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Chevron, Greenwashing, and the Myth of 'Green Oil Companies'

Miriam A. Cherry
Saint Louis University School of Law

Judd F. Sneirson
Savannah Law School

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Miriam A. Cherry[†] & Judd F. Sneirson[‡]

Abstract

As green business practices grow in popularity, so does the temptation to "greenwash" one's business to appear more environmentally and socially responsible than it actually is. We examined this phenomenon in an earlier paper, using BP and the Deepwater Horizon catastrophe as a case study and developing a framework for policing dubious claims of corporate social responsibility. This Article revisits these issues focusing on Chevron, an oil company that claims in its advertisements to care deeply about the environment and the communities in which it operates, even as it faces an $18 billion judgment for polluting the Ecuadorean Amazon and injuring its people. After describing Chevron's "we agree" advertising campaign, the Article sets out our framework for approaching "faux" corporate social responsibility, gauges whether misled consumers and investors might have a legal remedy as a result of Chevron's advertising claims, and proposes refinements to better regulate corporate greenwashing.

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† Professor, Saint Louis University Law School.

‡ Visiting Associate Professor, Hofstra University Law School. The authors wish to acknowledge Anne Bloom, Adrienne Davis, Monica Eppinger, Robert L. Rogers, Rachael Salcido, Norman Silber, Constance Z. Wagner, and Jarrod Wong for their insights. Special thanks to Andrew Schwartz, who provided excellent insights during Professor Cherry's presentation at the University of Colorado School of Law, and to Professor Sneirson's co-panelists when he presented at Washington & Lee School of Law as part of the symposium Regulating Resource Extraction: Creating Order from a Legal Morass. Finally, our appreciation to Joshua Ebersole, Kristen Henke, and William Kellner for their excellent research assistance.

I. Introduction

In the wake of the 2010 oil spill in the Gulf of Mexico, amid public backlash directed at BP in particular and the oil industry in general, the Chevron Corporation rolled out a series of new advertisements broadly agreeing with this popular sentiment and inviting critics to learn the company's positions on the environment and other sensitive subjects.[1] According to a company press release, "[t]he campaign highlights the common ground Chevron shares with people around the world on key energy issues."[2] "We hear what people say about oil companies—that they should develop renewables, support communities, create jobs and protect the environment—and the fact is, we agree."[3]

One of the advertisements touts Chevron's commitment to renewable energy, "agreeing" that we need to develop affordable, viable alternatives to fossil fuels now, describing its progress in this area, and noting that it has invested millions of dollars towards this end.[4] Along similar lines, another advertisement focuses on technology, "agreeing" that the company must think like a technology company and making the case that it currently

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1. *See Advertising*: *The Power of Human Energy*, CHEVRON CORP., http://www.chevron.com/about/advertising (last visited Sept. 4, 2011) (linking to the television and print advertisements that form Chevron's "we agree" campaign) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment). As to the timing of the campaign, see Ben Casselman, *Chevron Ad Campaign Answers Critics Head-On*, WALL ST. J., OCT. 18, 2010, at B10, *available at* http://online.wsj.com/article/SB10001424052702304250404575558363902469440.html ("[T]he campaign comes as the industry is trying to recover from the [BP oil spill, which] . . . only worsened the image of an industry that the public has consistently ranked dead last among 25 business sectors . . . .").

2. *See Chevron Launches New Global Advertising Campaign: "We Agree*," CHEVRON CORP. (Oct. 18, 2010), http://www.chevron.com/chevron/pressreleases/article/10182010_chevronlaunchesnewglobaladvertisingcampaignweagree.news (last visited Sept. 4, 2011) (introducing the ad campaign) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

3. *See id.* (quoting Rhonda Zygocki, Chevron's Vice President of Policy, Government, and Public Affairs).

4. *See It's Time Oil Companies Get Behind the Development of Renewable Energy*, CHEVRON CORP., http://www.chevron.com/weagree/?statement=renewables (last visited Sept. 5, 2011) (affirming Chevron's long term commitment to renewable energy sources) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment). Another ad, agreeing that "oil companies need to get real," offers somewhat of a counterpoint, stating that fossil fuels "are the lifeblood of any modern economy," that "no other form of energy is as economical, as plentiful, or as reliable," and therefore that oil must play a continuing role in meeting the world's energy demands. *See id.* (quoting Paul Siegele, President of Chevron Energy Technology).

does.[5] Still another admits that the company makes considerable profits but argues that it puts those profits "to good use," reinvesting them in future energy supplies, employing workers at good wages, paying billions in taxes, helping communities and small businesses, and distributing profits to shareholders "who rely on [Chevron] dividends."[6] And a final advertisement "agrees [that] oil companies should support the communities they're part of."[7] When it partners with a country, Chevron continues, it "commits for the long term," and although Chevron does not claim to "replace the role of government," it strives to "make a difference" where it operates, particularly in the areas of "health, education, and welfare."[8]

Much of the "we agree" campaign echoes what the company terms "The Chevron Way: Getting Results the Right Way." According to the company website, "Chevron Way" values include the following:

> We conduct our business in a socially responsible and ethical manner. We respect the law, support universal human rights, protect the environment and benefit the communities where we work . . . . *Integrity*. We are honest with others and ourselves . . . . We accept responsibility and hold ourselves accountable for our work and our actions . . . . *Protecting People and the Environment.* We place the highest priority on the health and safety of our workforce and protection of our assets and the environment.[9]

While Chevron's website is replete with impressive testimonials,[10] the "we agree" campaign, and particularly statements like these last few, rankled some.[11] So much so that a rogue series of "we agree" advertisements soon

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5. *See Oil Companies Should Think More Like Technology Companies*, CHEVRON CORP., http://www.chevron.com/weagree/?statement=technology (last visited Sept. 5, 2011) (quoting John W. McDonald, Chevron's Vice President and Chief Technology Officer) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

6. *See Oil Companies Should Put Their Profits to Good Use*, CHEVRON CORP., http://www.chevron.com/weagree/?statement=growth (last visited Sept 5, 2011) (quoting Patricia E. Yarrington, Chevron's Vice President and Chief Financial Officer) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

7. *See Oil Companies Should Support the Communities They're A Part Of*, CHEVRON CORP., http://www.chevron.com/weagree/?statement=community (last visited Sept. 5, 2011) (quoting Rhonda Zygocki) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

8. *See id.* (describing Chevron's positive impacts in partner countries).

9. *The Chevron Way*, CHEVRON CORP., http://www.chevron.com/about/chevronway (last visited Sept. 5, 2011) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

10. *See supra* notes 4–7 and accompanying text.

