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Re: Letters from Aaron Page to Chevron's Expert Witnesses

Dear Mr. Tyrrell, Mr. Veselka, Mr. Gomez, and Mr. Keker:

Your co-counsel Aaron Page (who is a client of the Smyser and Gomez law firms) recently sent and caused to be published false and threatening letters purportedly on behalf of your and his mutual clients, the Lago Agrio Plaintiffs, to Dr. Douglas Mackay, Dr. Robert Hinchee, and Dr. Pedro Alvarez. *See* Exhibits 1-3. Drs. Mackay, Hinchee, and Alvarez are all expert witnesses retained by Chevron Corporation, your litigation opponent, and Drs. Mackay and Hinchee are themselves witnesses with legal representation known to you and your co-counsel.[1] The express purpose of Mr. Page's letters was to alter these witnesses' testimony,

[1] Herein, "you" and "your" refers to all of you, your law firms, and your client here, Aaron Page.

demanding that they "immediately disavow [their] 2006 opinion and so notify the court in Ecuador." As part of his effort to pressure the witnesses into altering their testimony, Page also sent copies of the letters to the witnesses' respective employers, as well as to the Chairman/CEO and General Counsel of Chevron Corporation.

Page's published statements are false, unethical, and an unlawful effort to tamper with witnesses. The letters, and the press releases and other publications associated with them,[2] are part of a coordinated public relations campaign to publish falsehoods to divert attention from the undisputed proof of fraudulent acts by Page, Steven Donziger, and others with whom you are associated. They are only the latest of many falsehoods published by your associates and are in keeping with Mr. Donziger's expressed belief that, "If you repeat a lie a thousand times it becomes the truth."[3]

The letters sent by your co-counsel and published by your associates violate the rules of professional conduct and federal law. As they were sent ostensibly on behalf of your mutual clients, we write to put you and Page on notice of this unethical and unlawful conduct requiring immediate remedial action.[4]

I.

Page's letters are an attempt to tamper with witnesses, in violation of 18 U.S.C. § 1512(b)(1). It is a federal offense to "knowingly use[] intimidation, threaten[], or corruptly persuade[] another person, or attempt[] to do so, or engage[] in misleading conduct toward another person, with intent to influence, delay, or prevent the testimony of any person in an official proceeding." *See also* Cal. Penal Code § 136.1; N.Y. Penal Code § 215.10; Fla. Stat. § 914.22. The experts to whom the letters were directed are not only witnesses in the Ecuador litigation, but—as you are aware—have been subpoenaed to provide testimony in related proceedings under 28 U.S.C. § 1782 in the Eastern District of California and the Northern District of Florida, *see In re Application of the Republic of Ecuador*, No. 2:11-mc-00052-GSA (E.D. Cal.) ("Mackay 1782 Action"); *In re Application of the Republic of Ecuador*, No. 4:11-mc-73-RH/WCS (N.D. Fla.) ("Hinchee 1782 Action"), and are potential witnesses in pending

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2 *See* Paul Paz y Miño, *How Lawyer Arrogance Imperils Chevron Shareholders In Ecuador*, THE HUFFINGTON POST (January 4, 2012, 11:58 AM), http://www.huffingtonpost.com/paul-paz-y-mino/chevron-ecuador-oil_b_1180208.html.

3 DONZ00047412 (attached as Exhibit 4).

4 Mr. Keker is included as addressee because Mr. Page is co-counsel with Mr. Keker's client, Steven Donziger, in representing the Lago Agrio Plaintiffs. As reflected in the attached retainer agreement (Exhibit 5), Mr. Page acts at the direction of Mr. Donziger whenever he acts on behalf of the LAPs. Further, Mr. Donziger has "overall responsibility" for the "strategic direction" and "day-to-day management" of the litigation, including "coordinating the media, public affairs and public relations activities on behalf of Plaintiffs." *Id.* Mr. Page's deposition testimony confirms this agency relationship between Mr. Page and Mr. Donziger. *See* Exhibit 6 (excerpts).

litigation in the Southern District of New York (in which the Smyser and Gomez firms are representing Mr. Page), *see Chevron Corp. v. Donziger, et al.*, No. 1:11-cv-00691-LAK (S.D.N.Y.); *Chevron Corp. v. Salazar, et al.*, No. 1:11-cv-03718-LAK-JCF (S.D.N.Y.), and arbitration proceedings pending under the U.S.-Ecuador Bilateral Investment Treaty, *see Chevron Corp. and Texaco Petroleum Co. v. the Republic of Ecuador*, PCA Case No. 2009-23.

Page's letters to the witnesses and their employers are, on their faces, unlawfully intimidating and threatening, and also constitute unlawful "misleading conduct" because they attempt to coerce the witnesses to retract their testimony by portraying as fact allegations known to be false and baseless. *See U.S. v. Gabriel*, 125 F.3d 89, 102 (2d Cir. 1997), *overruled in non-relevant part by Arthur Anderson LLP v. United States*, 544 U.S. 696 (2005) (convicting defendant of violating § 1512(b)(1) by attempting to mislead a witness into believing a lie). For example, Page's letters assert that Chevron committed "fraud" by conducting "secret" pre-inspections and "produc[ing] false and misleading scientific results in order to deceive the Ecuadorian court." Mr. Page further asserts that Chevron conducted pre-inspection sampling in order to allow its experts to know where to take "clean" samples. These allegations are false and are known by you and Mr. Page to be false, as demonstrated by, among other things, your own clients' and co-counsel's documents.[5] And as you are aware, Chevron has filed detailed rebuttals to these spurious allegations in numerous court proceedings. *See, e.g.*, Mackay 1782 Action, Dkt. 34; *In re Application of the Republic of Ecuador*, No. 1:11-mc-91287-DPW (D. Mass.), Dkt. 23. Drs. Mackay, Hinchee and Alvarez have issued an "Open Response to Letters from Aaron Marr Page dated January 3, 2012," rebutting these patently false allegations. *See* Exhibit 7. Indeed, the charge makes no sense: The point of such testing is to identify the potentially affected areas and their boundaries, which necessarily entails testing to find "clean" areas.

