegato, Jan. 17, 2011 at 52.

56 C-931, Lago Agrio Judgment at 42, 43, 91, 99, 100, 112, 115, 116, 122, 124, 125, 130, 131, 146, 180-82, 184.

35. Chevron paid the fees for, and collaborated and met on an *ex parte* basis with, each of their nominated global experts.[57] That Chevron (and Plaintiffs) met *ex parte* with their nominated global experts is of course not surprising since doing so was both lawful and customary in Ecuador at the time.[58]

B. Judge Zambrano Addressed Chevron's Court Submissions Regarding Mr. Cabrera's Alleged Lack Of Independence In An Appropriate and Adequate Manner Well Within His Discretion

36. While Claimants have insisted on nothing short of dismissal of the environmental case based on their Cabrera allegations, the Lago Agrio Court acted well within its discretion in addressing Claimants' concerns regarding the drafting of Mr. Cabrera's reports while allowing the case to nonetheless move forward to a decision based on the evidence.

37. **First**, in response to Chevron's motions concerning, *inter alia*, the propriety of Mr. Cabrera's reports, the Court ordered the parties to present a legal brief ["escrito en derecho"] regarding potential damages before closing the evidence phase. The Lago Agrio Court's August 2, 2010 order allowing the submission of damages assessments to be submitted in response to allegations of fraud in the record was neither "unprecedented" nor an inappropriate attempt to

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[57] *See, e.g.,* R-605, Donziger's Counter-Claims ¶ 168, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Nov. 28, 2012 ("A glimpse of Chevron's behind-the-scenes collaboration with these court-appointed global experts was provided when Chevron refused to pay Dr. Muñoz, which occasioned a letter of complaint from Muñoz to the Lago Agrio Court in which, in passing, he mentions meeting privately with Chevron's technical consultant, Alfredo Guerrero, in Coca for a 'technical planning meeting' at which the engineer 'approved' a work plan.").

[58] *See* R-606, Donziger's Response to Chevron's Statement of Material Facts, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Nov. 8, 2012 at 117 ("Ecuadorian law at the time did not prohibit parties to a lawsuit from making contact with court-appointed experts prior to the issuance of the expert's report, including prior to the expert's formal appointment by the court. Instead, it was common practice in Ecuador for both sides to communicate and meet with court-appointed experts and advocate their positions.") (citations omitted); *see also* R-607, Saenz Decl, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Feb. 27, 2011, ¶¶ 56, 59; R-599, Aff. of Dr. Farith Ricardo Simon, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Feb. 16, 2011 ¶¶ 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).

"conceal the Cabrera fraud," as Claimants suggest.[59] Under the laws of Ecuador (and the United States), the Court's actions were entirely reasonable.

38. As an initial matter, Ecuadorian law clearly grants broad discretion to the judge with respect to the submission of evidence. For example, under Article 118 of the Ecuadorian Code of Civil Procedure, a judge can always order the submission of new evidence *ex officio* before the judgment is issued.[60] Additionally under Article 330(1) of the Judiciary Code, lawyers have the duty to "collaborate with the judges and courts" where doing so would aid the court and promote justice.[61]

39. The Lago Agrio Court's decision mirrors the tradition of U.S. courts in granting broad discretion to trial courts when determining whether to admit additional evidence.[62] As recently as 2011, the United States Court of Appeals for the Federal Circuit noted "[w]here there is new evidence indicating that the original record was tainted by fraud, reopening may be appropriate."[63] And in the words of the Supreme Court of Illinois:

> It must be remembered that courts are instituted for the administration of justice, and that the matter of the order of proof

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59 Claimants' Supplemental Merits Memorial ¶¶ 88, 191.

60 RLA-198, Ecuadorian Code of Civil Procedure, art. 118; *see also* RE-9, Andrade Expert Rpt. ¶¶ 31, 64 (noting a judge's authority under this article (formerly Article 122) to order the production of evidence to "elucidate the case at any stage of the proceeding").

61 RLA-303, Organic Code of the Judiciary, art. 330(1) ("The duties of counsel in representing causes: (1). Act in the service of justice and for this purpose, collaborate with the judges and courts."); *see also* RLA-164, Constitution of Ecuador (2008), art. 169 ("The procedural system is a means for the realization of justice. Procedural rules enshrine the principles of simplification, uniformity, efficiency, immediacy, celerity and judicial economy, and shall make due process guarantees effective. Justice shall not be sacrificed for the mere omission of formalities."). As a matter of fact and "in order for the court to receive further enlightenment and illustration and additional elements for judgment," the Lago Agio Court did permit both parties to submit additional expert reports under Article 330(1) of the Judiciary Code. C-361, Provincial Court of Sucumbíos Order, Aug. 2, 2010 at 1.