11. *See* Adam Werbach, *The Failure of Chevron's New "We Agree" Ad Campaign*, THE ATLANTIC (Oct. 21, 2010 4:50 PM), http://www.theatlantic.com/business/archive/2010/10/the-failure-of-chevrons-new-we-agree-ad-campaign/64951/ (last visited Sept. 5, 2011) (stating that

emerged, spoofing Chevron's campaign so well that some news outlets believed them authentic.[12] Not surprisingly, the spoofs went further than Chevron's own platitudes, "agreeing" that "oil companies should clean up their own messes," "fix the problems they create," "put safety first," and "stop endangering life."[13] One fake advertisement read:

> Extracting oil from the Earth is a risky process, and mistakes do happen. It's easy to pass the blame or ignore the mistakes we've made. Instead, we need to face them head on, accept our financial and environmental responsibilities, and fund new technologies to avoid these mistakes in the future.[14]

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many of Chevron's "good works . . . were required by law") (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

12. *See* David Zax, *Chevron's New Ad Campaign is a Slick Yes Men Hoax*, FAST COMPANY (Oct. 18, 2010), http://www.fastcompany.com/1695892/chevrons-new-ad-campaign-makes-lemonade (last visited Sept. 5, 2011) ("In retrospect, it does seem ridiculous that any oil company would take such aggressive responsibility for oil spills, poor industry safety, and exploitation of foreign resources.") (on file with the Washington and Lee Journal of Energy, Climate, and the Environment); *see also* Rupal Parekh & Michael Bush, *Pranksters Hijack Chevron Corporate-PR Efforts: What Do Marketers Do When Faced with Ads, Fake Press Releases, Fake News Stories?*, ADVERTISING AGE (October 18, 2010), http://adage.com/print/146559 (last visited September 8, 2011) (explaining that some media outlets had difficulty determining real ads from fake ones) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment); Stuart Elliott, *Pranksters Lampoon Chevron Ad Campaign*, N.Y. TIMES MEDIA DECODER BLOG (Oct. 18, 2010), http://mediadecoder.blogs.nytimes.com/2010/10/18/pranksters-lampoon-chevron-ad-campaign/ (describing the spoofed ads and noting fooled news outlets) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

13. *See Chevron—We Agree*, RAINFOREST ACTION NETWORK ET AL., http://www.chevron-weagree.com (last visited Sept. 19, 2011) (displaying realistic but false advertisements parodying Chevron's "we agree" campaign) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment). More parodies of the "we agree" campaign followed, including a fake ad contest and viral videos with lines like the following: Chevron executive, trying to understand the new ad campaign: "We say 'we agree' but we don't actually have to do anything?" Ad executive: "We are going to make pretending to care the new caring." *Punk Chevron Video Contest*, CHEVRONTHINKSWE'RESTUPID.ORG, http://chevronthinkswerestupid.org/videogallery (last visited September 20, 2011) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment); *see also ChevronToxico: The Campaign for Justice in Equador*, CHEVRONTOXICO, http://chevrontoxico.com (last visited September 20, 2011) (promoting awareness about Chevron's lawsuit in Ecuador) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment); *We Can Change Chevron, Energy Shouldn't Cost Lives*, RAINFOREST ACTION NETWORK, http://changechevron.org (last visited September 20, 2011) (attempting to pressure Chevron into taking responsibility for the environmental damage in Ecuador and elsewhere) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

14. *We Punked Chevron*, CHEVRONTHINKSWE'RESTUPID, http://chevronthinkswerestupid.org/weagree (last visited Sept. 5, 2011) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

What would trigger such a response? The answer lies in Chevron's other current public-relations effort: disclaiming responsibility for environmental damage to the Amazon Rainforest in Ecuador.[15] There, the company is defending against a lawsuit seeking billions of dollars for "environmental remediation, excess cancer deaths, impacts on indigenous cultures, and unjust enrichment" stemming from Texaco's activities there between 1964 and 1992.[16] All told, the company is said to have "dump[ed] an estimated 18 billion[] gallons of toxic wastewater into [Ecuadorean] rivers and streams and spill[ed] roughly 17 million gallons of crude oil into the ancestral territory of six indigenous tribes."[17] Chevron acquired Texaco, assuming its legal obligations, in 2001.[18]

The Ecuadorean plaintiffs originally brought suit in the United States against Texaco in 1993, but the oil company successfully moved to dismiss the case for *forum non conveniens*, leaving plaintiffs to litigate their claims, if at all, back in Ecuador.[19] Plaintiffs refiled their suit in Ecuador against Chevron as Texaco's successor in 2003[20] and won a staggering $18 billion judgment on February 14, 2011,[21] which Chevron is now appealing.[22]

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15. *See* Elliott, *supra* note 12 ("The spoof is a direct consequence of Chevron's trying to fool people into thinking it is environmentally conscious when the company is responsible for the extensive contamination found in Ecuador's rain forest . . . ." (quoting a spokesperson for the Ecuadorean plaintiffs)).

16. *See* CRUDE (Entendre Films 2009) (documenting the ongoing suit against Chevron for oil pollution in Ecuador).

17. *See* Mitch Anderson, *Chevron Adds Insult to Injury in the Amazon*, SAN FRANCISCO CHRONICLE CITY BRIGHTS BLOG (Feb. 7, 2011), http://www.sfgate.com/cgi-bin/blogs/manderson/detail?entry_id=82541 (detailing the extent of the environmental damage) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

18. *See* In re Chevron Corp., 749 F. Supp. 2d 141, 143 n.3 (S.D.N.Y. 2010) (noting Chevron's acquisition of Texaco). As a general rule, following a merger, a target's liabilities become the acquiror's. *See, e.g.*, DEL. CODE ANN. tit., 8 § 259(a) (2010) (providing that a target's liabilities following a merger "attach to [the] surviving corporation[] and may be enforced against it to the same extent as if said . . . liabilities . . . had been incurred or contracted by it").

19. *See* Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001) (dismissing the case), *aff'd*, 303 F.3d 470 (2d Cir. 2002); *see also* Ecuador v. Chevron Corp., 638 F.3d 384, 396 (2d Cir. 2011) (noting Texaco's "promise[] that . . . it would 'satisfy judgments that might be entered in plaintiffs' favor . . . subject to [its] rights under New York's Recognition of Foreign Country Money Judgments Act [dealing with fraud and due process]" (quoting an earlier Texaco memorandum of law)).

20. *See In re Chevron Corp.*, 749 F.Supp.2d at 143 ("Chevron is the target of litigation brought in Ecuador by the so-called Lago Agrio plaintiffs in which the latter seek to recover $113 billion for alleged environmental pollution by Texaco, Inc., from Texaco's current owner, Chevron Corporation."). The film CRUDE, cited *supra* note 16, documents the lawsuit in Ecuador and includes scenes where the court holds hearings in the field and hears arguments from the lawyers just steps from oil-contaminated sites.

21. *See* Felicity Carus, *Chevron Chiefs Face Shareholders After Huge $18bn Ecuador Fine*, THE GUARDIAN (May 25, 2011), http://www.guardian.co.uk/environment/2011/may/25/chevron-heads-shareholders-huge-fine

Chevron's position in the case is quite simple: whatever harm Texaco wrought in Ecuador was done as part of a consortium with Ecuador's national oil company Petroecuador, and when Texaco withdrew from the consortium in the 1990s, the Ecuadorean government released it from any further environmental responsibility upon the completion of certain remediation efforts.[23] These were completed to the Ecuadorean government's satisfaction by 1998,[24] and Chevron claims the resulting release bars plaintiffs' claims.[25] Plaintiffs respond that the release covers

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(breaking the judgment down as follows: $8.6 billion for environmental remediation, $860,000 to the named plaintiffs, and $8.6 billion in punitive damages) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

22. *See id.* (noting Chevron's appeal efforts).