You also know that Chevron's experts followed scientifically accepted sampling protocols and reported detections in their judicial inspection reports when substances were detected. *See, e.g.*, Alvarez, Mackay, Hinchee, *Evaluation of Chevron's Sampling and Analysis Methods* (Aug. 28, 2006) at 10. Far from being "secret," Chevron openly disclosed pre-inspections in filings and discussed them during the judicial inspections with the Ecuadorian court (as did the Lago Agrio Plaintiffs). For example, at the November 30, 2005 Judicial Inspection of one site, known as Lago Agrio 2, a member of Chevron's technical team directly informed the court of a "pre-inspection job I did on this site[."] Judicial Inspection Acta for Lago Agrio 2, dated Nov. 30, 2005, Record at 87930. Thus, the allegations contained in Page's letters are fabrications.

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5 *See, e.g.*, CL127042-45 (noting that pre-inspections required, and received, court assistance in gaining access to the sites); CL8453-55, CL8726, CL133301 (describing the LAPs' own pre-inspections, including the cement plugs they left at the inspection sites to mark where they took samples); DONZ-HDD-0068239 (internal LAP documents confirming that they used samples from their "field lab" for "pre-inspection analysis to determine where to take samples during the inspections").

The sending and publication of the letters is also unlawful because it is an "attempt to . . . influence" and/or "prevent the testimony" of those experts through "intimidation." Indeed, the only possible reason for Page to have sent copies of the letters to the witnesses' employers is to cause the witnesses to fear for their jobs unless they "disavow" their reports and retract their testimony. *See United States v. Aguilar*, 21 F.3d 1475, 1486 (9th Cir. 1994) ("If the defendant judge appeals to them not to so testify because it would harm his career . . . or threatens that he will see that they lose their jobs if they testify—that would amount to an attempt to corruptly influence the [witnesses] to change their testimony."); *Sanderson v. Boddie-Noelle Enterp., Inc.*, 227 F.R.D. 448, 453 (E.D. Va. 2005) (sanctioning an attorney for communicating with the employer of the opposing side's expert witness because a "direct and reasonably foreseeable consequence" of his communication was the expert's refusal to testify). In the *Crude* outtakes, your co-counsel openly discussed a strategy of making Chevron's experts "pay for it at some level" by threatening to put their "reputation and [] license . . . on the line."[6] Page's unlawful conduct implements the abusive strategy captured on video.

II.

Page's letters also violate the rules of professional conduct, which prohibit attorneys from "communicat[ing] or caus[ing] another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter." N.Y. R.P.C. 4.2(a); *see also* D.C. R.P.C. 4.2(a) (same); Cal. R.P.C. 2-100 (same). As you are well aware, two of the expert witnesses to whom the letters were directed—Dr. Mackay and Dr. Hinchee—are represented by counsel in the California and Florida § 1782 actions, respectively. In addition, Chevron Corporation—to which Page copied his letters—is a represented party in the Lago Agrio litigation, the § 1782 proceedings described above, the Southern District of New York litigation, and the Treaty Arbitration.

Furthermore, Federal Rule of Civil Procedure 26(b)(4) prohibits *ex parte* communications by one party's attorney with an opposing party's expert witness. *See Erickson v. Newmar Corp.*, 87 F.3d 298, 304 (9th Cir. 1996) (imposing sanctions and disciplinary action against an attorney for such conduct). Under the rules of professional conduct, Mr. Page's letters thus violate an attorney's "duty to obey the obligations of the tribunal." *Id.* at 302 (citing Nev. RPC); *Lewis v. Tel. Empl. Credit Union*, 87 F.3d 1537, 1558-59 (9th Cir. 1996) (court has power to impose sanctions where attorney engaged in *ex parte* contact with opposing side's expert); *see also Durflinger v. Artiles*, 727 F.2d 888, 891 (10th Cir. 1984); *Miller v. Hilton Hotels Corp.*, No. 92-7053, 1993 WL 210866, at *3 (D.C. Cir. June 1, 1993); 6 Moore's Fed. Practice § 26.80[4] (Matthew Bender 3d Ed.). As one court explained, "the vast majority of attorneys are sufficiently cognizant of their professional responsibility to avoid such error." *Sewell v. Maryland Dep't of Transp.*, 206 F.R.D. 545, 547 (D. Md. 2002).

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6 CRS088-05, at 3:05 and 8:40. *See also, e.g.*, DONZ-HDD-0081838 ("The goal is to find whatever you can on any of these people to undermine their credibility, to portray them as industry hacks, etc.").

Regardless of whether you knew about this unethical and unlawful conduct beforehand, you and your law firms are now on notice of it, and surely you recognize that it requires immediate remedial action.

Sincerely,

Randy M. Mastro /SN

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