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The Global Lawyer: Closing in on Truth and Justice in the Chevron Ecuador Case

By Michael D. Goldhaber February 4, 2013

On Jan. 28 Chevron Corporation filed overwhelming new testimonial and documentary evidence of fraud by the Ecuadorian plaintiffs who hold a \$19 billion judgment against it--including a declaration by a former judge that the judgment itself was procured through bribery. "Truth and justice are elusive," ran the headline by Thomson Reuters. With all due respect to my former colleague Alison Frankel, who sets the standard for litigation journalism, this reaction is deeply wrong.

The first time I met the plaintiffs' lead lawyer, Steven Donziger, I asked him if he was prepared to denounce the lawyers who rigged their cases against Dole Food Company in Nicaragua. Ironically, he answered yes. In refusing to condemn Donziger, many of us are now failing the same test.

Commentators continue to find balance where there is none, with the honorable exception of Roger Parloff. Human rights advocates, excepting Douglas Cassel, have rallied behind the allegations that Chevron is responsible for an environmental calamity in the Ecuadorian Amazon. Distinguished counsel in the U.S., Canada, Brazil, and Argentina are avidly seeking to enforce the Ecuadorian judgment. And most disturbingly, the enforcing courts are listening, with an Argentine court ruling on Jan. 30 that 40 percent of Chevron's local affiliates' revenues should be frozen pending enforcement.

Plaintiffs spokesperson Karen Hinton fairly notes: "We have not put forth every argument that we will make in briefs and arguments to jury if there ever is a jury trial." And indeed, for a journalist to weigh evidence that will be considered by a jury is often inappropriate. But in this case it's imperative. I aim to show here that the documentary evidence of fraud (nevermind the testimony) is now virtually unanswerable. To pretend otherwise is to encourage irresponsible courts to reward the alleged fraud.

Even before last week's evidentiary bombshells, adjudicators outside Ecuador who have weighed the evidence have consistently condemned the plaintiffs. Eight U.S. courts have now found a prima facie showing of fraud under the crime fraud exception to privilege. In allowing Donziger to be deposed in November 2010, U.S. District Judge Lewis Kaplan in New York found "substantial evidence" of misbehavior. The verdict against Chevron came on Valentine's Day 2011, and three weeks later Kaplan enjoined worldwide enforcement based on "abundant evidence" that due process had been violated. It is vital to note that the U.S. Court of Appeals for the Second Circuit in no way questioned this factual finding when it reversed Kaplan in January 2012 after examining New York's law on recognizing foreign judgments. (See here and here.) Finally, a panel of international arbitrators found the fraud allegations persuasive enough to order the Republic of Ecuador, also in January 2012, to take all measures to suspend enforcement.

In 2010 I disagreed with Roger Parloff that the plaintiffs' suit was crippled, and I queried whether Chevron's lawyers at Gibson, Dunn & Crutcher had "botched the kill step." The central fraud allegation at the time was that the plaintiffs had ghostwritten the damages recommendation of the main court-appointed expert, which they had for years passed off as independent. Chevron's evidence on the "Cabrera report" was so strong-the expert was essentially caught on film taking orders--that the plaintiffs eventually admitted this ghostwriting (without admitting to fraud). I was among the first to decry this scandal, and to take seriously the companion allegations of judicial intimidation. But the plaintiffs found new experts, and, when the verdict later came down, they could say it was untainted by Cabrera. I reasoned that Chevron had delivered its knockout punch too soon, and had made a potentially fatal mistake by giving the plaintiffs time to try curing the taint before a final judgment.

My logic was sound. But it seems that I was too kind in assuming that these plaintiffs were capable of taint-free litigation.

After a long windup, the real knockout punch landed last week. Although few noticed except Parloff, Chevron has over the past year amassed serious evidence of ghostwriting in the Ecuadorian judgment itself. Last week Chevron added to that evidence, and a former judge in the case, Alberto Guerra, stepped onto center stage with a firsthand account of the alleged judicial ghostwriting arrangement. Guerra swears that parties routinely paid him (after his own removal from the bench) to ghostwrite orders in their favor for Judge Nicolas Zambrano, and that (after Chevron declined his services) the Ecuadorian plaintiffs paid Guerra to play that role in the Chevron case. Finally, Guerra says that the plaintiffs promised Zambrano a half million dollar bribe to let them ghostwrite the judgment themselves, with a few tweaks by Guerra. At least no one can

say that these allegations are curable.

The plaintiffs' initial response was to deny all, while noting-correctly-that Guerra has been disgraced on multiple counts, and that Chevron is paying him a king's ransom. Hinton also finds it implausible that Chevron, in all its desperate efforts to discredit the case, never previously disclosed Guerra's overtures to Chevron.

Personally, I would not expect the bag man to be a boy scout and a philanthropist. But let's concede for the sake of argument that Guerra's testimony will be completely discredited by the New York jury that is set to hear Chevron's claims of fraud and racketeering at a trial before Judge Kaplan starting Oct. 15. And let's suppose that the jury discounts the egregious Cabrera affair and all the other multifarious allegations that appalled Judge Kaplan and the arbitrators. What is the new documentary evidence of incurable fraud?