62 *See, e.g.*, RLA-370, *Perlman v. Time, Inc.*, 478 N.E. 2d 1132, 1135 (Ill. App. Ct. 1985) ("The reopening of proofs is a matter within the sound discretion of the trial court") (citing *Harper v. Johnson*, 377 N.E. 2d 1288 (Ill. App. Ct. 1978); RLA-371, *Wright v. State*, 349 A.2d 3134 341 (Md. 1998) ("[T]he trial court has discretion to permit the moving party to reopen its case to introduce evidence adducible in chief") (quotations omitted).

63 RLA-372, *Home Products International, Inc. v. United States*, 633 F.3d 1369, 1379 (Fed. Cir. 2011) (ordering remand because lower court failed to consider new evidence pertaining to fraud, and requiring the Department of Commerce to reconsider its initial decision in light of new evidence).

> and allowing a case to be opened up for taking further evidence rests in the sound judicial discretion of the court and should not be interfered with except for clear abuse.[64]

40. Thus, the decision of the Lago Agrio Court to permit *both* sides to submit new damages assessments did not prejudice either side and was fully harmonious with legal tradition in both the United States and Ecuador.

41. Chevron has never alleged that the indigenous Plaintiffs have themselves acted with a fraudulent intent, or that the indigenous Plaintiffs otherwise had knowledge of the alleged drafting of Mr. Cabrera's report by their own experts. There is no basis to find that a court lacks discretion under such circumstances to determine liability on the basis of untainted evidence rather than to dismiss outright an otherwise meritorious lawsuit.

42. **Second**, contrary to Claimants' insinuations, the Court was not required to respond to each of Chevron's motions regarding Mr. Cabrera immediately after they were filed. Instead, the Court properly deferred adjudication of Chevron's motions to the time of the final judgment.[65] Based on the Court's amply-supported conclusion that Chevron had filed the motions to disrupt and delay the proceedings, the Court acted well within its discretion in declining to decide immediately Chevron's multiple, often repetitive, requests for evidentiary proceedings challenging the expert reports.[66] Moreover, the Court's decision not to rely on Mr.

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64 R-373, *People ex rel. Boos v. St. Louis, Iron Mountain and Southern Railway Co.*, 278 Ill. 25, 28 (Ill. 1917).

65 RE-9, Andrade Expert Rpt. ¶¶ 101-103.

66 *Id.* ¶¶ 102-103. Significantly, Chevron filed an essential errors motion for each report that was filed by a court-appointed expert nominated by the Lago Agrio Plaintiffs — twenty-six motions in all. The Court found that Chevron's motions recycled (often verbatim) arguments and allegations that had already been rejected by the Court. *See* RE-9, Andrade Expert Rpt. ¶ 103, nn.125-127 (citing to the Lago Agrio Record and to the Lago Agrio Judgment at 40-42). Accordingly, the Court concluded that Chevron's "allegations lack[ed] objectivity, and that the defendant has used these essential error proceedings as [a] . . . mechanism to challenge the evidence of the adversary, and not as a means to amend the record and correct real fundamental errors that could affect the decision in this case, which is the real purpose of such institution." C-931, Lago Agrio Judgment at 43-44. Ecuadorian law provides that motions intended to disrupt or delay proceedings, or to prejudice the opposing party, shall be denied and subject the

Cabrera's reports clearly was aimed at resolving Chevron's individual complaints and challenges to Mr. Cabrera, eliminating any alleged prejudice to Chevron, and stripping the Plaintiffs of any advantage tied to their alleged drafting of Mr. Cabrera's reports.[67]

43. **Third**, the Court's decision not to consider Mr. Cabrera's reports was both adequate and appropriate. Although the Court did not find that Chevron had established "fraud," the court expressly declined to consider the Cabrera reports in reaching its judgment:

> [D]ue to the seriousness of the charges, and although the circumstantial evidence does not constitute proof, we must address the petition found at the end of this motion which ... asks that this Court not consider expert Cabrera's report.... [T]he Court accepts the petition that said report not be taken into account to issue this verdict.[68]

44. And in its March 4, 2011 order in response to Chevron's motion for clarification, the Court reiterated that it had previously

> decided to refrain entirely from relying on Expert Cabrera's report when rendering judgment. If [Chevron] feels that it has been harmed because the Court refused to void the entire case against it in response to the alleged fraud in Expert Cabrera's expert assessment, which is allegedly demonstrated by [the Crude outtakes], the Court reminds the defendant that its motion was granted, and that the report had NO bearing on the decision. So even if there was fraud, it could not cause any harm to the defendant. The Court has safeguarded the integrity of the proceeding and the administration of justice.[69]

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moving party to sanctions. RE-9, Andrade Expert Rpt. ¶ 102 (citing RLA-198, Ecuadorian Code of Civil Procedure, arts. 292, 293).

