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**IN THE MATTER OF
AN ARBITRATION UNDER THE RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW**

**CHEVRON CORPORATION and
TEXACO PETROLEUM COMPANY,
CLAIMANTS,**

v.

**THE REPUBLIC OF ECUADOR,
RESPONDENT.**

**POST-SUBMISSION INSERT TO CLAIMANTS'
SUPPLEMENTAL MEMORIAL ON TRACK 2 –
EXAMINATION OF ZAMBRANO COMPUTER HARD DRIVES**

August 15, 2014

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**POST-SUBMISSION INSERT TO
CLAIMANTS' SUPPLEMENTAL MEMORIAL ON TRACK 2 –
EXAMINATION OF ZAMBRANO COMPUTER HARD DRIVES**

Claimants hereby supply this insert to Claimants' Supplemental Memorial on Track 2 with respect to the examination of the hard drives of former Judge Nicolás Zambrano's two court computers (the "Zambrano Hard Drives"). The evidence resulting from this examination confirms, among other things, that Zambrano's testimony about drafting the Lago Agrio Judgment is not true, the author(s) of the Judgment used the Lago Agrio Plaintiffs' unfiled work product, and former Judge Alberto Guerra served as Zambrano's ghostwriter.

**I. PROCEDURAL BACKGROUND AND SUMMARY OF THE ZAMBRANO
COMPUTER EXAMINATION**

1. On May 9, 2014, Claimants submitted their Supplemental Memorial on Track 2.¹ As set out in section II.F. (paragraph 101) of that Supplemental Memorial, Claimants promised to supplement the discussion of the fraud, corruption, and lack of due process in the Lago Agrio Litigation and Judgment following the then-pending examination of the Zambrano Hard Drives. This Post-Submission Insert to Claimants' Supplemental Memorial on Track 2 addresses the forensic examination of the Zambrano Hard Drives and the additional evidence generated in the course of that examination, and should be considered as Section II.F. of Claimants' Supplemental Memorial on Track 2.

2. Pursuant to Appendix A to the Tribunal's Procedural Order No. 26, the Protocol for Imaging the Zambrano Hard Drives, the on-site examination of the Zambrano Hard Drives began on May 20, 2014. The imaging of the hard drives of the Zambrano Hard Drives was supervised by the Tribunal's expert, Kathryn Owen, along with Respondents' expert Kevin Cantwell and Claimants' expert representative, Christopher Peltier. Upon receipt of the imaged

¹ "Supp. Track 2 Memorial."

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hard drives, Claimants' expert, Spencer C. Lynch, Director of Digital Forensics for Stroz Friedberg, LLC, analyzed the data and prepared a new report setting forth his conclusions based on that analysis, including that the recoverable computer data is inconsistent with Zambrano's sworn RICO testimony. A copy of Mr. Lynch's new report, dated August 15, 2014, is included with this submission.² This new report supplements Mr. Lynch's previous report dated October 7, 2013.³

3. Claimants' expert Patrick Juola, Ph.D., also prepared a new report, dated August 12, 2014, with respect to the information gained from the Zambrano computers and the use of additional unfiled work product from the Lago Agrio Plaintiffs copied into the Lago Agrio Judgment.⁴ This report updates Professor Juola's previous report regarding the use of other unfiled Plaintiffs' work product in the Judgment.⁵

4. Also included with this submission are two new Claimants' exhibits. The first, C-2416, is an August 18, 2008 internal memorandum authored by Graham Erion, a legal intern for the Lago Agrio Plaintiffs' lawyers, entitled "Chevron's Liability for Texaco in Fact and Law" (the "Erion Memo"). As discussed below, the Erion Memo is another Lago Agrio Plaintiffs' work product document, not found in the court record, from which text was copied into the Judgment.

² Expert Report of Spencer Lynch, Stroz Friedberg, LLC, dated August 15, 2014 ("August 2014 Lynch Report").

³ See Expert Report of Spencer Lynch, Stroz Friedberg, LLC, dated October 7, 2013 ("October 2013 Lynch Report"), submitted with Claimants' Letter to the Tribunal (October 7, 2013) (regarding Mr. Lynch's replacement of his Stroz Friedberg colleague Michael Younger due to Mr. Younger's health issues).

⁴ Declaration of Patrick Juola, Ph.D., Juola & Associates, "*Stylometric Analysis of Legal Sources and Assertions*," dated August 12, 2014 ("August 2014 Juola Report").

⁵ See Declaration of Patrick Juola, Ph.D., "*Stylometric Report of Computational Analysis of Extended Court Record in Lago Agrio Case*," dated June 3, 2013 ("June 2013 Juola Report") (submitted with Claimants' Reply Memorial – Track 2 (June 5, 2013)).

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5. The second new exhibit, C-2417, is a copy of the Direct Testimony of Samuel Hernandez, Jr. (October 8, 2013), Exhibit PX 3900 in the RICO Case, with respect to the review of the Lago Agrio court record and the Lago Agrio Plaintiffs' unfiled work product documents. Mr. Hernandez's first statement in the RICO Case is in the BIT record as Exhibit C-1366, and Claimants referenced both of Mr. Hernandez's statements at note 225 of Claimants' Supplemental Memorial on Track 2. Claimants inadvertently confused the two Hernandez statements as referenced in the RICO record and failed to submit the second Hernandez statement (PX 3900) as an exhibit in this arbitration along with the Track 2 Supplemental Memorial.⁶ This oversight is corrected here.

II. EXAMINATION OF THE ZAMBRANO COMPUTERS FURTHER ESTABLISHES THAT THE LAGO AGRIO JUDGMENT IS THE PRODUCT OF FRAUD AND CORRUPTION

A. Summary of Key Findings from the Zambrano Computer Examination

6. Spencer Lynch determined that the forensic evidence on Zambrano's computers is inconsistent in all material respects with Zambrano's RICO testimony recounting how he purportedly drafted the Lago Agrio Judgment.⁷ Among other factual assertions, Zambrano repeatedly and emphatically testified that, beginning in November 2010, he and an 18-year old typist named Evelyn Calva researched and drafted the Judgment using only the newer of the two court-issued computers in his office, the "New Computer." Yet Zambrano's New Computer yielded no evidence of the Judgment drafting process he detailed. To the contrary, Mr. Lynch's forensic analysis shows that neither Zambrano nor the author of the Lago Agrio Judgment drafted the Judgment on either of Zambrano's computers.

⁶ Claimants produced PX 3900, Direct Testimony of Samuel Hernandez, Jr. to the Respondent as part of the production of documents from the RICO case on January 30, 2014.

⁷ August 2014 Lynch Report § II at p. 5; § IV.D.1 at pp. 24-25.

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7. In sum, Zambrano testified that his Judgment drafting process consisted of months of long hours of typing original text, internet searches for foreign law principles and authorities, and translation of those foreign language sources.⁸ But Mr. Lynch found that Microsoft Word was open on the New Computer for a total of only 36 hours prior to February 14, 2011 (the date the Judgment was issued), and for 167 hours on the Old Computer between November 1, 2010 and February 14, 2011.⁹ Mr. Lynch further found no evidence of internet searches of foreign law sources or use of language translators on either computer.¹⁰

8. The Zambrano computers contained multiple copies of document with a portion of the Index Summary, an unfiled, internal work product document from the Lago Agrio Plaintiffs.¹¹ The forensic examination also revealed at least two additional instances in which the Lago Agrio Plaintiffs' unfiled work product documents, the "Erion Memo" and the "Moodie Memo," were used as source documents for Judgment text.¹² Professor Patrick Juola confirms in his August 2014 Report that neither of these internal Plaintiffs documents are found in the Lago Agrio court record.¹³

9. Whoever calculated the sampling percentages copied into the Judgment – which are nearly identical to those in the Lago Agrio Plaintiffs' unfiled Selva Viva Data Compilation, an Excel spreadsheet – used Microsoft Excel to perform those calculations. But analysis of the Zambrano computers showed that, between them, Excel (the spreadsheet program itself) was

⁸ **Exhibit C-1979**, Zambrano Depo. Tr. 95:14-96:6; **Exhibit C-1980**, RICO Trial Tr. 1607:5-22 (Zambrano).