Most importantly, Chevron has forensically traced passages on 60 pages of the 188-page final judgment to seven files from Donziger's hard drive, and one from his associate's. According to Chevron, these files were not in the court record. This is confirmed by two Chevron experts-one who reviewed the 200,000-page record electronically, and one who reviewed it by hand.

After reviewing most of this evidence in a discovery action, a Maryland federal court concluded on Jan. 25: "Chevron has shown to anyone with common sense that this is a blatant cut and paste exercise."

The plaintiffs have not shown any pages to the contrary, and they have not produced court-stamped copies of their supposed filings. Plaintiffs' spokesperson Hinton says, "We believe that those documents were entered into the court record." However, Chevron says that that plaintiffs have taken no such position in U.S. court, and Hinton was unable to show me otherwise. Instead, she directed me to a July 2011 filing by plaintiffs lawyer Pablo Fajardo in Lago Agrio, where he argued that Chevron must be behind the mysterious alien passages in the judgment. Fajardo reasoned that Chevron knew from my "Botched the Kill Step" column that it needed to discredit the final ruling, and suspiciously began to claim that Zambrano received "secret assistance" on the day after the verdict, before the record could be reviewed. I am flattered that the plaintiffs lawyers are aficionados of my work, and not just overplotted spy fiction.

It seems that the only response plaintiffs can make in court is to grasp at a speculative theory. At a discovery hearing on Dec. 21, a lawyer representing the Ecuadorian parties in New York, Larry Veselka of Smyser Kaplan & Veselka, floated the idea that Chevron itself might have secretly "slipped" Donziger's files to the judge who handed down the \$19 billion verdict. Judge Kaplan was bemused: "So they wrote parts of this decision hammering them as bad as anybody in world history has ever been hammered so that they could then attack it because the judge copied the bad stuff from them. Oh, please, Mr. Veselka. No. If I misunderstood you, please tell me....I have to give you credit for imagination on that, Mr. Veselka. I mean, really."

Besides adding to its unanswered evidence showing plaintiffs' fingerprints on the final judgment, Chevron last

week produced files from Guerra's hard drive showing that he ghostwrote for Zambrano nine preliminary judicial orders against Chevron, amounting to about 300 pages, and two non-Chevron judgments, including one shortly before the \$19 billion verdict.

In response to the evidence from Guerra's hard drive, Hinton offers a speculative theory similar to the one mocked by Judge Kaplan. "Is Chevron capable of intentionally placing information on Guerra's computer?" she asks. "Yes. Do we know that? No. Other unethical and illegal conduct by Chevron during and after the trial would lead me to believe it's possible." The plaintiffs' accusations against Chevron are reviewed in recent press releases (here and here), with links to court filings that discuss them more systematically. To date, none of the plaintiffs' allegations of illegality by Chevron has been accepted by a U.S. court.

To top it all off, Chevron has produced two deposit slips showing \$1000 deposits to Guerra's bank account, with a signature and national identity number that Chevron attributes to an administrative assistant for the plaintiffs. On Oct. 27, 2009, two days before the first deposit, plaintiffs lawyer Fajardo emailed Donziger: "The puppeteer won't move his puppet until the audience doesn't pay him something." Exactly a month later--on the same day as the second deposit--another plaintiffs' advocate, Luis Yanza, emailed Donziger: "[T]he budget is higher in relation to the previous months, since we are paying the puppeteer." Chevron interprets other emails to show that "puppet" and "puppeteer" were code for Zambrano and Guerra.

Hinton denies this, and says "puppeteer" may simply have been a bantering reference to one of the plaintiffs' consultants. She says that no one "representing the Ecuadorians" made a deposit to Guerra, and that both the signature and ID number on the bank deposit slips are too visually obscure to prove the depositor's identity. (I find the ID number on one slip quite easy to read. Readers can judge for themselves at the bottom of this image.)

So the documentary evidence seems to show that Guerra received two payments from the plaintiffs at roughly the same time that the plaintiffs chatted about paying a puppeteer; that Guerra ghostwrote nine preliminary orders for Zambrano in the Chevron case; that Guerra had a continuing ghostwriting relationship with Zambrano during the relevant period; and that the plaintiffs' electronic fingerprints are on nearly a third of Zambrano's final judgment against Chevron. The only significant point in Guerra's testimony that's not directly corroborated is Zambrano's bribe.

Nor is Chevron done. It is seeking further bank records through its discovery action in Miami. Presumably, it will depose Donziger again before the close of New York discovery on May 31. And if Guerra's arrangement with Zambrano was as extensive as his testimony suggests, then I suspect that Chevron will put into evidence a very large number of other ghostwritten judgments.