67 Claimants' Supplemental Merits Memorial ¶ 202 (third bullet point).

68 C-931, Lago Agrio Judgment at 50-51.

69 C-1367, Lago Agrio Clarification Order at 8; *see also* C-991, Lago Agrio Appellate Decision, Jan. 3, 2012 at 9-10.

45. The Court's decision complies not only with Ecuadorian law, but also with what Chevron itself requested the Court to do.[70]

46. Under the laws of both the United States and Ecuador, courts have broad discretion to strike allegedly tainted evidence from the record rather than declaring a mistrial.[71] When evidence is improperly admitted, judges in both Ecuador and the United States routinely resolve such issues not by declaring a mistrial but by issuing curative instructions to ignore or strike the tainted evidence.[72] The Court's damages award was not, and need not have been, based on Mr. Cabrera's two reports. The trial record includes more than 200,000 pages and contains in excess of 100 expert reports addressing nearly 64,000 soil and water sample results.

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[70] Claimants' Merits Memorial ¶¶ 478, 528 (second and fourth bullet points, respectively); *see also*, *e.g.*, C-503, Chevron's Motion for Terminating Sanction, filed in the Lago Agrio Litigation, Aug. 6, 2010 at 35. The Court could not have done more than it did. While Chevron argues that the Court could have criminally sanctioned counsel for the Plaintiffs, in fact the Court could only refer the matter to the General Prosecutor who could in turn initiate a formal investigation. In this case, however, Chevron had already requested the General Prosecutor to open a case against Plaintiffs' counsel so there was no need for the Court to make such a referral. Nor would a criminal referral have made any difference in the civil case. Finally, while Claimants would have preferred the Court to have suspended the proceedings to investigate the allegations levied against Mr. Cabrera, any such suspension would have been "contrary to public law, which orders that no incidental proceeding can suspend the verbal summary proceeding." *See* C-931, The Lago Agrio Judgment at 50.

[71] *See* RLA-374, *State v. Munroe*, Case No. 06-03000429, 2011 WL 6114 at *8 (N.J. Super. Ct. App. Div. Oct. 21, 2010) ("The decision to grant a mistrial is entrusted to the sound discretion of the trial court, and only to prevent an obvious failure of justice. We defer to the decision of the trial court, which is in the best position to gauge the effect of the allegedly prejudicial evidence.") (citations omitted); RLA-375, *State v. Williams*, Case No. 44899-4-I, 2000 WL 1224796 at *2 (Wash. Ct. App. Aug. 29, 2000) ("Trial courts are given wide discretion 'in dealing with trial irregularities,' 'in determining whether an error can be cured by an instruction,' and 'in determining whether to grant a mistrial.'") (internal citations omitted).

[72] *See, e.g.*, See R-608, Cassation File 197, Official Registry 59-April 10, 2003 (Ecuador) (confirming on other grounds the decision of the first instance court and striking from the record not legally produced prior testimony considered by the lower court); RLA-334, *Wingfield v. State*, Case No. 189.2012, 2012 WL 4878864 at *2 (Del. Oct. 15, 2012) (wherein the Supreme Court of Delaware upheld the trial court's denial of defendant's motion for mistrial because there was sufficient other evidence to convict defendant and the trial court issued a clear and prompt curative instructions. The court did so noting that the improper "references to the ammunition found in Wingfield's home did not taint the entire trial, especially because the trial judge instructed the jury not to consider any evidence from Wingfield's home."); RLA-335, *Bonnell v. Mitchel*, 301 F. Supp. 2d 698, 730 (N. D. Ohio 2004) (finding evidence should not have been introduced but nonetheless was insufficient "to taint the entire guilt phase of trial in light of the other evidence against defendant"); R-376, *State v. Balvin*, 791 N.W. 2d 352, 366 (Neb. Ct. App. 2010) ("If an objection or motion to strike is made and the jury is admonished to disregard the objectionable or stricken testimony, ordinarily, error cannot be predicated on the allegedly tainted evidence and a mistrial should not be granted."); RLA-377, *Henderson v. State*, 82 S.W.3d 750, 754 (Tex. Ct. App. 2002) ("When the testimony tainted by the alleged unlawful arrest is not considered, we find enough evidence still remained for a reasonable trier of fact to find Henderson guilty beyond a reasonable doubt.").

Additionally, the record contains testimony from dozens of fact witnesses and hours upon hours of legal argument.