⁹ August 2014 Lynch Report § IV.D.7 at pp. 38-39.

¹⁰ *Id.* § IV.C.5 at p. 23.

¹¹ *Id.* § IV.C.2 at pp. 17-21.

¹² August 2014 Juola Report ¶¶ 75-79, 87-90; August 2014 Lynch Report § IV.D.2 at pp. 26-27 (regarding temporary files containing Judgment text).

¹³ August 2014 Juola Report ¶¶ 75-79, 87-90.

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open for only four minutes during the relevant period.¹⁴ Mr. Lynch concluded it would not have been possible to run the calculations to derive the statistics appearing in the Judgment, or even copy that data from other Excel spreadsheets, in the time Excel was open on the computers.¹⁵ This evidence further confirms that the author of the Judgment used the Lago Agrio Plaintiffs' unfiled Selva Viva Data Compilation as a source for the sampling percentages used in the Judgment.¹⁶

10. Tellingly, neither computer contains the final Lago Agrio Judgment published on the court's SATJE document system.¹⁷ Mr. Lynch did recover two documents containing text from the Judgment, the main document named "*Providencias.docx*," which was created on the Old Computer and not saved onto the New Computer until months after the Judgment was issued, and a version of a second document named "*Caso Texaco*" which contained a block of Judgment text.¹⁸ The forensic analysis of the Old Computer shows that *Providencias.docx* was created on October 11, 2010, weeks before Zambrano says he began drafting the Judgment.¹⁹ This timing suggests that *Providencias.docx* was opened to create a document unrelated to the Judgment and that only later was Judgment text placed into it.

11. Formatting differences in the text from the Judgment in *Providencias.docx* indicate that material was cut and pasted into that document, contrary to Zambrano's testimony that he dictated 80-85% of the Judgment to Ms. Calva and typed the rest himself, without cutting

¹⁴ August 2014 Lynch Report § II at p. 6; § IV.C.4 at pp. 21-22.

¹⁵ *Id.* § IV.C.4 at p. 22.

¹⁶ *See id.* § II at p. 6, § III.A at p. 7, § IV.C.3 at p. 21, and Appendix A.

¹⁷ *Id.* § IV.D.1 at pp. 24-26.

¹⁸ *Id.*

¹⁹ *Id.* § IV.D.3 at p. 27-28.

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and pasting from any other source.²⁰ However, because multiple USB devices were used on both computers, and substantial data has been overwritten, Mr. Lynch cannot determine how much, if any, of the Judgment text was actually typed, as opposed to copied from other sources, into the *Providencias.docx* document.²¹

12. Mr. Lynch found that both of the Zambrano computers have been subjected to bulk transfers of thousands of data files, overwriting and destroying preexisting data on the computers and making it unrecoverable.²² Such bulk transfers are a known technique for obscuring computer data.²³

13. In contrast to the disagreement between the forensic evidence and Zambrano's testimony, the Zambrano computers corroborated the testimony and other evidence from former Judge Alberto Guerra regarding his work as Zambrano's ghostwriter. Mr. Lynch found 82 of the draft orders that Guerra supplied were on Zambrano's Old Computer, and the Guerra versions predated the versions on the Zambrano computers. The Guerra and Zambrano computers also shared multiple USB devices, corroborating the testimony from both Guerra and Zambrano that Guerra drafted orders for Zambrano and shipped them to him by USB.²⁴

14. At every turn, the forensic evidence proves the Judgment was not drafted using either of the Zambrano computers. It confirms that Zambrano's testimony about drafting the Judgment is not true. It further proves the author of the Judgment had access to and copied the Lago Agrio Plaintiffs' internal, unfiled work product. And, it corroborates former Judge

²⁰ *Id.* § II at p. 6, § IV.D.1 at pp. 24, 26, § IV.D.3 at pp. 30-31; see **Exhibit C-1980**, RICO Trial Tr. 1877:21–1878:23, 1879:23-25 (Zambrano); **Ex. C-1979**, Zambrano Depo. Tr. 63:13-19, 65:2-24; see also Claimants' Supp. Track 2 Memorial ¶¶ 84, 97-98.

²¹ August 2014 Lynch Report § II at pp. 6-7, § IV.D.1 at p. 26, § IV.D.5-6 at pp. 34-38.

²² *Id.* § II at p. 7, § IV.A.1-2 at pp. 11-12.

²³ *Id.* § IV.A.1 at p. 11.

²⁴ *Id.* § IV.B. at pp. 12-16.

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Guerra's testimony. Whatever efforts may have been made to conceal the truth, the forensic analysis was able to reveal further evidence of the fraud surrounding the Lago Agrio Litigation and Judgment.²⁵

B. The Forensic Analysis of the Zambrano Computers

1. The "Old Computer" and the "New Computer"

15. Former Judge Zambrano testified in the RICO Case that he had two desktop computers in his office at the Sucumbíos courthouse, one that he had used since he began his tenure as a judge and a second, new computer that he received sometime after he resumed sitting as the presiding judge in the Lago Agrio Litigation in October 2010.²⁶ Mr. Lynch was able to confirm, through review of manufacturing and court inventory records, that Zambrano did have two computers available for his official use: an "Old Computer" manufactured in 2006 and which appears in the courthouse inventory in December 2008, and a "New Computer" manufactured in 2010 and purchased by the Judicial Council on November 26, 2010.²⁷

16. Claimants did not gain access to any data from either of the Zambrano computers until May 2014, when, pursuant to the Tribunal's order, the parties' and Tribunal's experts

²⁵ Appendix A to Procedural Order No. 26, the Protocol for Imaging the Zambrano Hard Drives, currently requires that the parties maintain the evidence derived from the Zambrano Hard Drives as confidential and prevents Claimants from using this evidence in any other proceeding. However, having now received and analyzed the evidence resulting from the examination of the Zambrano Hard Drives, Claimants believe that evidence is exceptionally probative and relevant, not only to this arbitration but equally so in respect of the Judgment enforcement proceedings the Lago Agrio Plaintiffs continue to actively pursue, and other matters related to the Lago Agrio Litigation and Judgment. Claimants further do not believe that the evidence derived from the Zambrano hard drives is of a sensitive nature requiring any significant degree of confidentiality in this or other proceedings. It may become appropriate for the Claimants to seek leave from the Tribunal to allow Claimants to use this evidence in the Judgment enforcement actions and other related proceedings.

²⁶ See **Exhibit C-1979**, Zambrano Depo. Tr. 32:2-15; **Exhibit C-1980**, RICO Trial Tr. 1678:23-1679:7, 1680:3-6 (Zambrano).

²⁷ August 2014 Lynch Report § III.C at pp. 8-9. In the RICO Case, the RICO Defendants submitted a statement from an Ecuadorian police officer, Jaque Tarco, regarding the results of Tarco's examination of the hard drives of the Zambrano computers. The RICO Court ultimately refused to admit that statement because the RICO Defendants did not make the witness available for cross-examination and did not provide a copy of his full report. See Claimants' Supp. Track 2 Memorial ¶ 21 (regarding Exhibit C-1984, RICO Witness Statement of Jaque Efrain Tarco).

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supervised the creation of images of the hard drives of the two computers formerly assigned to Zambrano. These images revealed the contents of the hard drives only as of the time the images were created, that is, as the computer hard drives existed on May 21, 2014.²⁸ Mr. Lynch and his team at Stroz Friedberg then reviewed the imaged hard drives from both the Old and New Computers, and performed an analysis of their contents and use.

2. Overwritten and Destroyed Data from Both Computers

17. As a threshold matter, data which once resided on the two Zambrano computers has been overwritten or destroyed.²⁹ Both of the Zambrano computers were subjected to bulk copying and deleting of thousands of files resulting in destroyed and unrecoverable data.