If proven, the relationship between Guerra and Zambrano would not be unique. In its 2010 report on Ecuador, the U.S. State Department stated that judges there are sometimes

corrupt, and referred to media accounts on "the susceptibility of the judiciary to bribes for favorable decisions and resolution of legal cases and on judges parceling out cases to outside lawyers, who wrote the judicial sentences and sent them back to the presiding judge for signature." Back in the day, experts for the plaintiffs presciently warned U.S. District Judge Jed Rakoff in Manhattan that he should not ship the case back to Ecuador because of pervasive judicial corruption.

All this might incline a jury to credit ex-judge Guerra's account of bribery. My point is that the existing documentary evidence, on its own, leads inescapably to the conclusion that the judgment is unenforceable as a result of corruption. Of course each party is entitled to a full legal defense on each legal theory in the New York civil trial (and any possible future criminal proceedings). I am not trying to hang the plaintiffs in advance. I am trying to expose the worthlessness of the judgment that, even now, they are racing to enforce.

The "truth" here is not elusive. On the contrary, we will rarely find a case where the truth may be established more fully. It took the discovery of documentary film outtakes due to an on-camera slip by the plaintiffs; the green light given to Section 1782 discovery as a result (see here and here); the near-complete piercing of Donziger's privilege; and the extraordinarily high stakes that have justified Chevron's unprecedented commitment of resources and unwillingness to settle.

In calling "justice" elusive, Alison Frankel is on firmer ground. But even there, I do not fully agree.

Some may resist Chevron's protestations of victimhood because they believe that corporations are evil. It should be self-evident that seeking corporate accountability from this perspective is little better than racist prosecution. Others inexcusably assume that even if the plaintiffs were overzealous, Chevron must be guilty of the underlying charges, because it seems plausible and because the plaintiffs exaggerate so loudly and often. Frankel makes the more respectable argument that we will simply never know.

Actually, we have a large body of scientific evidence. I condemn Texaco (Chevron's predecessor) for using the long-disfavored industry practices of dumping toxic sludge into unlined pits and pouring the water used in oil production back into the environment. But it cannot simply be presumed that massive contamination spread and led to massive health consequences. I believe that litigation is a horrendous context for scientific sampling, and I hope that the U.N. Environmental Programme's alternative factfinding model in Nigeria is emulated. But the fact is that even the plaintiffs' samples show no significant groundwater contamination except below the pits.

After wading into the scientific evidence on both sidessee here and here--I previously concluded that, setting aside the legal defenses, a factfinder in a trial conducted under the rule of law might find Chevron liable for a soil cleanup with a maximum plausible price tag of \$1 billion. Douglas Cassel later reached a similar conclusion.

So, no, we will never know the outcome of a just trial on the billion-dollar claim of environmental devastation that passes the straight-face test. I agree with Frankel that this is a great shame. But we do know that the next \$18 billion of the judgment is unjust to Chevron--and that wrong can be righted.

By far the greatest injustice is that the indigenous residents of the Ecuadorian Amazon suffer serious health and social problems. But we do not have the evidence to pin much blame for this on Chevron. And we should not forget the responsibility of Ecuador, which has operated the oil project at issue since 1990 and was the majority owner for most of the period when Texaco was the operator. What's more, Ecuador collected so much in taxes that, when Chevron won an arbitration for diverted oil revenues, the award needed to be reduced from about \$700 million to \$100 million. Ecuador chose to spend precious little of its oil windfall on social services in the Amazon region. Sadly, this injustice is not amenable to litigation, except at the far frontiers of economic and social rights.

The likely truth of Chevron's core allegations should now be evident to anyone who studies the evidence without ideological blinders--including the attorneys and judges. If the enforcing lawyers no longer believe in good faith that the judgment is pure, then they should withdraw from the case. That includes Patton Boggs, which is not implicated in any fraud (discounting Chevron's most aggressive theories), but certainly finds itself in an awkward position. The litigation funder that brought Patton Boggs into the case, Burford Capital, has not only sold its interest, but accused the plaintiffs of defrauding them. Patton Boggs might wish to ponder what its lead lawyer on the case, James Tyrrell Jr., told me in December 2010: "I'm certainly not here to join in any fraudulent effort....My mission is to see that a judgment on the merits, warranting international respect, is entered in Ecuador, and, if we win, to enforce it."

My most fervent hope is that Ecuador's National Court of Justice reclaims its nation's dignity by overturning this disgraceful and doomed judgment in the pending appeal. If it does, the enforcement actions will go away. If it does not, I optimistically believe that the enforcement actions will be dismissed, because they are now too shameful for even the most renegade court to approve.

Come what may, I expect Chevron to seek revenge on the plaintiffs' team in the New York fraud trial, and to demand in arbitration that Ecuador cover its record legal bills. It would be fitting if Chevron donated such a recovery to environmental and health projects in the Ecuadorian Amazon. Chevron is closing in on truth and, in a very partial way, closing in on justice.

Clarification: With regard to bank slips that Chevron contends support its accusations of bribery, plaintiffs spokesperson Karen Hinton clarifies that she doesn't contest that a national ID number is distinctly visible on the documents. Rather, Hinton told us she was referring to an account number that is partly redacted.