47. According to the Plaintiffs themselves, the core of the Lago Agrio Litigation was a "series of approximately 45 'judicial site inspections,'" which resulted in the production of "more than a hundred expert reports."[73] The reports from ***each*** of these sites demonstrate the presence of carcinogens and other chemicals associated with adverse impacts on human health, with some sites exceeding the legal limit many times over.[74] Many of these exceedances were identified by ***Chevron's own experts***, who in fact found substantial contamination at ***every*** single site inspected.[75] [redacted] Moreover, the reports submitted by Chevron's nominated global experts were considered by the Court in calculating its ultimate finding of damages.[77] At least two of Chevron's appointed global experts documented contamination and poor corporate practices.[78]

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73 R-601, Donziger's Amended Answer to Plaintiff's Amended Complaint, Affirmative Defenses and Counterclaims, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Aug. 15, 2012, ¶ 125.

74 *Id.* ¶¶ 126-127; *see also id.* ¶¶ 138-139 (discussing Chevron's own reports of contamination found during the inspections). [redacted]

75 R-195, Lago Agrio Plaintiffs' First Alegato, Jan. 17, 2011 at 26-42. Moreover, as established above, Chevron's reliance on its own unsubstantiated version of what happened with Dr. Calmbacher cannot serve to undermine or taint the entire judicial inspections phase. Indeed, it would be absurd to use the alleged falsification of Dr. Calmbacher's reports as a reason to strike all of the evidence obtained during the judicial inspections phase.

76 [redacted]

77 *See, e.g.*, C-931, Lago Agrio Judgment at 42, 43, 91, 99, 100, 112, 115, 116, 122, 124, 125, 130, 146, 180-82, 184 (considering the reports and testing results submitted by Chevron experts Muñoz, Barros, and Bermeo).

78 C-381, Expert Report of Gerardo Barros (Dec. 21, 2009) at 9, 18; R-195, Lago Agrio Plaintiffs' First Alegato, Jan. 17, 2011 at 52 ("Muñoz's work reveals exceedances at each site tested.").

In light of the voluminous evidence showing contamination, there is no reason that the court would have been required or compelled to dismiss the case. Even without Mr. Cabrera's reports, the Court had ample evidence to rely upon in reaching its decision.

C. The Court's Damages Assessment Was Predicated On Sources Other Than Mr. Cabrera's Findings

48. Claimants make a series of allegations challenging the assessment of damages. In each case the Court acted well within its discretion.

49. Claimants begin their attack by asserting that the court awarded nearly US$ 1 billion to Plaintiffs based on damages assessed by Mr. Cabrera and the supplemental experts for categories of harm that the Plaintiffs had not pleaded, including a potable water system, excess cancer deaths, and cultural damages.[79] **First**, the Plaintiffs absolutely did include these categories of damages in their Complaint. Part III of the Complaint, for example, specifically addresses increased rates of mortality caused by cancer, the contamination of drinking water in the Concession area, and the cultural decimation of five indigenous groups.[80] **Second**, Judge Zambrano made clear that he was using a "holistic definition of environmental harm" so that he could incorporate into his damages assessment various categories of injury specifically claimed by the Plaintiffs, including elevated rates of cancer and the destruction of cultural identity.[81]

50. Claimants next allege that the Court in fact did rely on Mr. Cabrera's reports despite its representations to the contrary. As proof, Claimants allege that the court assessed damages for soil remediation in excess of US$ 5 billion based in part on the conclusion that Chevron was responsible for remediating 880 pits. Claimants posit that the number (880)

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79 Claimants' Supplemental Merits Memorial ¶ 41.

80 C-71, Lago Agrio Complaint, Part III at 10-12; *see also* RE-9, Andrade Expert Rpt. ¶¶ 89, 92.

81 C-931, Lago Agrio Judgment at 171; *see also id.* at 94-95, 125, 138; Re-9, Andrade Expert Rpt. ¶¶ 90-91 (noting that the court deemed it appropriate to assess the extent of the damages "in their complexity as a whole," and that it had adopted a broad definition of environmental harm based on a document that Chevron had submitted).

derived directly from Annex H to Mr. Cabrera's Report, and that this specific pit count is contained in no other source in the record.[82] Claimants' allegation is without merit.