18. Mr. Lynch identified multiple instances of bulk copying and deletion of files on the Old Computer in the years since the issuance of the Lago Agrio Judgment.³⁰ In particular, Mr. Lynch was able to determine that on September 26, 2012, someone copied 2,202 files onto the Old Computer within a space of 4 minutes. All of those files were subsequently deleted.³¹ Mr. Lynch cannot identify what was in those files, when they were deleted, or why, or what data was lost as a result of the bulk copying and deletion. However, he can confirm that bulk copying and deletion of large numbers of files is a technique used to overwrite previously deleted data, making it unrecoverable.³²

19. Similarly, the New Computer also shows bulk copying of thousands of files. That bulk copying occurred during the years after the Lago Agrio Judgment was issued and since

²⁸ See August 2014 Lynch Report § IV at pp. 10-11.

²⁹ *Id.* § IV.A.1-2 at pp. 11-12.

³⁰ *Id.* § IV.A.1 at p. 11.

³¹ *Id.*

³² *Id.* (“Though I do not know the motivation for these actions, in my experience, the bulk copying of files will destroy data, and bulk copying and deletion of the copied files is consistent with an attempt to overwrite previously deleted data.”).

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Zambrano was removed from the bench on suspicion of corruption in February 2012. For example, on July 9, 2012, someone copied 4,701 new files onto the New Computer.³³ Again, while Mr. Lynch cannot determine the reasons for the file transfers, bulk copying of large numbers of files is a known method of destroying previously existing computer data, and these instances of bulk copying effectively destroyed data the New Computer once contained, likely including data relating to the Lago Agrio Litigation.³⁴ Even with the loss of data, however, the forensic analysis of the Zambrano computers uncovered significant evidence of fraud.

3. The Forensic Evidence Disproves Zambrano’s Testimony About the Process of Drafting the Lago Agrio Judgment

20. As discussed in detail in Claimants’ Supplemental Memorial on Track 2, ample evidence proves that Zambrano’s testimony about drafting the Lago Agrio Judgment is untrue.³⁵ Analysis of the Zambrano computers adds forensic findings to that mountain of evidence.

21. Zambrano testified that he began drafting the Lago Agrio Judgment in November 2010, a few weeks after he was reassigned to the Lago Agrio case as presiding judge on October 11, 2010.³⁶ He insisted that his 18-year-old personal typist, Evelyn Calva, typed the vast majority of Lago Agrio Judgment solely from his dictation, and he typed the rest, without cutting and pasting from any other source.³⁷ Zambrano repeatedly confirmed that he and his typist used *only* the New Computer in preparing the Judgment “because it was the more modern

³³ *Id.* § IV.A.2 at p. 12. We do not know, for example, if one or both of the Zambrano computers were reassigned to new users after Zambrano’s removal from the bench in February 2012, and if the files may have been bulk transferred for the new users.

³⁴ *Id.*

³⁵ See Claimants’ Supp. Track 2 Memorial ¶¶ 8, 66-91.

³⁶ **Exhibit C-1979**, Zambrano Depo. Tr. 62:19-70:7; **Exhibit C-1980**, RICO Trial Tr. 1663:22-1665:6, 1736:9-1737:2 (Zambrano); see also Claimants’ Supp. Track 2 Memorial ¶¶ 72-74 (regarding Zambrano’s contradictory testimony about the timeline for drafting the Judgment).

³⁷ **Exhibit C-1980**, RICO Trial Tr. 1877:21 – 1878:23, 1879:23-25 (Zambrano); **Exhibit C-1979**, Zambrano Depo. Tr. 63:13-19, 65:2-24; see also Claimants’ Supp. Track 2 Memorial ¶¶ 84, 97-98.

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computer.”³⁸ He also testified Ms. Calva used the New Computer to conduct internet research of foreign legal sources and then translated those foreign-language sources into Spanish – apparently using internet translation sites – so he could review them.³⁹

22. The forensic analysis shows that Zambrano’s testimony is false. Zambrano’s New Computer was not used to draft the Lago Agrio Judgment, and neither was his Old Computer. As detailed below, the usage record of the computer files, the internal computer programs, and the internet history all confirm that Zambrano did not, as he testified, use the New Computer to draft the Judgment, nor did he use his Old Computer to do so.

23. Tellingly, neither the New Computer nor the Old Computer contains a copy of the final Lago Agrio Judgment as loaded onto the court’s SATJE document system.⁴⁰ The two files with text from the Judgment were both created and saved on the Old Computer, not the New Computer as Zambrano insisted.⁴¹ The primary file containing text from the Judgment, named “*Providencias.docx*,” was created on the Old Computer on October 11, 2010, the same day Zambrano was reassigned to the Lago Agrio case and weeks before he says he began drafting the Judgment.⁴² Mr. Lynch could not determine what text was copied or typed into

³⁸ **Exhibit C-1980**, RICO Trial Tr. 1678:12-1680:15, 1683:8-1684-24 (Zambrano); *see also* **Exhibit C-1979**, Zambrano Depo. Tr. 31:2-33:10; **Exhibit C-1981**, Zambrano RICO Decl. ¶ 15 (“I never prepared one word of the judgment on any other computer”). The Ecuadorian Court’s inventories show the Judicial Council purchased the “New Computer” on November 26, 2010. *See* August 2014 Lynch Report § III.C at pp.8-9.

³⁹ **Exhibit C-1979**, Zambrano Depo. Tr. 243:12-246:8; **Exhibit C-1980**, RICO Trial Tr. 1616:21-1617:4, 1618-1620:6 (Zambrano); *see* Claimants’ Supp. Track 2 Memorial ¶¶ 78-83. Zambrano’s testimony on the translation was unclear, to say the least. Admitting he neither speaks nor reads English or French, he testified that Ms. Calva did the research, then he “had to choose the Spanish option” for the foreign language materials, which Ms. Calva printed out for him and he later reviewed. **Exhibit C-1980**, RICO Trial Tr. 1616:25-1617:4.

⁴⁰ *See* August 2014 Lynch Report § IV.D.1 at pp. 24-26.

⁴¹ *Id.* § IV.D.1 at pp. 24-25; § IV.D.3-4 at pp. 27-33.

⁴² *Id.* § II.D. at 9-10, § IV.D.1 at pp. 23-24, § IV.D.3 at p. 27. As Mr. Lynch explains, there were two “*Providencias*” documents: an “*Original Providencias*” document created sometime before July 14, 2010, and a new document also named “*Providencias*” created on the Old Computer on October 11, 2010 (“*Providencias.docx*”) and later used as the primary document containing the text of the Judgment. *Id.* § IV.D.3 at p. 28-29. Mr. Lynch could not determine the contents of the new *Providencias.docx* document when it was created (October 11, 2010) because he could not recover any temporary files from on or around that date. *Id.*

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Providencias.docx when it was created, and so could not determine how much of the Judgment text may have existed in the document at that time.⁴³ Mr. Lynch found a version of a second document, named “*Caso Texaco*,” that was created on the Old Computer on January 19, 2011 and contained a block of Judgment text which was later cut and pasted into *Providencias.docx*.⁴⁴ The Old Computer yielded the only recoverable documents containing text of the Lago Agrio Judgment.⁴⁵

24. For the New Computer, the forensic analysis showed that the Microsoft Word program itself – not just individual documents – was open on the New Computer for a total of only 38 hours between October 2010 and March 2011, including a total of only four hours between December 28, 2010 and February 14, 2011 (the day Zambrano issued the Judgment).⁴⁶ The user did not copy *Providencias.docx* onto the New Computer until July 7, 2011, months after the Judgment issued.⁴⁷

25. Even if one were to disregard that Zambrano, despite his emphatic testimony on this point, did not know which computer he and his typist supposedly used in preparing the Judgment, the forensic evidence disproves Zambrano’s testimony about the long hours and late nights, over weeks and months, he and Ms. Calva supposedly spent working on the Judgment.⁴⁸ Mr. Lynch’s analysis shows that on December 21, 2010, a user saved a version of *Providencias.docx* on the Old Computer that contained 42% of the Judgment text.⁴⁹ A week later, on December 28, 2010, a version of *Providencias.docx* found on the Old Computer

⁴³ *Id.* § IV.D.3 at p. 27-29.