23. *See* Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 342 (S.D.N.Y. 2005) (describing Ecuador and Texaco's 1995 contract).

24. *See Texaco Petroleum, Ecuador and the Lawsuit Against Chevron*, CHEVRON CORP., www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf (last visited Sept. 19, 2011) [hereinafter *Texaco Petroleum*] (noting Texaco's remediation to the Ecuadorean government's satisfaction and the government's subsequent release of Texaco from any remaining environmental liability) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment). Plaintiffs dispute whether Chevron adequately fulfilled these obligations. *See, e.g.*, Steven Donziger, *The Chevron Way*, FORBES (Sept. 16, 2009), http://www.forbes.com/2009/09/16/chevron-texaco-crude-amazon-ecuador-opinions-contributors-steven-donziger.html (conveying the position of plaintiffs' lawyer, Stephen Donziger, that "[e]vidence at trial submitted by the plaintiffs demonstrates that Texaco's purported clean-up ignored the contaminated groundwater, rivers and streams, and consisted primarily of dumping dirt over waste pits without adequately cleaning out the toxins") (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

25. *See* Michael D. Goldhaber, *Forum Shopper's Remorse*, CORPORATE COUNSEL (Apr. 1, 2010), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202445653516 ("Chevron says[] Texaco abated the problem with a $40 million cleanup after it left the country, for which it obtained a (much disputed) release from liability.") (on file with the Washington and Lee Journal of Energy, Climate, and the Environment). Chevron also claims that the plaintiffs' lawyers have improperly influenced the Ecuadorean courts, manufactured and falsified evidence, and are generally trying to defraud and extort Chevron in the Ecuador litigation. *See* Lawrence Hurley, *Chevron Wins Restraining Order in $113B Pollution Case*, N.Y. TIMES, Feb. 9, 2011, http://www.nytimes.com/gwire/2011/02/09/09greenwire-chevron-wins-restraining-order-in-113b-polluti-20818.html (discussing Chevron's accusations) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment). Chevron has also obtained injunctive relief before the Permanent Court of Arbitration in the Hague under United Nations trade law, arguing that Ecuador's court system cannot fairly and independently hear the case against it. *See* Michael D. Goldhaber, *Arbitrators Order Ecuador to Suspend Enforcement of Any Judgment Against Chevron*, AMERICAN LAWYER (Feb. 10, 2011, 10:51 PM), http://amlawdaily.typepad.com/amlawdaily/2011/02/chevron021111.html (noting the decision and Chevron's accusations of fraud by plaintiffs' lawyers) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment). This is somewhat ironic given the company's earlier effort to have the case heard in Ecuador. *See* Goldhaber, *Forum Shopper's Remorse*, *supra*; *see also* Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001) (dismissing the case), *aff'd*, 303 F.3d 470 (2d Cir. 2002) (granting Chevron's motion for *forum non conveniens* in the United States). A federal court in New York recently entered a similar order, which is now on appeal in the Second Circuit. *See* Chevron Corp. v.

only governmental claims for environmental liability, not citizen-plaintiffs' claims for personal injuries and other private harms the pollution is said to have caused.[26]

Whatever the merits of the Ecuadorean action,[27] Chevron's critics cry hypocrisy: "Chevron's rhetoric and the public image that they put forward [are] very different from how they're actually operating."[28] While the company claims to care about the communities in which it operates, and particularly local health and welfare, its Ecuadorean track record and litigation position belie its public statements.[29] While the company claims to prioritize the environment and accept responsibility for its actions, it disclaims any obligation for the oil pollution its predecessor created that continues to seep into water sources and, it is argued, severely impact residents' health.[30] And while the company purports to put its considerable profits to "good use," those uses apparently include lobbying efforts to repeal climate-change legislation,[31] multinational litigation to evade environmental responsibility, and superficial ad campaigns meant to persuade critics, consumers, and investors of the company's environmental bona fides.[32]

Donziger, 768 F. Supp. 2d 581, 660 (S.D.N.Y. 2011) (preventing the Ecuadorean plaintiffs from immediately enforcing any Ecuadorean judgment against the company's United States assets); s*ee also* Mark Hamblett, *Attorneys Spar Over Impact of Injunction in Chevron Case*, N.Y. L.J., May 11, 2011, http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202493524878 (reporting on the Second Circuit oral argument) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

26. *See* Goldhaber, *Forum Shopper's Remorse*, *supra* note 25 (relating plaintiffs' argument).

27. For more on the Ecuador lawsuit and related issues, see generally Chris Jochnick & Nina Rabaeus, *Business and Human Rights Revitalized: A New U.N. Framework Meets Texaco in the Amazon*, 33 SUFFOLK TRANSNAT'L L. REV. 413 (2010); Cortelyou Kenney, *Disaster in the Amazon: Dodging "Boomerang Suits" in Transnational Human Rights Litigation*, 97 CALIF. L. REV. 857 (2009); Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and* Aguinda v. Texaco, 38 N.Y.U. J. INT'L L. & POL. 413 (2006); Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081 (2010).

28. *See* Casselman, *supra* note 1, at B10 (discussing criticism of Chevron's new ad campaign); *see also* Elliott, *supra* note 12 ("Chevron's trying to fool people into thinking it is environmentally conscious when the company is responsible for extensive contamination found in Ecuador's rain forest and in other places as well." (quoting a spokesperson for the Ecuadorean plaintiffs)).

29. *See* Casselman, *supra* note 1, at B10 (contrasting Chevron's "we agree" campaign with Chevron's corporate practices).

30. *See Texaco Petroleum*, *supra* note 24 (summarizing the company's litigation position).

31. *See* Casselman, *supra* note 1, at B10 (noting Chevron's efforts to repeal a 2006 Californian climate-change law).