51. As an initial matter, Appendix H to Mr. Cabrera's report notes the existence of 916 pits, not 880.[83] Claimants attempt to overcome this hurdle by suggesting that if one were to sort Stratus' pit inventory spreadsheet (which they allege is materially similar to Mr. Cabrera's Appendix H-1) "to remove the pits for which the comments mention 'no impact,' 'Petroecuador,' and 'Petroproduccion' (an affiliate of Petroecuador)," it would leave 880 pits — "the same number of pits identified in the Judgment."[84]

52. Of course there is absolutely nothing in the Judgment — nor do Claimants point to any documentary or other evidence outside of the Judgment — that would support Claimants' speculation that Judge Zambrano in fact engaged in such a mathematical exercise. In this case, though, Claimants' underlying math is simply incorrect. If one were to remove from Appendix H-1 of Mr. Cabrera's Report all such references, there would be only eight fewer pits (not the required 36) for a total of 908 pits.[85] And if one were to subtract from the 916 figure any pits that the Remedial Action Plan (a) designated as being built or modified by either "Petroecuador," "Petroproduccion" or after June 30, 1990 (when TexPet ceased being Operator), and (b) listed as having "no apparent contamination," one would have to remove forty two pits (not thirty six), for a total pit count of 874.[86]

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82 Claimants' Supplemental Merits Memorial ¶¶ 51-52 (citing to Expert Reports by W. Di Paolo & M. Younger).

83 R-77, Appendix H to the Cabrera Report at 10.

84 Claimants' Supplemental Merits Memorial ¶ 52.

85 R-77, Appendix H of Cabrera's Report at 39-41.

86 There is no reason that Judge Zambrano would have automatically removed from his calculations pits that that the Remedial Action Plan labeled "No Apparent Contamination." R-610, Remedial Action Plan for the Former Petroecuador-TexPet Consortium, Sept. 8, 1995, Table 3.1. The vast majority of pits supposedly not requiring

53. There are indeed other sources in the court record that Judge Zambrano could have relied on to determine the number of pits at Texpet sites.[87] For example, Attachment A to the Complaint identifies almost 500 TexPet sites that are the subject of the Complaint.[88] The Court noted in addition, in both its initial Judgment and again in its Clarification Order, that it also relied on aerial photographs in assessing the number of pits at issue.[89] There is no dearth of data in this case. While the Court did not identify the calculation it relied upon to conclude that there are 880 pits, there is no basis to conclude that the court relied on Mr. Cabrera's report in any way.

54. Claimants further contend that Mr. Cabrera's reports are the sole source of data relied on by the Court in awarding eight damages categories: (1) remediation of soil; (2) a healthcare system; (3) indigenous population impacts; (4) a potable water system; (5) excessive deaths from cancer; (6) ecosystem losses; (7) unfair profits; (8) remediation of groundwater.[90] The Court did not rely on Mr. Cabrera's narrative or findings with respect to these categories of damages, which are not unique to Mr. Cabrera's report in any event. Instead, the Court looked at

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remediation under the RAP demonstrated excess levels of pollution when sampled during the judicial inspections. *See* RE-10, LBG Expert Rpt. § 5.3.2.

87 It is curious that Chevron, which presumably had the authoritative count of pits that TexPet created at each site, never submitted a pit count, leaving the Plaintiffs and later the Court to review aerial photographs and other records to determine how many pits TexPet had created and then left behind. C-931, Lago Agrio Judgment at 125 (the determination of the number of pits requiring remediation was "aggravated by the fact that [Chevron] has not submitted the historical archives that record the number of pits, the criteria for their construction, use or abandonment."). Nor did Chevron submit any "corrective" records during the first instance appellate process when it had the opportunity to do so.

88 R-350, Annex A to *Aguinda* Complaint, Detail of the Stations, Wells and Pits.

89 C-931, Lago Agrio Judgment at 125; C-1367, Lago Agrio Clarification Order at 15; *see also* R-127, Judicial Inspection Acta for Sacha 6 filed in the Lago Agrio Litigation, Aug. 18, 2004 at 13 (referencing aerial photographs taken at Sacha 6 and contained in Chevron's Judicial Inspection Report); C-497, Expert Report of John A. Connor, Judicial Inspection of Well Sacha-06, Jan. 7, 2005 at 3, 9 (same); R-77, Appendix H of Cabrera's Report at 10 (wherein he states that there were aerial photos for 832 pits). Significantly, LBG notes in its expert reports that "during their operations of the Concession Area, Texaco created about 2 to 5 unlined pits per well site and production stations for the handling of various E&P wastes and water. Based on Texpet drilling 325 wells and 22 production stations, this puts a rough estimate of the number of pits constructed and used by Texpet at over 900 pits." RE-10, LBG Expert Rpt. § 5.3.

90 Claimants' Supplemental Merits Memorial ¶ 40.

the raw data submitted by Mr. Cabrera and Chevron's global experts.[91] As reflected in the Court's decision, it also relied upon testimony provided by citizens living in the impact zone,[92] and Plaintiffs' six supplemental expert reports submitted in September 2010.[93] Lastly, the Court was free to incorporate into its damages calculation the data from the judicial site inspections.