⁴⁴ *Id.* § IV.D.1 at pp. 24-25, § IV.D.4-5 at pp. 31-35.

⁴⁵ *Id.* § IV.D.1 at p. 25.

⁴⁶ *Id.* § VI.D.1. at 25, § IV.D.7 at pp. 38-39.

⁴⁷ *Id.* § II at p. 6, § IV.D.3 at pp. 27-28, Table 7.

⁴⁸ See **Exhibit C-1979**, Zambrano Depo. Tr. 95:14-96:6; **Exhibit C-1980**, RICO Trial Tr. 1607:5-22 (Zambrano).

⁴⁹ August 2014 Lynch Report § II at 6, § IV.D.1. at p. 24.

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contained 66% of the text of the Judgment – an implausible feat of productivity, particularly over the holidays.⁵⁰ Indeed, the “edit time” for the *Providencias.docx* file as of that date totaled only 53 hours.⁵¹ That is, in the 78-day period between October 11, 2010, when *Providencias.docx* was created, and December 28, 2010, the date of a recovered draft containing 66% of the Judgment text, the *maximum* time spent editing the *Providencias.docx* document was 53 hours – an average of about 41 minutes per day. Subtracting 24 days for weekends and Ecuadorian holidays during that period, *Providencias.docx* was still open for an average of less than one hour per business day (53 hours over 54 business days).⁵²

26. Notably, the *Providencias.docx* document contained not just text from the Lago Agrio Judgment, but also text from other orders in the Lago Agrio Litigation.⁵³ That *Providencias.docx* was open on the computer and accumulating “edit time” does not mean the user was actively editing anything in the document, much less the Judgment text.⁵⁴ And even attributing all 53 hours of total “edit” time on *Providencias.docx* as of December 28, 2010, to active work on the Judgment, it was not enough time to draft, dictate, and type 66% of the 188-page, single-spaced Judgment.

27. Further, the forensic analysis confirms that parts, if not all, of the Judgment text were copied and pasted from other sources. Zambrano testified that he never gave Ms. Calva any documents from which to copy, but instead dictated everything to her, and that they never

⁵⁰ *Id.* § IV.D.1. at pp. 24-25.

⁵¹ *Id.* § VI.D.1. at pp. 25-26. The total “edit time” on the document does not mean, however, that the document was actually being edited during that period. *Id.* § IV.D.3 at p. 28.

⁵² Mr. Lynch was not able to determine the total “edit time” for the *Providencias.docx* document after December 28, 2010 because it was saved as a new version on January 21, 2011, which set the “edit time” to zero. *Id.* § VI.D.3 at 26.

⁵³ *Id.* § IV.D.1 at p. 24, § IV.D.3 at pp. 28-29.

⁵⁴ *Id.* § IV.D.3 at p. 28.

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cut and pasted anything into the document from any other source.⁵⁵ However, both the December 21 and December 28, 2010 recovered versions of *Providencias.docx* show formatting changes consistent with significant amounts of the Judgment text having been electronically copied and pasted or otherwise transferred from other sources.⁵⁶ This is not surprising, given Zambrano's inability under cross-examination to explain how Ms. Calva could type complex terms and long alphanumeric sequences from dictation, or how the final Lago Agrio Judgment came to have the same formatting, the same typographical and statistical errors, and the same idiosyncratic reference conventions and out-of-order numbering as in the Lago Agrio Plaintiffs' unfiled work product documents.⁵⁷ At this point, it is impossible to forensically determine exactly how much of the Judgment text was copied and pasted from other sources or how much, if any, of the text was actually typed on the Old Computer.⁵⁸ Nonetheless, the evidence of copying contradicts Zambrano's testimony.

28. Zambrano testified that Ms. Calva conducted legal research on the internet, using the New Computer to find the French, Australian, U.S., and English cases and legal concepts that were discussed and relied upon in the Lago Agrio Judgment, and she then translated the research results into Spanish for him to read.⁵⁹ Mr. Lynch's analysis of the internet history data from both the Old Computer and the New Computer showed that Calva's Facebook page and other internet sites were accessed from them, but found no history indicating that Ms. Calva or anyone

⁵⁵ **Exhibit C-1980**, RICO Trial Tr. 1877:21 – 1878:23, 1879:24-25 (Zambrano); **Exhibit C-1979**, Zambrano Depo. Tr. 63:13-19, 65:2-24; *see also* Claimants' Supp. Track 2 Memorial ¶¶ 84, 97-98.

⁵⁶ August 2014 Lynch Report § II at p. 6, § IV.D.1 at pp. 24, 26, § IV.D.3 at p. 30, § IV.D.7 at p. 38.

⁵⁷ **Exhibit C-1980**, RICO Trial Tr. 1663:7-21, 1711:3-15 (Zambrano); **Exhibit C-1979**, Zambrano Depo. Tr. 62:19-64:6; *see* Claimants' Supp. Track 2 Memorial ¶ 84.

⁵⁸ August 2014 Lynch Report § IV.D.1 at p. 26. As noted above, the forensic record shows that none of the text was on the New Computer.

⁵⁹ **Exhibit C-1979**, Zambrano Depo. Tr. 243:12-246:8; **Exhibit C-1980**, RICO Trial Tr. 1618:13-1620:6 (Zambrano). There is no evidence that Ms. Calva has any training in legal research or speaks any language other than Spanish. *See* Claimants' Supp. Track 2 Memorial ¶¶ 78-83.

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else visited any websites to conduct international legal research or to access online translation services.⁶⁰

29. In light of the differences between Zambrano's testimony and the forensic evidence, Mr. Lynch found that the forensic evidence on the Zambrano computers cannot be reconciled with Zambrano's narrative.⁶¹ He concluded: "In summary, the totality of the available forensic evidence is inconsistent in all material respects with Mr. Zambrano's testimony describing how the drafting of the Ecuadorian Judgment occurred on the New Computer."⁶²

C. Additional Internal and Unfiled Lago Agrio Plaintiffs' Work Product Was Found on the Zambrano Computers

1. A Version of the Plaintiffs' Index Summary was on the Zambrano Computers

30. Among the data Mr. Lynch recovered from the hard drives of the two Zambrano computers, as imaged in May 2014, was information found only in the Lago Agrio Plaintiffs' unfiled work product.⁶³

31. The Old Computer and the New Computer each contained a version of the Lago Agrio Plaintiffs' unfiled "Index Summary" Excel spreadsheet.⁶⁴ This version of the Index Summary differed from the two versions, discussed in Dr. Leonard's expert report of May 24, 2013, that were copied into the Judgment.⁶⁵ However, the version found on the Zambrano computers shares data and text with those other versions and is clearly a version of the Plaintiffs'

⁶⁰ August 2014 Lynch Report § IV.C.5 at p. 23.

⁶¹ *Id.* § II at p. 5, § IV.D.1 at p. 25.

⁶² *Id.* § II at p. 7.

⁶³ *Id.* § IV.C at pp. 16-21.

⁶⁴ *Id.* § IV.C.2 at pp. 17-21. See [Second] Expert Report of Robert A. Leonard, Ph.D. (May 24, 2013) at 8, 22-30 (submitted with Claimants' Track 2 Reply) (discussing Index Summaries and their use in the Judgment).

⁶⁵ [Second] Expert Report of Robert A. Leonard, Ph.D. (May 24, 2013) at 8, 22-30 (submitted with Claimants' Track 2 Reply).