32. *See* Steven Mufson, *Critics Spoof New Chevron Ads Promoting Responsibility*, WASHINGTON POST, Oct. 20, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/19/AR2010101904622.html ("When it comes to oil spills, climate

In an earlier article, we examined a similar "green" advertising campaign from another major oil company mired in an environmental catastrophe.[33] There, in the context of the BP oil spill, we explored what it means to be a socially responsible corporation, noted consumer and investor preferences for socially responsible behavior and goods and services, and recognized a temptation for firms to appear to be more socially responsible than they in fact are.[34] We termed misleading corporate social responsibility claims "faux CSR" and discussed various ways in which the legal system could police this sort of corporate greenwashing.[35]

We draw on that framework here to determine whether the legal theories we advanced in the previous article could provide redress to consumers or investors misled by Chevron's CSR claims.[36] This Article proceeds in two parts. In Part II, we offer some background on greenwashing and CSR and set out the framework we established in the earlier article for approaching faux CSR.[37] In Part III, we apply this framework to Chevron's "we agree" campaign, gauge whether misled consumers and investors might have a legal remedy as a result of Chevron's advertising claims, and refine the alternatives we developed to better regulate corporate greenwashing.[38]

II. A Framework for Policing Greenwashing

American environmentalist Jay Westerveld coined the term "greenwashing" in 1986 in response to a hotel's efforts to encourage guests

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change and human rights abuses, we need real action from Chevron. Instead we get this high-cost glossy ad campaign.") (on file with Washington and Lee Journal of Energy, Climate, and the Environment); *see also* Casselman, *supra* note 1, at B10 (estimating the cost of the "we agree" campaign at more than $90 million).

33. *See* Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 1002–09 (2011) (analyzing corporate social responsibility and greenwashing in the context of the BP oil spill).

34. *See id.*

35. *See id*.

36. We do not address securities-fraud claims that Chevron misled its shareholders about the severity of the risks to the company from the Ecuadorean litigation. For such an analysis, see Simon Billenness & Sanford Lewis, *An Analysis of the Financial and Operational Risks to Chevron Corporation from* Aguinda v. ChevronTexaco, AMAZON WATCH 1, 1–17 (May 11, 2011) http://chevrontoxico.com/assets/docs/Chevron-Ecuador_Risk_Analysis_Report_May2011.pdf.

37. *See infra* Part II (discussing origins of "greenwashing" and potential legal implications).

38. *See infra* Part III (proposing ways to police "greenwashing" and faux CSR more effectively).

to help the environment by reusing towels.[39] While the hotel's stated purpose was to reduce water, energy, and detergent use, Westerveld suspected its true motivation was profit.[40] A play on "whitewashing"—using white paint to cover over dirt in a superficial or transparent way—the term "greenwashing" soon came to signify insincere, dubious, inflated, or misleading environmental claims.[41] Various environmental groups have similarly objected to the current widespread use of the word "green" for products and services that do not truly or meaningfully benefit the environment.[42] Indeed, it seems that many products, services, and companies now boast some shade of "green"—even companies in "dirty" industries, who often proclaim their dedication to the environment the loudest.[43]

By contrast, many companies genuinely engage in corporate social responsibility (or CSR).[44] These firms strive to create returns for their shareholders, good products and services for their customers, good jobs and wages for their employees and communities, and benefit the public by treading lightly on (or even improving) the natural environment.[45] In serving all of these corporate constituencies, and taking a broad view of the firm's best interests, a company often benefits financially.[46] Studies have

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39. *See* Alice Rawsthorn, *The Toxic Side of Being, Literally, Green*, N.Y. TIMES, Apr. 5, 2010, http://www.nytimes.com/2010/04/05/arts/05iht-design5.html?scp=1&sq=the%20toxic%20side%20of%20being%20literally%20green&st=cse (crediting Westerveld with coining the term "greenwashing") (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

40. *See id.*

41. *See id.* ("These days [greenwashing] refers to anyone who makes fake environmental claims.").

42. *Cf.* Tom Wright, *False "Green" Ads Draw Global Scrutiny*, WALL ST. J., Jan. 30, 2008, at B4, *available at* http://online.wsj.com/article/SB120163622342426091.html (discussing the difficulties of policing inaccurate "green" ads). Today many of these environmental groups receive corporate support and have shied away from such accusations; the more radical environmental groups including Greenpeace continue their criticism unabated. *See, e.g.*, John Vidal, *Artists Prepare for BP Protest at Tate Britain*, THE GUARDIAN (U.K.), June 25, 2010, 2010 WLNR 12736937 (interviewing groups protesting BP's "cuddly" manufactured corporate persona).

43. *See* Beate Sjåfjell, *Regulating Companies as if the World Matters: Reflections from the Ongoing Sustainable Companies Project*, 46 WAKE FOREST L. REV. (forthcoming 2011) (remarking that "the ugliest companies wear the most makeup"); *see also* Carol Elliott, *ND Management Professor Earns "Best Paper" Award for Greenwashing Research*, UNIVERSITY OF NOTRE DAME MENDOZA SCHOOL OF BUSINESS (Nov. 22, 2010), *available at* http://business.nd.edu/faculty_and_research/article.aspx?id=8012 (describing Sarv Devaraj & Suvrat Dhanorkar, Do As I Say Not As I Do: An Empirical Examination of the Relationship Between Corporate Sustainability Beliefs and Performance, which found a negative correlation between CSR rhetoric and environmental performance).

44. *See* Cherry & Sneirson, *supra* note 33, at 1013 n.160 (listing examples of genuine CSR).

45. *See id.* at 1010–14 (describing ways in which corporations engage in CSR).

46. *See id.* at 1013–14 (noting the correlation between profitability and CSR).

shown that CSR tends to break even and frequently turns a profit,[47] which comports with one's general sense that consumers are willing to pay more for organic, sustainably harvested, and/or environmentally gentle goods and services.[48]

Several legal scholars have noted the problems that arise from greenwashing and other forms of faux CSR.[49] Driven to maximize short-term profits,[50] companies have an incentive to promise consumers "eco-friendly" products but deliver goods or services in the cheapest way possible, regardless of environmental impact.[51] While this description may seem extreme or blatant, there is an unfortunately strong incentive to renege on advertising promises to uncertain constituencies outside the company, like the environment.[52] Indeed, because of these issues, some commentators have called for more disclosure of the true state of corporate environmental records and for the creation of a remedy for fraudulent or misleading CSR claims.[53]

Professor Cynthia Williams began this effort approximately ten years ago, arguing in the *Harvard Law Review* that the SEC should require publicly-traded companies to make accurate and standardized disclosures of their social and environmental performance.[54] More recently, Professor Michael Siebecker agreed but noted that false CSR advertising, commercials, and social responsibility reports might easily mislead

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47. *See id.* at 1013 (citing various studies); *see also* Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 22 J. OF APPLIED CORP. FIN. 32, 32–41 (2001) (positing that a firm best maximizes its long-term value by tending to all of its stakeholder groups).

48. *See* Cherry & Sneirson, *supra* note 33, at 1002–03 (noting consumer willingness to pay more for socially responsible goods and services).

49. *See id.* at 1026–27 (citing scholarship).

50. *See* Judd F. Sneirson, *Shareholder Profits and the Sustainable Corporation*, 46 WAKE FOREST L. REV. 541, 556 (2011) [hereinafter Sneirson, *Shareholder Profits*] (identifying the market forces that encourage corporate managers to focus on short-term stock price).

51. *See* Cherry & Sneirson, *supra* note 33, at 1026–28 (discussing incentives to produce short-term profits).

52. *See id.* at 1026–28 (noting these incentives).