55. Finally, Claimants complain that the Court relied on Plaintiffs' expert reports submitted after Mr. Cabrera submitted his two reports, at least to the extent that these reports relied on Mr. Cabrera's data. As will be discussed below, **first**, there is nothing in the record to suggest that Mr. Cabrera's underlying data was not valid or reliable; **second**, experts routinely rely on data gathered by other scientists when available; and **third**, the supplemental experts specifically found Mr. Cabrera's data reliable and credible or they would not have relied on them. Additionally, as already discussed in Section II.A of the Counter-Memorial, Mr. Cabrera's data revealing the presence of contamination are mirrored by the data gathered by Claimants' own experts.

56. Claimants' allegations aimed at undermining the validity of Mr. Cabrera's data lack merit. For example, Claimants criticize the fact that Mr. Cabrera (a) occasionally let representatives from the Plaintiffs and community members accompany him in the field when he conducted his testing, and (b) had *ex parte* communications with local residents, the Plaintiffs,

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91 *See, e.g.*, C-931, Lago Agrio Judgment at 180-181 (wherein the Court considered studies provided by Chevron's global expert Mr. Barros in calculating soil damages).

92 *See, e.g.*, C-1367, Lago Agrio Clarification Order at 13; C-931, Lago Agrio Judgment at 130, 139-145 (wherein the court considered the testimony of the affected residents in reaching its decision on damages for a healthcare system and excess deaths from cancer). *See also id.* at 147-153 (wherein the court considered the testimony of the affected residents regarding harm to their animals, food and agricultural lands and productivity).

93 The supplemental experts provided reports on the following categories of damages: (1) Douglas Allen provided a report concerning soil remediation and groundwater; (2) Lawrence Barnthouse provided a report covering damages to the ecosystem; (3) Carlos Picone submitted a report on the healthcare system; (4) Jonathan Shefftz provided a report regarding unjust enrichment; (5) Daniel Rourke prepared a report on excess cancer deaths; and (6) Paolo Scardina submitted a report regarding damages for a new potable water system. Impacts to the Indigenous Population and Culture were outlined in Annex G of the Plaintiffs' September 16, 2010 Submission. *See* R-574, Lago Agrio Plaintiffs' Motion, Sept. 16, 2010, Annex G.

and their counsel.[94] But there is nothing illegal about any of these acts, which were consistent with court rules and practice.[95] Chevron in fact was encouraged to provide information to and communicate directly with Mr. Cabrera, and as discussed above, often communicated *ex parte* with its own global experts.

57. Moreover, it is not only lawful but even encouraged that scientists rely on or use data that has previously been collected.[96] Indeed, in the United States this practice happens regularly, and experts are rarely required to travel to the contaminated site(s) or perform their own testing. For example, in *Monsanto v. David*, the Court of Appeals for the Federal Circuit held that under the Federal Rules of Evidence, "an expert need not have obtained the basis for his opinion from personal perception."[97] The Court of Appeals went on to state that "numerous

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94 Claimants' Merits Memorial ¶ 234. Claimants also, by way of example, allege that Mr. Cabrera had a conflict of interest because his remediation company is allegedly registered to do business with Petroecuador. *See id.* at 110. But as Mr. Cabrera explained in a March 22, 2010 letter to the Court, this is a "serious and false accusation." R-576, Letter from R. Cabrera to Judge Ordóñez, Mar. 22, 2010 at 2.

Claimants also attack Mr. Cabrera's reliance on Mr. Beristain's report in assessing the presence of excess cancer among the Lago Agrio population. *See* Claimants' Merits Memorial ¶ 232. Claimants argue that Mr. Beristain was not independent and that Mr. Cabrera was working with Mr. Beristain before he was sworn in. Chevron's accusations lack support. The May 2007 meeting that Claimants criticize between Messrs. Cabrera and Beristain occurred before Mr. Beristain was identified as a member of Cabrera's technical team. At that time, Mr. Beristain was working for an environmental group and was merely assisting the Ecuadorian Plaintiffs' team with "community-based information gathering." *See* R-523, Donziger Dep. Tr. (Jan. 14, 2011) at 2895:13-22, 2896:4-17. The May 2007 meeting was a community meeting among the Cofán people and their attorneys "to talk about what they want as compensation for all the damage." Mr. Beristain's role at the meeting was "in the form of leading a discussion" with the Cofán people. *Id.* at 2919:20-23. The global damages assessment was not discussed or planned during this meeting.