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unfiled work product Index Summary document.⁶⁶ Based on the recoverable data, Mr. Lynch concludes that “all versions of the Index Summary were generated from the same original document created in January 2007 but were separately edited... .”⁶⁷

2. The Sampling Results in the Judgment Were Not Generated Using the Zambrano Computers

32. The forensic analysis showed that the statistics regarding sampling results recited in the Lago Agrio Judgment could not possibly have been generated on either of the Zambrano computers.⁶⁸

33. The Lago Agrio Judgment “contains data from two different Excel Spreadsheets, including statistics calculated across thousands of rows of data.”⁶⁹ Those figures resulted from Excel calculations, yet the Excel spreadsheet program was open on the Zambrano computers for a combined total of only four minutes during the entire time when Zambrano says he was preparing the Lago Agrio Judgment.⁷⁰ It would take someone experienced in using Excel – which Zambrano says he never used – several hours to calculate the statistical percentages included in the Lago Agrio Judgment.⁷¹ Notably, neither of the Zambrano computers contained a copy of the Selva Viva Data Compilation from which those sampling percentages were taken.⁷²

34. Mr. Lynch thus concludes: “[b]ased on the recorded activity of the Excel program, it would not have been possible, in the amount of time Excel was recorded as having

⁶⁶ August 2014 Lynch Report § IV.C.2 at pp. 17-21. The version of the Index Summary on the Zambrano computer was copied from the Old Computer to the New Computer and found on both hard drives, but is the same version.

⁶⁷ *Id.* § IV.C.2 at p. 21.

⁶⁸ *Id.* § III.A. at p. 7, § IV.C.3-4 at p. 21-22, Appendix A (comparing Selva Viva Data Compilation sampling percentages to those in the Judgment).

⁶⁹ *Id.* § IV.C.4 at p. 22.

⁷⁰ *Id.*

⁷¹ *Id.*; **Exhibit C-1979**, Zambrano Depo. Tr. 278:9-11; **Exhibit C-1980**, RICO Trial Tr. 1698:1-20 (admitting Zambrano does not know what an Excel spreadsheet is).

⁷² August 2014 Lynch Report § II at pp. 5-6, § IV.C. p. 17, § IV.C.3 at p. 21.

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been used, to use either of the Zambrano Computers to: (1) derive the statistics appearing in the Ecuadorian Judgment from the Lago Agrio Plaintiffs unfiled Excel spreadsheets; or (2) copy the other Microsoft Excel data from the Plagiarized Documents appearing in the Ecuadorian Judgment.”⁷³

3. The Judgment Copied Text and Analysis from Two of the Plaintiffs’ Internal Legal Memos

a. The Temporary File

35. One of the documents Mr. Lynch was able to recover from Zambrano’s Old Computer is a Windows temporary file named “~WRL0989.tmp.docx” a version of the “*Providencias.docx*” document that was last modified on December 28, 2010 (the “Temporary File”).⁷⁴ The text of the Temporary File closely tracks that of the first nine sections of the final Lago Agrio Judgment with some important differences.⁷⁵ This recovered Temporary File also revealed two more instances of previously unidentified text directly copied from the Lago Agrio Plaintiffs’ unfiled work product into the Judgment.

36. The draft of the Judgment in the Temporary File contains legal assertions supported by nine citations to United States legal authorities (“the Deleted Citations”). These Deleted Citations also appear verbatim (or nearly verbatim) in an August 18, 2008 internal memorandum, entitled “Chevron’s Liability for Texaco in Fact and Law,” authored by the Lago Agrio Plaintiffs’ legal intern Graham Erion (“the Erion Memo”).⁷⁶ The text in the Temporary File also includes two citations to authorities that appear in the “Moodie Memo,” an unfiled

⁷³ *Id.* § IV.C.4 at p. 22.

⁷⁴ *Id.* § IV.D.2 at pp. 26-27 (regarding temporary files for *Providencias.docx* and *Caso Texaco*); § IV.D.3 at pp. 28 (regarding *Providencias.docx* metadata).

⁷⁵ August 2014 Juola report ¶¶ 1, 10-14.

⁷⁶ **Exhibit C-2416**, Email, with attachments, from G. Erion to S. Donziger, Nov. 11, 2009 [DONZ00101563] (the “Erion Memo”).

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Plaintiffs' work product document discussed in Claimants' previous submissions.⁷⁷ As set forth below, no court record sources exist that can account for the appearance in the Temporary File of the text and U.S. legal citations from the Erion Memo or from the Moodie Memo. Tellingly, while the final Lago Agrio Judgment copied analysis from these memoranda, the author deleted all of the supporting U.S. legal citations.

37. Professor Patrick Juola, an expert in forensic linguistics, stylometric analysis, and authorship analysis,⁷⁸ supplementing his previous work, analyzed the additional information gained from examining the Zambrano computers against the Lago Agrio court record of the Lago Agrio Litigation. He confirms that neither the Erion Memo nor the Moodie Memo is found in the court's record.⁷⁹ Mr. Samuel Hernandez previously reviewed the Lago Agrio Court record for the Moodie Memo and also did not find it in the court record.⁸⁰

b. The Temporary File Copied Analysis and Citations from the Erion Memo

38. The Erion Memo states that it was "intended to be provided to a corporate law expert as background for an affidavit in support of [the Lago Agrio Plaintiffs'] arguments,"⁸¹ but the author of the Lago Agrio Judgment ultimately inserted its analysis into the Judgment itself. The forensic analysis of the Temporary File and related data from the Zambrano computers, along with the Erion Memo and the Lago Agrio Judgment, reveals the following sequence of events:

August 18, 2008 – The unfiled Erion Memo uses the Deleted Citations to support assertions (in English) regarding successor liability.

⁷⁷ See Claimants' Reply Memorial ¶¶ 49-50, discussing **Exhibit C-1645**, Moodie Memo (Feb. 2, 2009).

⁷⁸ See August 2013 Juola Report ¶¶ 3-9.

⁷⁹ *Id.* ¶¶ 75-79, 87-90.

⁸⁰ **Exhibit C-2417**, Direct Testimony of Samuel Hernandez, Jr. (Oct. 8, 2013) (RICO PX 3900), ¶¶ 3, 16-22, 35-36.

⁸¹ **Exhibit C-2416**, Erion Memo at p. 1 of 7.

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December 28, 2010 – The draft of the Lago Agrio Judgment in the Temporary File includes the Deleted Citations as support for assertions (in Spanish) that are substantively similar to those in the Erion Memo regarding successor liability (the “Spanish Assertions”).

February 14, 2011 – The Final Lago Agrio Judgment retains the Spanish Assertions almost verbatim, but excises the Deleted Citations contained in the draft reflected in the Temporary File.

39. The table below reflects the comparison of (i) the text of the Erion Memo; (ii) the text of the draft Judgment from the Temporary File, and (iii) the text of the final Lago Agrio Judgment:

#	Erion Memo	Temporary File	Final Judgment
1.	Page 5 of 7: Did the corporate structure cause fraud or similar injustice? FN7: <i>Wallace v. Wood</i> , 752 A.2d 1175, 1184 (Del. Ch. 1999). See also <i>Outokumpu Eng’g Enters., Inc. v. Kvaerner EnviroPower, Inc.</i> , 685 A.2d 724, 729 (Del. Sup. Ct. 1996).	Page 14: En casos como este, que se cumpla el supuesto de que la nueva estructura corporativa podría provocar fraude a terceros o una injusticia similar, la jurisprudencia norteamericana nos enseña que se impone de manera especial la doctrina del levantamiento del velo societario. (<i>Wallace contra Wood</i> , 752 A.2d 1175, 1184 (Del. Ch. 1999); y también <i>Outokumpu Eng’g Enters., Inc. contra K vaerner EnviroPower, Inc.</i> , 685 A.2d 724, 729 (Del. Sup. Ct. 1996).	Original Spanish, page 13: En casos como este, que se cumple el supuesto de que la nueva estructura corporativa podría provocar fraude a terceros o una injusticia similar, la jurisprudencia norteamericana nos enseña que se impone de manera especial la doctrina del levantamiento del velo societario. [Citations in the Temporary File omitted.] Certified Translation, page 13: In cases like this one, that fit the case where the new corporate structure could provoke a fraud on third parties or a similar injustice, North American jurisprudence teaches us that the doctrine of lifting the corporate veil must especially be asserted.
2.	Page 2 of 7: In addition to the Delaware Code, the principle of the common law in Delaware as applied to non-statutory mergers, as stated by the Delaware Court of Chancery is that “corporation[s] may not avoid [their] obligations by merger.” FN2 <i>Fitzsimmons</i>	Page 16: Los precedentes en Delaware establecen que “las corporaciones no podrán evitar sus responsabilidades mediante una fusión” (<i>Fitzsimmons contra Western Airlines</i> , 290 A.2d 682 (Del. Ch. 1972).	Original Spanish, page 15: Los precedentes en Delaware establecen que “las corporaciones no podrán evitar sus responsabilidades mediante una fusión”. [Citation in the Temporary File omitted.] Certified Translation, page 15: The precedents in Delaware