53. *See, e.g.*, Cynthia A. Williams, *The SEC and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1293–1306 (1999) (proposing that SEC mandate disclosure of environmental information, thus providing a check against inflated advertising claims); Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 618–19 (2006) (suggesting that First Amendment jurisprudence does not protect misleading corporate political speech from mandatory disclosure securities laws); Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating CSR Through a Legal Lens*, 81 TEMP. L. REV. 831, 834–42 (2008) [hereinafter Kerr, *Creative Capitalism*] (contemplating corporate liability for "greenwashing" under Section 10(b) of the Securities Exchange Act).

54. *See* Williams, *supra* note 53, at 1293–1306 (proposing that the SEC mandate disclosure of environmental information, thus providing a check against inflated advertising claims).

investors.[55] And two years ago, Professor Janet Kerr began sketching the preliminary contours of what an action under Rule 10b-5 for misleading or faux CSR might look like.[56]

In our previous article, we criticized BP as a "free rider" on the CSR efforts of other firms and argued that BP undeservingly enjoyed the public's goodwill toward companies involved in socially responsible practices.[57] The gap that BP so effectively exploited—taking advantage of the public relations upside of CSR without actually expending the time or money to integrate or engage in it—is particularly troublesome in that it might ultimately erode the positive sentiment enjoyed by companies actually engaged in meaningful CSR.[58] We then suggested a number of avenues for policing greenwashing and faux CSR, which we revisit here: remedies under false advertising laws; claims under the securities-fraud laws; the newly established Bureau of Consumer Financial Protection, which could play a major role in policing CSR claims; and private standard-setting by independent organizations or other groups.[59] We review their basic elements below and in Part III apply them to Chevron's "we agree" campaign.

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55. *See* Siebecker, *supra* note 53, at 618–19 (suggesting that First Amendment jurisprudence does not protect misleading corporate political speech from mandatory disclosure securities laws).

56. *See* Kerr, *Creative Capitalism*, *supra* note 53, at 839–42 (applying Rule 10b–5 to materially misleading CSR statements). Some of Professor Kerr's other proposals are far more radical. For example, in a 2009 article, she argues that the government might want to choose to mandate CSR in some instances, for example, when a multinational corporation engages in various functions in a third-world country that make it more akin to a government than a corporation. *See* Janet E. Kerr, *A New Era of Responsibility: A Modern American Mandate for CSR*, 78 UMKC L. REV. 327, 333–34 (2009) (arguing that Congress has the authority to set corporate social responsibilities under the Commerce Clause); *see also* David Monsma & John Buckley, *Non-Financial Corporate Performance: The Material Edges of Social and Environmental Disclosure*, 11 U. BALT. J. ENVT'L L. 151, 182–93 (2004) (arguing that corporate statements about the extent of their CSR programs could in some instances be material). Others have noted that corporate "codes of ethics" could also potentially be subject to liability as a form of false advertising if the company's executives fail to comply with the codes. *See* Su-Ping Lu, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT'L L. 603, 619–28 (2000) (discussing the elements necessary to enforce corporate conduct through the FTC).

57. *See* Cherry & Sneirson, *supra* note 33, at 1036 (arguing that BP benefited from other companies' genuine CSR by advertising their faux CSR).

58. *See id.* at 1026–27 (citing Professors Williams, Siebecker, and Kerr's articles on CSR and greenwashing).

59. *See id.* at 1025–35 (discussing possible legal claims against companies employing faux CSR).

A. False Advertising

To allege a claim for unfair trade practices, false advertising, or consumer fraud, one must typically show a representation, omission, or practice that is likely to mislead or deceive potential consumers; the representation, omission, or practice must be material, meaning it is likely to affect consumers' buying decisions; and the representation, omission, or practice must cause consumers some injury.[60]

There are few such reported cases dealing with corporate claims of social responsibility, and those that have been brought typically concern specific product labeling asserting the product is "green."[61] For example, successful claims have been made as against insecticide companies who labeled their products as safe or environmentally friendly when that was not the case.[62] Cases have also been brought challenging the use of the word "recycled," "recyclable," or "biodegradable," which all now have strict legal definitions.[63] Although these cases dealt with false representation claims concerning product labeling, a false advertising case around an environmental claim could be seen as analogous.

Perhaps the most prominent case involving greenwashing and faux CSR is *Kasky v. Nike*.[64] There, activist plaintiffs brought an action under California's false advertising law against Nike for making assertions about its labor practices, which action the lower courts summarily dismissed on free-speech grounds.[65] Holding that Nike's assertions were commercial speech and thus subject to a lower level of constitutional protection, the California Supreme Court remanded the case for further factual findings to

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60. *See* IQ Prods. Co. v. Pennzoil Prods. Co., 305 F.3d 368, 370 (5th Cir. 2002) (interpreting section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A)–(B) (2006), which regulates false or misleading descriptions of fact in connection with commerce of goods and services); *see also* Kasky v. Nike, Inc., 45 P.3d 243, 247 (Cal. 2002) (analyzing Nike's statements about its labor practices under California law), *cert. granted*, 539 U.S. 654 (2003). Many states provide similar protections. *See, e.g.*, N.J. STAT. ANN. § 56:8-19 (West 2001 & Supp. 2011) (regulating consumer fraud); N.C. GEN. STAT. § 75-1.1(a) (2009) (regulating unfair trade practices).

61. *See* Douglas M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 646 (2001) (identifying specific claims against green labeling).

62. *See id.* (referencing cases involving misleading environmental advertising claims); *see also* John M. Church, *A Market Solution to Green Marketing: Some Lessons from the Economics of Information*, 79 MINN. L. REV. 245, 301–04 (1994) (same).

63. *See* 16 C.F.R. Part 260 (2011) (setting forth the Federal Trade Commission's "Green Guides" for the use of environmental labels in marketing); Church, *supra* note 62, at 305–06 (referring to cases involving terms such as "degradable," "biodegradable," "environmentally safe," and "ozone friendly").

64. Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002), *cert. granted*, 539 U.S. 654 (2003).

65. *See id.* at 249 (summarizing the case's procedural history).

see if Nike's statements were, indeed, false.[66] The California Supreme Court stated:

> Our holding, based on decisions of the United States Supreme Court, in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully.[67]

The case eventually settled out of court with Nike promising to fix various labor issues, subject itself to third-party monitoring, and make a monetary payment to a worker's advocacy non-profit group.[68] While many commentators have lauded *Kasky v. Nike* as a promising avenue to keep corporations to their word regarding worker rights,[69] the result is more tantalizing than fulfilling, as the Supreme Court of the United States never ruled on the issue.

That said, the issue likely remains an open one: if "green" claims were a significant part of a company's consumer marketing and consumers did, in fact, rely on false statements, the corporation's claims would not be entitled to an absolute First Amendment free-speech defense.[70] Instead, such statements would only be accorded the (lesser) deference afforded to commercial speech.[71] State governments may regulate commercial speech that is false or misleading,[72] and consumer reliance on false green advertising could form the basis of private actions for false advertising and consumer fraud.[73] Thus, if consumers could show that they purchased gasoline or other goods and services on the basis of green advertising

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66. *See id.* at 262 (not deciding whether Nike's speech was false or misleading).