Claimants' other allegations concerning Mr. Cabrera are equally unavailing. *See* Claimants' Merits Memorial at ¶¶ 226-245. In any event, Chevron's own data reveal the presence of contamination on a scale similar to what the Court ultimately found, thereby rendering Claimants' criticisms of the manner in which Mr. Cabrera collected and processed his data moot. *See* RE-10, LBG Expert Rpt. § 3.

95 R-606, Donziger's Response to Chevron's Statement of Material Facts, filed in *Chevron Corp. v. Donziger et al.*, Case No. 1:11-cv-00691, Nov. 8, 2012 at 31-32.

96 Mr. Allen affirmed in his deposition that his report "represent[s] [his] opinions to a degree of scientific certainty" and that the result of his analysis was "something that I considered to be reasonable and appropriate consistent with best practices and standards." C-898, Allen Dep. Tr. (Dec. 16, 2010) at 123-24.

97 RLA-378, *Monsanto v. David*, 516 F.3d 1009, 1015 (Fed. Cir. 2008) (citing *Sweet v. United States*, 687 F.2d 246, 249 (8th Cir. 1982); RLA-429, *Data Line Corp. v. Micro Techs., Inc.*, 813 F.2d 1196, 1200-01 (Fed.Cir.1987).

courts have held that reliance on scientific test results prepared by others may constitute the type of evidence that is reasonably relied upon by experts for purposes of Rule of Evidence 703."[98]

58. The Appeals Court further found that expert testimony was reliable even if the seed report (the report that the expert had relied on in preparing his subsequent report) was not admissible.[99] Like in the *Monsanto* case, the tests conducted by Mr. Cabrera were certainly of the type normally relied upon by experts, and thus, the expert testimony submitted to the Lago Agrio Court in September 2010 was admissible.[100]

59. Moreover, in this instance, Plaintiffs' supplemental experts do not rely exclusively on Mr. Cabrera's data, and at least two of the supplemental experts — Drs. Rourke and Picone — did not rely on Mr. Cabrera's data at all.

60. Douglas Allen "performed an independent valuation of damages in the concession area of the Ecuadorian jungle" "to develop an independent cost estimate for remediating contaminated soils, sediment, and groundwater in the well sites and production stations of the

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98 RLA-378, *Monsanto v. David*, 516 F.3d 1009, 1015 (Fed. Cir. 2008) (citing *Ratliff v. Schiber Truck Co.*, 150 F.3d 949, 955 (8th Cir. 1998) (holding that expert testimony regarding a report prepared by a third party was properly allowed); *see also* RLA-379, *Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 94-95 (2d Cir. 2000) (finding that testimony was properly admitted from an expert who did not conduct his own tests); RLA-380, *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 592 (1993) ("[A]n expert is permitted wide latitude to offer opinions, including those that are not based on first hand knowledge.").

99 RLA-378, *Monsanto v. David*, 516 F.3d at 1016 ("Rule 703 expressly authorizes the admission of expert opinion that is based on 'facts or data' that themselves are inadmissible, as long as the evidence relied upon is 'of a type reasonably relied upon by experts in the particular field in forming opinions.'").

100 There is nothing to suggest that the Lago Agrio Court's consideration of the supplemental expert reports perpetuated the alleged Cabrera fraud by "repackaging" some of the findings in the Cabrera report. Chevron raised the crime-fraud exception in five separate Federal judicial districts in the United States, where it sought documents from the supplemental experts. None of the five courts applied the crime-fraud exception, principally because the experts who relied on the data contained in the Cabrera report did so openly and with full disclosure. *See* RLA-381, *In re Application of Chevron Corp.*, No. 10-mc-00091-WKS, Dkt. 38 at 12-13 (D. Vt. Dec. 2, 2010) (12-13); RLA-382, *Chevron Corp. v. Barnthouse*, No. 10-mc-00053-SSB-KKL, Dkt. 36 at 20-21(D. Ohio Nov. 26, 2010); RLA-383, *Chevron Corp. v. Shefftz*, No. 1:10-mc-10352-JLT, Dkt. 45 at 20-21 (D. Mass. Dec. 7, 2010); RLA-384, *Chevron Corp. v. Picone*, No. 10-cv-02990, Dkt. 28 (D. Md. Nov. 24, 2010); RLA-385, *Chevron Corp. v. Rourke*, No. 10-cv-02989, Dkt. 34 (D. Md. Nov. 24, 2010); RLA-386, *Chevron Corp. v. Scardina*, No. 10-cv-00549, Dkt. 33 (W.D. Va. Nov. 24, 2010).