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#	Erion Memo	Temporary File	Final Judgment
	<p><i>v. Western Airlines</i>, 290 A.2d 682 (Del. Ch. 1972)</p>		<p>establish that “the corporations shall not be able to avoid their responsibilities through a merger.”</p>
<p>3.</p>	<p>Page 2 of 7: Merely naming a transfer a particular type does not make it so. <i>Courts consider substance over form</i>, and look to the nature of the transaction as a whole as reflected in the [actual] agreement and its actual consequences. FN 3 <i>Wilson v. Fare Well Corp.</i>, 356 A.2d 458 (Sup. Ct. N.J. 1976)</p> <p>“[Courts look at] the substance of the agreement [regardless of] the title put on it by the parties” FN6 <i>Cinocca v. Baxter Laboratories, Inc.</i>, 400 F. Supp. 527, 530 (E.D.Okla.1975)</p>	<p>Page 16: Ha quedado claro que el simple hecho de llamar fusión a una transacción no la convierte en tal (<i>Wilson v. Fare Well Corp.</i>, 356 A.2d 458 (Sup. Ct. N.J. 1976), y que las Cortes deben observar la substancia de transacción en lugar de lo alegado por las partes (<i>Cinocca v. Baxter Laboratories, Inc.</i>, 400 F. Supp. 527, 530 (E.D.Okla.1975).</p>	<p>Original Spanish, page 15: Ha quedado claro que el simple hecho de llamar fusión a una transacción no la convierte en tal, y que las Cortes deben observar la substancia de la transacción en lugar de lo alegado por las partes. [Citations in the Temporary File omitted.]</p> <p>Certified Translation, p. 15: It has been made clear that the simple fact of calling a transaction a merger does not turn it into such, and that the Courts must observe the substance of the transaction in place of what is alleged by the parties.</p>
<p>4.</p>	<p>Page 3 of 7: This finding is also supported by another important general principle underlying much common law jurisprudence respecting the legal effect of non-statutory mergers that “he who takes the benefit must bear the burden,” a maxim of [SIC] not only deeply-rooted in the common law but also explicitly expressed in many state codes, including California where Chevron is headquartered. FN 8 <i>See, e.g.</i>, California Civil Code § 3521.</p>	<p>Page 16: Esta Corte considera que es de vital importancia el principio general según el cual en las fusiones, “aquel que se beneficia asume también las obligaciones”, que se haya establecido en varios Códigos, incluyendo el de California, 3521.</p>	<p>Original Spanish, pages 15-16: Se considera que es de vital importancia el principio general según el cual en las fusiones, “aquel que se beneficia asume también las obligaciones”, que se ha establecido en varios Códigos. [Reference in the Temporary File to the California Code omitted.]</p> <p>Certified Translation, pages 15-16: Considered of vital importance is the general principle according to which in mergers, “the party that benefits also assumes the obligations,” which has been established in various Codes.</p>
<p>5.</p>	<p>Page 3 of 7: US. courts are conscious of the fact that</p>	<p>Page 16: Doctrinariamente esta Corte ha observado que la</p>	<p>Original Spanish, page 16: Doctrinariamente se aprecia que la</p>

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#	Erion Memo	Temporary File	Final Judgment
	limited liability is supposed to be prospective, not retrospective; as stated by the leading US treatise on corporate law, “[t]he imposition of successor liability is appropriate in those cases where ... the successor has had prior notice of the liability in question.” FN 9 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF PRIVATE CORPORATIONS § 7122 (West 2004).	imposición de responsabilidades a la nueva compañía es apropiada en aquellos casos en que ésta conocía previamente la responsabilidad de su antecesora (William Meade Fletcher, Enciclopedia de Corporaciones Privadas, 7122, West 2004)	imposición de responsabilidades a la nueva compañía es apropiada en aquellos casos en que ésta conocía previamente la responsabilidad de su antecesora. [Citation Omitted] Certified Translation, page 16: From the standpoint of legal scholars, imposing responsibilities on the new company is appropriate in those cases where it knew previously of the responsibility of its predecessors
6.	Page 3 of 7: [T]hereby prevent the “patent injustice” ¹⁶ or “manifest injustice” ¹⁷ that would result from allowing a tort victim's legal right to compensation disappear on the basis of merger transaction formalities in which, of course, the injured party had no voice whatsoever. FN 16: <i>In re Penn Central Securities Litigation</i> , 367 F.Supp. 1158, 1170 (E.D.Pa.1973). FN 17: <i>In re: Acushnet River</i> , 712 F. Supp. at 1019	Page 16: Por otro lado, permitir que desaparezca el derecho de las víctimas a reparación por meras formalidades dentro de la fusión, sería considerado por las Cortes de EEUU como “Injusticia manifiesta” (<i>In re: Acushnet River</i> , 712 F.Supp. at 1019) o “injusticia patente” (<i>Penn Central Securities Litigation</i> , 367 F.Supp. 1158, 1170 (E.D.Pa.1973))	Original Spanish, page 16: Por otro lado, permitir que desaparezca el derecho de las víctimas a reparación por meras formalidades dentro de la fusión, sería considerado por las Cortes de EEUU como “Injusticia manifiesta”, ... [Citation in Temporary File omitted.] Certified Translation, page 16: On the other hand, to allow the right of the victims to redress to disappear for mere formalities within the merger, would be considered by the Courts of the US as “manifest Injustice,” ...

40. Upon examining the Temporary File and discovering this additional text copied from Plaintiffs’ internal work product, Claimants asked Professor Juola to determine whether any of the following content appears in the Lago Agrio court record (other than in the final Judgment): (1) the Erion Memo; (2) the Deleted Citations appearing in the Erion Memo and in the Temporary File; or (3) the Spanish Assertions for which those Citations are offered as support in the Temporary File and which are included in the Lago Agrio Judgment.

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41. As detailed in Professor Juola’s report of August 12, 2014, none of that content is found in documents filed in the Lago Agrio court record prior to December 28, 2010, the date the Temporary File was last modified on Zambrano’s Old Computer.⁸² Professor Juola further concludes that the Spanish Assertions are not “lexical bundles” in the Spanish language (*i.e.*, they are not common phrases) which might account for their independent use by two different authors.⁸³

42. Further evidence points to the author of the Temporary File copying from the Erion Memo. For example, the Erion Memo twice cites *In re: Acushnet River & New Bedford Harbor Proceedings*. In keeping with proper “Bluebook” citation form for U.S. case law, the first citation, in footnote 7, is a full citation: “*In re: Acushnet River & New Bedford Harbor Proceedings*, 712 F.Supp. 1010, 1014 (D. Mass. 1989).”⁸⁴ Also in accordance with proper Bluebook form, the second citation to the case, in footnote 17, is a “short cite”: “*In re: Acushnet River*, 712 F.Supp. at 1019.”⁸⁵ This short cite is offered in support of the assertion that “U.S. courts are keenly aware of the judiciary’s fundamental responsibility to . . . prevent . . . [the] ‘manifest injustice’ that would result from allowing a tort victim’s legal right to compensation

⁸² August 2014 Juola Report ¶¶ 44-62, 75-79. As explained in his expert report, Professor Juola found one of the Deleted Citations in the Lago Agrio Plaintiffs’ Second Alegato, filed on January 17, 2011. *Id.* ¶¶ 45, 47-49, 69. This document, however, was filed after the Temporary File was last modified (on December 28, 2010) and therefore cannot have served as a record source for the appearance of that Citation in the Temporary File. *Id.* ¶ 71. Similarly, Professor Juola found that some of the Spanish Assertions appear in Chevron’s Request for Clarification and Expansion of the Judgment. *Id.* ¶¶ 46, 54, 58-59. But that document also post-dates the issuance of the final Lago Agrio Judgment and in fact quotes the language of one of the Spanish Assertions that had already appeared in that Judgment. *Id.* ¶ 69-70.