67. *Id.* at 247.

68. *See* Adam Liptak, *Nike Move Ends Case Over Firms' Free Speech*, N.Y. TIMES, Sept. 13, 2003, at A8 (discussing how Nike's settlement ended what was expected to be a landmark ruling on free speech).

69. For a sampling of commentary about *Kasky v. Nike*, see generally Robert L. Kerr, *From Sullivan to Nike: Will the Noble Purpose of the Landmark Free Speech Case Be Subverted to Immunize False Advertising*, 9 COMM. L. & POL'Y 525 (2004); Tamara R. Piety, *Grounding Nike: Exposing Nike's Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151 (2005); Michele Sutton, *Between a Rock and a Judicial Hard Place: Corporate Social Responsibility Reporting and Potential Legal Liability Under* Kasky v. Nike, 72 UMKC L. REV. 1159 (2004); Samuel A. Terilli, Nike v. Kasky *and the Running-But-Going-Nowhere Commercial Speech Debate*, 10 COMM. L. & POL'Y 383 (2005); David C. Vladeck, *Lessons from a Story Untold:* Nike v. Kasky *Reconsidered*, 54 CASE W. RES. L. REV. 1049 (2004).

70. *See* Kasky v. Nike, Inc., 45 P.3d 243, 247–49 (Cal. 2002) (concluding Nike's statements are commercial speech).

71. *See id.* at 247.

72. *See id.* (noting permissible limitations on commercial speech).

73. *See supra* notes 39–59 and accompanying text (discussing the background of greenwashing and faux CSR).

claims that turned out not to be true, they would be entitled to recover the amount that they paid as compared to prices for similar goods and services, together with any other damages as provided in the relevant statutes.

B. Securities Fraud

A second cause of action could lie with investors under Section 10(b)[74] and Rule 10b-5[75] for securities fraud. Rule 10b-5 requires that a plaintiff show a material misstatement or actionable omission of fact, made with scienter, on which another justifiably relies, causing damages.[76] Securities fraud additionally requires that the fraud be "in connection with the purchase or sale of a security" per the statute;[77] if the security is traded on an efficient market such as the New York Stock Exchange, reliance can be presumed under the "fraud on the market theory";[78] and, regarding causation, the plaintiff must show both that the misstatement or omission caused the purchase or sale (transaction causation) and that the misstatement or omission caused the complained-of loss (loss causation).[79]

A recent Sixth Circuit case highlights a difficult obstacle for faux CSR claims alleging securities fraud: materiality.[80] There, shareholders sued the Ford Motor Company alleging securities fraud in connection with the company's statements regarding the safety of the Ford Explorer's tires.[81] Plaintiffs noted that they were in part suing Ford for calling itself a "socially responsible company" while simultaneously marketing products that were dangerous.[82] The court was not moved by Ford's claim that it was "a leader in corporate social responsibility":

> Such statements are either mere corporate puffery or hyperbole that a reasonable investor would not view as significantly changing the general gist of available information, and thus, are not material, even if they were misleading. All public companies praise their products and

74. *See* Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j–2 (2010) (prohibiting securities fraud).

75. *See* 17 C.F.R. § 240.10b–5 (2011) (prohibiting securities fraud).

76. *Compare* WILLIAM LLOYD PROSSER ET AL., PROSSER & KEETON ON LAW OF TORTS § 105 (W. Page Keeton et al. eds., 5th ed. 1984) (listing the elements of common-law fraud), *with* Basic, Inc. v. Levinson, 485 U.S. 224, 231–32 (1988) (listing the elements of securities fraud), *and* Dura Pharm. Inc. v. Broudo, 544 U.S. 336, 341–42 (2005) (same).

77. *See* 15 U.S.C. § 78j(b).

78. *See Basic, Inc.*, 485 U.S. at 241–48 (endorsing the fraud-on-the-market theory).

79. *See Dura Pharm., Inc.*, 544 U.S. at 341–42 (distinguishing between transaction causation and loss causation and requiring both).

80. *See* In re Ford Motor Co., 381 F.3d 563, 570–71 (6th Cir. 2004) (analyzing whether Ford's statements were material); *see also* Monsma & Buckley, *supra* note 56, at 115 (discussing materiality); Kerr, *Creative Capitalism*, *supra* note 53, at 857 (same).

81. *See In re Ford Motor Co.*, 381 F.3d at 570–71 (relating plaintiffs' allegations).

82. *Id.* at 569.

> their objectives. Courts everywhere "have demonstrated a willingness to find immaterial as a matter of law a certain kind of rosy affirmation commonly heard from corporate managers and numbingly familiar to the marketplace—loosely optimistic statements that are so vague, so lacking in specificity, or so clearly constituting the opinions of the speaker, that no reasonable investor could find them important to the total mix of information available."[83]

Thus, even if a faux CSR challenge can successfully point to a company's false statement, that statement might be immaterial as a matter of law on the ground that it is just meaningless hyperbolic puffery.[84]

We suggested in our earlier article that this materiality hurdle might be overcome on appropriate facts.[85] We noted that, as socially conscious investing continues to increase in volume and popularity,[86] "a large institutional investor or a class of socially responsible mutual funds may have a more objective basis for relying on non-financial company statements, policies and practices."[87] These sorts of funds explicitly make investment decisions based on more than just financial performance and place credence on statements about a company's social and environmental activities.[88] It would be wrong to say that CSR would be immaterial to such an investment decision, notwithstanding the Sixth Circuit's reasoning in the quoted passage.

A second, smaller hurdle for faux CSR securities fraud claims involves causation. As noted above, a plaintiff in a securities fraud action must prove both that the misstatement caused the plaintiffs to purchase or sell the company's security and that the misstatement of fact relates to the complained-of loss.[89] As applied to BP or Chevron, this means that an investor was motivated to buy or sell their stock on the basis of the companies' environmental platitudes. Such a plaintiff would also have to

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83. *Id.* at 570–71 (quoting *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1217 (1st Cir. 1996)). On puffery generally, see David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395 (2006).

84. *See* Hoffman, *supra* note 83, at 1407 (noting a Fourth Circuit determination that a company's statement about future earnings was immaterial puffery).

85. *See* Cherry & Sneirson, *supra* note 33, at 1032 (discussing how, as socially conscious investing increases, the materiality hurdle may not seem insurmountable).

86. *See generally* George Djurasovic, *The Regulation of Socially Responsible Mutual Funds*, 22 J. CORP. L. 257 (1997) (noting the increasing popularity of socially conscious investing).

87. *See* Monsma & Buckley, *supra* note 56, at 189 (discussing how a company's non-financial commitments can create investor expectations).

88. *See id.* at 169 (noting that investment firms assess environmental performance and overall corporate responsibility).

89. *See supra* note 79 and accompanying text (noting the transaction and loss causation requirements).

show loss causation, that BP's or Chevron's stock price subsequently fell because it did not live up to its environmental claims.