concession area."[101] Testifying under oath, Mr. Allen affirmed: "I used what I felt was relevant and valid out of [Mr.] Cabrera's report, but I didn't rely solely on [it] to do the valuation. I relied on other sources of data and information."[102] He also explained that he was not "looking at [Mr.] Cabrera's report and rebutting the work that he did so much as . . . using his information to the extent that I found it was useful and valid to develop my own valuation."[103]

61. Similarly, Dr. Barnthouse testified during his deposition that he made an "independent evaluation of the quality of the [Cabrera] study and the validity of the conclusions."[104] His conclusions were based primarily on 1990s studies commissioned by Chevron itself, and he was not asked to assume the data cited by Mr. Cabrera was accurate, nor did he make that assumption.[105]

62. During their respective depositions, Drs. Picone and Rourke explained that they did not rely on Mr. Cabrera's data at all. Dr. Picone testified that he relied in part on demographic data provided by another expert in reaching the conclusions in his report.[106] He added that he was never instructed "to support the findings in the Cabrera report;" instead "the request was to generate a report that did not replicate or did not rely on the Cabrera report."[107]

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101 C-898, Allen Dep. Tr. (Dec. 16, 2010) at 90:4-5, 105:8-12.

102 *Id.* at 90:20-23.

103 *Id.* at 141:8-11; C-899, Barnthouse Dep. Tr. (Dec. 10, 2010) at 27:3-28:1, 42:10-12 (wherein he explained that he made an "independent evaluation of the quality of the [Cabrera] study and validity of the conclusions"). In other words, his conclusions were based only on the portions of the Cabrera report he found reliable; the rest of his conclusions were based on studies commissioned by Chevron itself. *Id.* at 51:11-17. *See also* C-901, Shefftz Dep Tr. (Dec. 16, 2010) at 59:24-60:1; 190:21-24 (wherein he explained that his analysis "follows from [only] ***some*** data and cost figures from the Cabrera report" and further explaining that he did not "accept[] all the statements in the Cabrera report . . . as being true.") (emphasis added). As with Dr. Barnthouse, Dr. Shefftz was not instructed to assume that the data items in the Cabrera reports were correct. *Id.* at 62:23-63:2.

104 C-899, Barnthouse Dep. Tr. (Dec. 10, 2010) at 42:10-12.

105 *Id.* at 51, 111.

106 C-900, Picone Dep. Tr.(Dec. 16, 2010) at 191.

107 *Id.* at 80:14-81:5.

As a result, according to Dr. Picone, "I did not rely on the Cabrera report to generate my report."[108]

63. When Chevron asked Mr. Rourke how he utilized the Cabrera report in preparing his expert report, Mr. Rourke replied: "I didn't make any use of . . . the Cabrera Report." Chevron then asked whether the expert "ultimately rel[ied] on the Cabrera Report in any way," to which Mr. Rourke replied: "No, I did not."[109]

64. Finally, Claimants are incorrect when they contend that the supplemental experts who relied on some of Mr. Cabrera's underlying data recanted their damages assessments after they learned that a Colorado environmental firm (Stratus) may have drafted parts of Mr. Cabrera's reports. To the contrary, Dr. Barnthouse testified that if "some parts of the Cabrera Report . . . [he] relied on, were drafted by Stratus," that would give him "a little bit of comfort, in the sense that I know that a group that has had a lot of experience in doing these assessments was involved."[110] Likewise, Mr. Shefftz testified that the fact that Stratus may have provided the figures in the Cabrera report would be a bonus since Stratus was "a major well-regarded firm in the field" and "at the end of the day, we have a lot of regard for Stratus' objectivity and integrity. So if they were helping Cabrera out, my initial reaction would be that that helps the accuracy of the Cabrera report."[111]

65. Finally, Claimants' allegation that Mr. Cabrera's data is "scientifically bankrupt" is without merit. At the height of their operations, Claimants discharged an average of *880 million gallons* of production water *per year* directly into the surface waters of the Amazon

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108 *Id.* at 86:9-10.

109 C-1042, Rourke Dep. Tr. (Dec. 20, 2010) at 230:8-14; 231:6-8; *see also* C-900, Picone Dep. Tr. (Dec. 16, 2010) at 58:3-8, 82:4-20 ("[The Weinberg Group] shared with me the [Cabrera] report, and we talked about the report, and . . . I truly felt that I could not rely on any information in the report.").

110 C-899, Barnthouse Dep. Tr. (Dec. 10, 2010) at 245-246.

111 C-901, Shefftz Dep. Tr. (Dec. 16, 2010) at 250-251.

basin.[112] As discussed in the Counter-Memorial at Section II.A, the levels of contamination documented in Mr. Cabrera's reports are accurate, as Chevron's own data confirms.

[112] *See* R-426, Letter from P. Pallares to X. Alvarado, Mar. 5, 2007.