⁸³ *Id.* ¶¶ 63-68.

⁸⁴ **Exhibit C-2416**, Erion Memo at n.7. This first citation is offered in support of the assertion (not repeated in the draft found in the Temporary File) that “[Companies cannot] avoid liability for past pollution through formalistic corporate slight [sic] of hand.”

⁸⁵ *Id.* at n.17. It is highly unlikely that Zambrano, an Ecuadorian trained lawyer who does not speak or write English, has any familiarity with proper U.S. legal citation form.

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disappear [sic] on the basis of merger transaction formalities in which, of course, the injured party had no voice whatsoever.”

43. The Temporary File cites *Acushnet River* only once; however, rather than providing a full citation, as would be proper when citing a case for the first time, the Temporary File draft uses the same short cite found in footnote 17 of the Erion Memo: “*In re: Acushnet River*, 712 F.Supp. at 1019.” And the Temporary File cites that case in support of the assertion that “to allow the right of the victims to redress to disappear for mere formalities within the merger, would be considered by the Courts of the US as ‘manifest injustice,’” a statement strikingly similar to that for which the Erion Memo cites *Acushnet River* in footnote 17. In both instances, the phrase “manifest injustice” appears in quotes. This is no coincidence. The forensic evidence recovered from the Zambrano computers demonstrates that the author of the draft of the Judgment in the Temporary File copied directly from the unfiled Erion Memo.

c. The Temporary File Copied the “Substantial Factor Test” and Citations from the Moodie Memo

44. The Temporary File draft also contains citations to two California state court decisions (together, the “*Whitley/Rutherford* Citation”) which also appear in the Moodie Memo, another internal Plaintiffs’ work product document.⁸⁶ As discussed in Claimants’ previous Memorials, the Moodie Memo was an internal legal memorandum written by an Australian legal intern for the Lago Agrio Plaintiffs concerning causation principles.⁸⁷ It cites sources from both California law applicable to asbestos litigation and from Australian tort law – causation standards that have no basis in Ecuadorian law. Both the Lago Agrio Judgment and the Moodie Memo purport to analyze causation under the “substantial factor” test, a narrow doctrine found in

⁸⁶ Exhibit C-1645, Moodie Memo.

⁸⁷ See Claimants’ Reply Memorial ¶¶ 49-50; Claimants’ Supp. Track 2 Memorial ¶¶ 83, 94.

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California state law that applies only to asbestos litigation and is wholly inapplicable to the facts of the Lago Agrio case. And the Lago Agrio Judgment and the Moodie Memo also both misapply that doctrine in multiple respects in exactly the same way, and both purport to do so in reliance on California and Australian tort law.⁸⁸

45. A discussion of the same “substantial factor” text appearing in the Moodie Memo (in English) also appears in the Temporary File (in Spanish). That passage is supported by the *Whitley/Rutherford* Citation appearing in the Moodie Memo. However, although that passage from the Temporary File remains verbatim in the final Lago Agrio Judgment, the *Whitley/Rutherford* Citation is deleted.

46. Similarly to his analysis of the Erion Memo, Claimants asked Professor Juola to determine whether any of the following content appears in the Lago Agrio court record (other than in the Lago Agrio Judgment): (1) the Moodie Memo; (2) the *Whitley/Rutherford* Citation appearing in the Moodie Memo and in the Temporary File; or (3) the assertions for which the *Whitley/Rutherford* Citation is offered as support in the Temporary File and which appear in the Judgment. Professor Juola confirmed that none of that content is found anywhere in the record of the Lago Agrio Litigation.⁸⁹ He further concluded that no text substantially similar to the assertions for which the *Whitley/Rutherford* Citation is offered in support appeared in the court record.⁹⁰

47. An analysis of the Temporary File and related data from the Zambrano computers, along with the Moodie Memo and the Lago Agrio Judgment, shows the evolution of the use of the Moodie Memo:

⁸⁸ See Claimants’ Track 2 Reply ¶¶ 49-50.

⁸⁹ August 2014 Juola Report ¶¶ 87-90; see also **Exhibit C-2417**, Hernandez Direct Testimony ¶ 35 (confirming that the Moodie Memo is not found in the court record).

⁹⁰ August 2014 Juola Report ¶¶ 84-86, 88.

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February 2, 2009 – The Moodie Memo uses the *Whitley/Rutherford* Citation to support assertions (in English) regarding the “substantial factor” causation test.

December 28, 2010 – The draft in the Temporary File uses the *Whitley/Rutherford* Citation to support assertions (in Spanish) substantially similar to those in the Moodie Memo regarding the “substantial factor” causation test (“el factor substancial”).

February 14, 2011 – The final Lago Agrio Judgment uses the same assertion (in Spanish) regarding the “substantial factor” test, but omits the *Whitley/Rutherford* Citation.

48. The table below reflects the comparison of (i) portions of the text of the Moodie Memo; (ii) the text of the draft Judgment from the Temporary File; and (iii) the text of the Lago Agrio Judgment:

#	Moodie Memo	Temporary File	Final Judgment
1.	<p>The Moodie Memo discusses the “substantial factor” test for causation under California case law, citing (in six footnotes) <i>Whitley v. Phillip Morris, Inc.</i> five times and <i>Rutherford v. Owens-Illinois, Inc.</i> twice.</p> <p>In discussing the elements of the substantial factor test the Memo states, among other things, that a plaintiff must show that a toxic substance played “more than . . . [a] theoretical” role in bringing about the claimed injury. The Memo further states that a plaintiff has “[n]o need to prove that it was toxic chemical’s [sic] from D[efendant]’s conduct that actually produced the malignant growth.” See</p>	<p>p. 59: El factor substancial, que implica que el elemento dañoso no puede ser mas meramente teórico ni tampoco jugar el papel secundario generando el daño. Según esta teoría estos elementos deben ser considerados sin necesidad de probar cuál de ellos ha sido precisamente el que causó el daño, debido a la irreducible falta de certeza científica respecto a cuál de los elementos utilizados por el demandado provocó el daño (ver <i>Whitley contra Philip Morris, Inc.</i> y <i>Rutherford contra. Owens-Illinois, Inc.</i>).</p>	<p>pp. 89-90: El factor substancial, que implica que el elemento dañoso no puede ser meramente teórico ni tampoco jugar el papel secundario generando el daño. Según esta teoría estos elementos deben ser considerados sin necesidad de probar cuál de ellos ha sido precisamente el que causó el daño, debido a la irreducible falta de certeza científica respecto a cuál de los elementos utilizados por el demandado provocó el daño [Citation in the Temporary File omitted.]</p> <p>pp. 89-90: The substantial factor, which requires that the harmful element cannot be merely theoretical nor can it play a secondary role in the generation of the harm. According to this theory, these elements must be considered without the need to investigate which of them was</p>

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#	Moodie Memo	Temporary File	Final Judgment
	Moodie Memo, at WOODS-HDD-0012794. ⁹¹		precisely the cause of the harm, due to the irrefutable lack of scientific certainty about which of the elements used by the defendant caused the harm.

49. Rather than translating word-for-word, the author of the draft Judgment text condensed the Moodie Memo’s discussion of the substantial factor test into two sentences. However, the correlation between the text of the Lago Agrio Judgment highlighted above and the text of the Moodie Memo similarly highlighted is apparent. And, there is no question that the Moodie Memo and the Temporary file both cite *Whitley* and *Rutherford* for the same – yet wholly inapplicable – legal concept.