C. Dodd-Frank

A third possibility for policing CSR claims may be on the horizon. In July of 2010, Congress enacted a number of historic financial reforms as part of the Dodd-Frank Act.[90] Section 1011 of the Act enables the establishment of a Bureau of Consumer Financial Protection to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[91] The statutory language concerning consumer education, appropriate disclosure, and tracking of consumer complaints[92] could overlap with faux CSR and greenwashing, as these are consumer-information issues and accurate disclosure could certainly influence consumers' informed investment decisions. Further, educating consumers about their rights should include helping consumers understand whether their purchases will advance the causes they believe in. That can only be done through accurate disclosure. As the legislation and the Bureau are still so new, it is difficult to know how the various provisions will be enforced and what litigation they will generate. That said, it is intriguing to think about the possibility that the new agency might include accurate corporate social responsibility information as one aspect of its consumer-fraud agenda.[93]

D. Certifications

A fourth means of policing corporate claims of social responsibility draws on certifications. Many public and private certifications currently exist, verifying that foods are organic or kosher,[94] that products are fairly

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90. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376, 1964 (2010).

91. *Id.* § 1011.

92. *See id.* §§ 1031–37 (delineating the actions the Bureau may take against unfair, deceptive, or abusive acts or practices).

93. *See generally* Cherry & Sneirson, *supra* note 33, at 1034.

94. *See National Organic Program*, U.S. DEP'T OF AGRIC., AGRIC. MKTG. SERV., http://www.ams.usda.gov/AMSv1.0/nop (last visited Sept. 7, 2011) (describing the regulations and process for certifying USDA organic products) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment); *see also Certification Services*, QUALITY ASSURANCE INT'L, http://www.qai-inc.com/services/certification_services.asp (last visited Sept. 7, 2011) (explaining QAI's certification programs) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment); *Overview of Oregon Tilth*, OR. TILTH, http://tilth.org/about (last visited Sept. 7, 2011) (describing the nonprofit organization's goal of supporting socially equitable agriculture through certification) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment); *OUKosher.Org: The World's Most*

traded or meet certain qualities,[95] that buildings meet certain "green" standards,[96] that wood and paper products are sustainably harvested,[97] and that companies adhere to environmental and social-responsibility standards.[98] Certifying organizations typically license their marks to those who meet their standards, permitting them to display the marks on products and in advertisements, sometimes in exchange for some amount of compensation.[99]

These and other marks can be used to verify corporations' social-responsibility claims for consumers and investors.[100] B Labs, the owner of the "B Corporation" mark, already offers something similar, certifying and licensing corporations that adhere to its standards of environmental and social benevolence.[101] The Bureau of Consumer Financial Protection or another federal agency could also develop uniform corporate social responsibility standards and designate private organizations to verify compliance with them, as the Department of Agriculture did for organic food.[102] Such marks could offer consumers and investors a verifiable option for identifying and comparing socially responsible companies and products and offer companies wishing to proclaim their CSR bona fides a credible way to do so.

Recognized & Trusted Kosher Trademark, ORTHODOX UNION, http://www.oukosher.org (last visited Sept. 7, 2011) (describing the O-U hechsher and mark) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

95. *See* FAIR TRADE USA, http://www.transfairusa.org (last visited Sept. 7, 2011) (defining what fair trade is and what the Fair Trade Certified label represents) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment); *see also About the Good Housekeeping Seal: How Our Magazine and the GH Seal Protect You*, GOOD HOUSEKEEPING, http://www.goodhousekeeping.com/product-testing/history/about-good-housekeeping-seal (last visited Sept. 7, 2011) (describing the *Good Housekeeping* seal) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

96. *See* U.S. GREEN BLDG. COUNCIL, http://www.usgbc.org/leed (last visited Sept. 7, 2011) (describing the LEED building designations) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

97. *See* FOREST STEWARDSHIP COUNCIL, http://www.fsc.org (last visited Sept. 7, 2011) (describing the FSC certification process) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

98. *See* Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 1017–19 (2009) [hereinafter Sneirson, *Green is Good*] (discussing the "B Corporation" and how its mark signifies that a business meets certain high standards of social and environmental performance).

99. *See, e.g.*, *id.* (describing the "B Corporation" mark and arrangement).

100. *See* Cherry & Sneirson, *supra* note 33, at 1034 (discussing how the private certification model can help to police corporate claims of social responsibility).

101. *See* Sneirson, *Green is Good*, *supra* note 98, at 1017–19 (describing the "B Corporation" mark and arrangement).

102. *See* Cherry & Sneirson, *supra* note 33, at 1034–35 (discussing the development of the USDA standards for organic-labeled food).

E. Watchdogs

A final means of keeping corporate claims of CSR in check is through "watchdogs," like the activists who created the Chevron "we agree" spoofs.[103] Some see tremendous potential in these groups' power to reign in false CSR claims: "For the price of a URL and a little wit, a campaign that is out of step with reality can be hacked and become more of a liability than a potential benefit."[104] Of course, where a company or its environmental record is not in the public eye, the company is less likely to draw these individuals' ire.[105] Whether such a deterrent is enough to put an end to false claims of CSR remains to be seen, but this may prove a promising method for policing corporate greenwashing.

III. Analysis of the "We Agree" Campaign

In this Part, we now reexamine Chevron's "we agree" campaign[106] and analyze how such a campaign might fit into our framework for addressing greenwashing and faux CSR.[107]

Chevron's "we agree" campaign and website are in many ways at odds with its Ecuadorean activities.[108] Chevron says that oil companies should protect the environment, that it does protect the environment, that it "places the highest priority on . . . the environment,"[109] and that it conducts itself in a socially responsible and ethical manner.[110] Chevron also states that it strives to "make a difference" in the communities where it does business, improving people's "health . . . and welfare," and generally supporting and benefiting

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103. *See supra* notes 12–14 and accompanying text (describing how activists responded to Chevron's "we agree" campaign).

104. *See* Werbach, *supra* note 11 ("As times go on these sorts of campaigns will begin to diminish.").

105. *See* Cherry & Sneirson, *supra* note 33, at 1002–04 (noting how, before its 2010 oil spill in the Gulf of Mexico, BP was largely admired by environmental groups and others for its perceived earth-friendly approach to doing business).

106. *See supra* notes 1–9 and accompanying text (discussing the "we agree" campaign).

107. *See supra* Part II (setting forth our framework for policing greenwashing and faux CSR).

108. Chevron has also recently drawn criticism from environmentalists and a surprising number of its own shareholders for "fracking"—the controversial drilling method that involves injecting water and chemicals deep underground to fracture rock and release natural gas deposits. *See* Cassandra Sweet, *Chevron Investors Defeat Fracking Proposal*, MARKET WATCH (May 25, 2011, 6:14 PM), http://www.marketwatch.com/story/chevron-investors-defeat-fracking-proposal-2011-05-25 (last visited Sept. 7, 2011) (noting approximately 40% of Chevron shareholders voted in favor of the shareholder proposal) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

109. *Supra* note 9 and accompanying text.

110. *See supra* note 9 and accompanying text (describing Chevron's vision and values).

"the communities [it is] part of."[111] These claims are complicated and depend on the timeframe being examined. For example, Chevron may follow these precepts even if Texaco did not during its tenure in Ecuador.[112]

Other Chevron statements seem questionable upon closer inspection. For example, Chevron may invest millions of dollars on renewable alternatives to fossil fuels,[113] but that is comparatively little for a company with a market capitalization of over $200 billion, and the company tellingly balances this statement with a reaffirmation of the importance of oil exploration and production.[114] Chevron also says that it puts its profits to good use, but includes in that description paying its employees' salaries (including $16 million to its CEO in 2010) and issuing its shareholders dividends each quarter.[115] And in its statement about "protecting people and the environment" the company incongruously adds a reference to its assets: "We place the highest priority on the health and safety of our workforce and protection of *our assets* and the environment."[116] In other words, many of Chevron's pro-CSR messages in fact reveal the company's more or less conventional way of doing business.

The value Chevron places on its assets is perhaps most apparent in its defense of the Ecuadorean lawsuit.[117] Whereas Chevron writes on its website, "We accept responsibility and hold ourselves accountable for our work and our actions" and "respect the law,"[118] its litigation strategy calls these claims into question. From the very outset of the Ecuadorean action, the company has disclaimed, not accepted, responsibility for its predecessor's environmental actions, and now that the Ecuadorean court it sought to hear the case has found the company liable, Chevron is fighting around the globe

111. *See supra* note 9 and accompanying text (explaining the "Chevron Way").

112. *See supra* notes 18, 23–25 and accompanying text (noting the timing of the pollution in Ecuador and Chevron's acquisition of Texaco).

113. *See supra* note 4 and accompanying text (quoting Chevron's "we agree" campaign about the company's investments in geothermal, biofuel, and solar technologies).

114. *Compare supra* note 4 and accompanying text (discussing Chevron's time and financial commitment to renewable energy), *with Chevron Corp.*, GOOGLE FIN., http://www.google.com/finance?q=NYSE:CVX (last visited Sept. 8, 2011) (listing Chevron's financial information).

115. *Compare supra* note 6 and accompanying text (quoting Chevron's statement about putting its profits to good use), *with Chevron Corp.*, GOOGLE FIN., *supra* note 114 (containing information on Chevron's executive compensation and dividend history), *and Chevron Corp. (CVX)*, REUTERS, http://www.reuters.com/finance/stocks/officerProfile?symbol=CVX (last visited Sept. 8, 2011) (same).

116. *See supra* note 9 and accompanying text (describing Chevron's position on protecting people, its workers, and the environment).

117. *See supra* notes 15–26 and accompanying text (describing the Ecuadorean plaintiffs' lawsuit).

118. *See supra* note 9 and accompanying text.

to prevent plaintiffs from collecting the judgment.[119] Defending the lawsuit and appealing the trial court's decision are of course not inconsistent with integrity, but prolonging the lawsuit for nearly twenty years in order to outspend and outlast its adversaries, and now working to deny plaintiffs even a rightful recovery, goes well beyond any definition of accepting responsibility.

Still, there might be obstacles to customers wishing to bring a false advertising action based on these statements and actions. As the *Nike* case demonstrates, Chevron could not avoid such a claim on First Amendment grounds and would have to defend it on its merits.[120] But, on the merits, Chevron could argue that even if it made false representations, they were meaningless puffery and in any event not material to a consumer's gasoline purchase.[121] This argument would track the argument Ford successfully made in the securities-fraud case discussed above,[122] and its likelihood of success would turn on a court's opinion of eco-conscious consumers' choices.[123]

Chevron investors might also encounter difficulty using Chevron's advertising campaign and website[124] as the basis for a securities-fraud action.[125] Plaintiffs might be able to show both transaction and loss causation, assuming they purchased Chevron stock as a result of the company's green advertising campaigns and Chevron's stock price dropped as a result of the Ecuador lawsuit. However, even if Chevron shareholders could successfully prove the company's CSR statements intentionally misleading, the statements might be deemed immaterial in that they would not have altered the "total mix of information" about the company considering its newsworthy litigation efforts in Ecuador.[126]

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119. *See supra* notes 22–26 and accompanying text (noting Chevron's appeal and other efforts to prevent enforcement of a judgment in the Ecuadorean action).

120. *See supra* notes 64–69 and accompanying text (discussing the *Nike* case).

121. *See supra* notes 80–84 and accompanying text (discussing a Sixth Circuit case's materiality analysis).

122. *See id*.

123. Based on the boycott of BP in the summer of 2010, there is evidence to suggest that consumers indeed change their gasoline consumption patterns on factors other than price.

124. *See Advertising*, *supra* note 1 (linking to Chevron's advertising campaign).

125. Again, we do not discuss Chevron's exposure to securities-fraud liability based on its SEC disclosures concerning the Ecuadorean lawsuit. *See* Billenness & Lewis, *supra* note 36, at 13–16 (analyzing possible securities-fraud claims against Chevron regarding the Ecuadorean litigation).

126. *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (discussing materiality and whether statements in question altered the "total mix of information"). Ironically, the spoofed ads and public criticism contributed to the total mix of information on Chevron's Ecuadorean activities, as well. By contrast, before the BP oil spill, the total mix of information probably did not include the environmental and safety risks that BP undertook. *See* Cherry & Sneirson, *supra* note 33, at 1008 (noting the favorable impression BP enjoyed before the *Deepwater Horizon* disaster).

Given these obstacles, increased government regulation and mandated disclosure might be more useful in preventing faux CSR. CSR reporting, whether done voluntarily or mandated by the Bureau of Consumer Financial Protection, can provide objective, verifiable information on a company's activities as opposed to the empty puff or vaguely positive statements many advertisements feature.[127] And while puffery might be enough to escape false-advertising or securities-fraud liability, auditors for certification organizations and environmental activists may be less easily fooled and better positioned to hold CSR-boasting firms accountable to their promises.[128]

IV. Conclusion

All too often, the statements and promises of CSR have been found to be overblown blandishments, the afterthought of a clever marketing department, or part of a public-relations effort to control damage through greenwashing. That seems to be the case with Chevron's "we agree" campaign, which is particularly unfortunate in that such faux CSR can breed cynicism toward genuine CSR and the firms that actively engage in it. Corporate claims of social responsibility need to be policed, and the Chevron example demonstrates that civil actions by consumers and investors cannot do the job alone. Certifying organizations and watchdog groups can pick up some of this slack, restoring trust with consumers and investors who wish to do business with socially responsible and sustainable businesses. CSR disclosures can also play an important role, transforming corporate communications that would otherwise raise suspicions of greenwashing into informative and reliable accounts of corporate behavior.

127. *See supra* Part II.C (analyzing the Dodd-Frank provisions that could form the basis of CSR disclosure requirements).

128. *See supra* Parts II.D & II.E (discussing certifications and watchdog groups).