50. Ultimately, as with the Deleted Citations from the Erion Memo, the author of the Lago Agrio Judgment deleted the *Whitley/Rutherford* Citation, apparently in an effort to obscure the fact that the Judgment’s discussion of the “substantial factor” test originates directly from the Lago Agrio Plaintiffs’ unfiled work product.

D. The Zambrano Computer Evidence Corroborates the Guerra Evidence

51. In contrast to the Zambrano testimony, former Judge Guerra’s testimony is corroborated by the evidence from the Zambrano computers. To summarize, Guerra testified that he served as Zambrano’s ghostwriter in civil cases and drafted orders he then shipped to Zambrano, sometimes by USB drive, for which Zambrano paid him and which Zambrano later issued as Zambrano’s own orders and rulings. Guerra also testified that he drafted orders and rulings in the Lago Agrio Litigation favorable to the Lago Agrio Plaintiffs, who paid him for

⁹¹ Exhibit C-1645, Moodie Memo (Feb. 2, 2009).

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those ghostwriting services.⁹² For his part, Zambrano admitted that Guerra drafted a number of rulings in civil cases pending before Zambrano, but denied that Guerra did any work on the Lago Agrio Litigation itself.⁹³

52. As articulated in Mr. Lynch's first report, the forensic analysis of Mr. Guerra's computer and related materials yielded significant corroborative evidence regarding the ghostwriting scheme.⁹⁴ Guerra's personal computer contained over 100 unique files with drafts of various orders and rulings Zambrano eventually issued in cases pending before him.⁹⁵ Guerra's computer also contained eleven draft orders and rulings relating to the Lago Agrio Litigation, nine of which Zambrano ultimately issued in the case.⁹⁶ Corroborating those findings and testimony, Guerra's bank records show deposits to his account by Lago Agrio Plaintiffs' group Selva Viva, and TAME airlines shipping records show shipments between Zambrano and Guerra around the time Zambrano issued the orders in the Lago Agrio Litigation.⁹⁷

53. The evidence from the Zambrano computers confirms the ghostwriting scheme. While Mr. Lynch was not able to recover any files from the Zambrano computers regarding the orders Guerra drafted in the Lago Agrio Litigation, this is likely due to the loss of data on the Zambrano computers.⁹⁸ In particular, these Guerra drafts all pre-dated the reinstallation of

⁹² See Claimants' Supp. Track 2 Memorial ¶¶ 50-65, discussing Guerra evidence: **Exhibit C-1616a**, Declaration of Alberto Guerra Bastidas (Nov. 17, 2012); **Exhibit C-1648**, [Second] Declaration of Alberto Guerra Bastidas (Jan. 13, 2013); **Exhibit C-1828**, First Supplemental [Third] Declaration of Alberto Guerra Bastidas (Jan. 13, 2013); **Exhibit C-1888**, Deposition of Alberto Guerra Bastidas, *Chevron Corp. v. Donziger et al.*, No. 11-CIV-0691 (LAK) (S.D.N.Y.) (May 2, 2103); **Exhibit R-907**, Deposition of Alberto Guerra Bastidas (Nov. 5, 2013); **Exhibit C-2386**, Guerra Witness Statement (RICO direct testimony); **Exhibit C-1978**, RICO Trial Tr. (Oct. 23, 2013), Testimony of Alberto Guerra Bastidas, pp. 908:5 *et seq.*

⁹³ **Exhibit C-1979**, Zambrano Depo. Tr. 213:6-214:19, 221:23-223:18, 252:14-254:23; **Exhibit C-1980**, RICO Trial Tr. 1637:13-1641-4; 1643:18-1644:14. See also Claimants' Supp. Track 2 Memorial ¶¶ 56-64, 70.

⁹⁴ October 2013 Lynch Report §§ 2.1-2.3 at pp. 6-19.

⁹⁵ *Id.* § 2.1.3-4 at pp. 12-16; August 2014 Lynch Report § I at p. 4, § IV.B.1 at pp. 12-13.

⁹⁶ October 2013 Lynch Report § 2.1.1-3 at pp. 8-13.

⁹⁷ See Claimants' Supp. Track 2 Memorial ¶ 59.

⁹⁸ August 2014 Lynch Report § IV.B.1 at pp. 12-13.

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Windows on the Old Computer in July 2010, an event causing significant data loss.⁹⁹ The information that could be gleaned from the recoverable documents, however, is consistent with Guerra's testimony and Zambrano's admissions regarding the ghostwriting scheme.¹⁰⁰

54. The Zambrano computers contained 82 unique recoverable files with the same file names as those on the Guerra computer, the content of which was substantially similar to the Guerra computer documents.¹⁰¹ The files on the Guerra computer pre-dated their counterparts on the Zambrano computers, indicating that, as former Judge Guerra testified, Guerra drafted those orders and rulings for Zambrano, who later issued them as his own rulings.¹⁰²

55. Further, at least 31 different USB devices were used on the Zambrano computers before, during, and after Zambrano's tenure presiding over the Lago Agrio Litigation.¹⁰³ Of these, nine of the USB drives Guerra used on his computer were also used on one or both of the Zambrano computers, all but one of which was first used on the Guerra computer and then later attached to the Zambrano computer.¹⁰⁴ Mr. Lynch further identified that at least 48 of the draft orders and rulings in Zambrano cases found on the Guerra computer were on USB drives shared between the Guerra and Zambrano computers.¹⁰⁵

56. Using the forensic analysis of the Zambrano and Guerra computer evidence, along with shipping records, Mr. Lynch tracked a repeating sequence of events:

In 16 instances the following events took place, in order:

1. A draft ruling was saved on the Guerra Computer;

⁹⁹ *Id.*

¹⁰⁰ *Id.* § IV.B. at pp. 12-16.

¹⁰¹ *Id.* § IV.B.1 at pp. 12-13.

¹⁰² *Id.*

¹⁰³ *Id.* § IV.B.2 at pp. 13-15.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* § IV.B.3 at pp. 15-16.

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2. A file with same name as the draft ruling was saved on a USB device used on the Guerra Computer;
3. A package was sent from former Judge Guerra in Quito to Lago Agrio; and
4. A file with same name as the draft ruling was saved to one of the Zambrano Computers.¹⁰⁶

This evidence is all corroborates Guerra's testimony, and Zambrano's admission, that Guerra drafted rulings for Zambrano, shipped the draft rulings to Zambrano on flash drives, and Zambrano then finalized and issued them as his own rulings in civil cases pending before him.

III. CONCLUSION

57. Forensic analysis of the Zambrano computers revealed additional substantial evidence that former Judge Zambrano's description of drafting the Lago Agrio Judgment is false. Among other things, that forensic analysis demonstrates that material was copied and pasted from other sources into the Judgment, and that neither of the Zambrano computers was used to conduct internet legal research on the Judgment's foreign law principles or to access translation services to translate the English and French language cases and legal authorities. The Excel program on the computers was likewise not open long enough for Zambrano to have conducted the spreadsheet calculations included in the Judgment, which were taken from the Lago Agrio Plaintiffs' unfiled Selva Viva Data Compilation. The forensic evidence also demonstrates that whatever work was done on the Judgment using the Zambrano computers, if any, was not done on the New Computer or in the time frame as Zambrano insisted in his RICO testimony. In contrast, the analysis of the Zambrano computers did yield evidence corroborating former Judge Guerra's testimony and other evidence.

¹⁰⁶ *Id.*

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58. The forensic analysis of the Zambrano computers further exposed additional instances of copying of text and assertions from the Lago Agrio Plaintiffs' unfiled work product into the Lago Agrio Judgment. Expert analysis of the Lago Agrio court record confirms that the Erion Memo and the Moodie Memo, the sources of the additional instances of the Lago Agrio Plaintiffs' work product being copied into the Judgment, are not found in the court record.

59. Therefore, for the reasons stated above and in Claimants' previous submissions to the Tribunal, Claimants request the Tribunal make the findings and grant them the relief as set forth most recently in Claimants' Supplemental Memorial on Track 2.

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Respectfully submitted,



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