SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

JOHN DOE I, et al., Plaintiffs, Vs. UNOCAL CORP., et al., Defendants; and JOHN ROE III, et al., Plaintiffs, Vs. UNOCAL CORP., et al., Defendants.	Case Nos: BC 237 980; and BC 237 679 RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION ON EACH OF PLAINTIFFS' TORT CLAIMS

Hearing date: 5/21/02

Ruling date: 6/7/02

After considering the moving, opposing and reply papers and the arguments of counsel at the hearing, the court now rules as follows:

Unocal's motion for summary adjudication is GRANTED as to the intentional tort and negligence causes of action as to direct liability only. This ruling does not address vicarious liability issues. Summary adjudication in favor of individual defendants Imle and Beach is GRANTED. Summary adjudication is DENIED as to the Business and Professions Code section 17200 violations and California Constitution claims.

Defendants' Unocal Corporation, Union Oil Company of California, John Imle and Roger C. Beach (collectively "Unocal") move for summary judgment, or in the alternative, summary adjudication, of plaintiffs' causes of action on the following grounds:

1. Myanmar law bars all of plaintiffs' claims;
2. Each cause of action fails because Unocal's investment in Myanmar did not cause plaintiffs' alleged injuries;
3. Plaintiffs' causes of action for battery, false imprisonment, assault, intentional infliction of emotional distress and conversion fail because Unocal did not intend the alleged injuries:
4. Plaintiffs' causes of action for negligence, negligent infliction of emotional distress, negligence per se, negligent hiring and negligent supervision fail because Unocal did not owe the plaintiffs a duty of care;
5. Plaintiffs' causes of action for violation of California Constitution Art. I, § 6 and violation of Business and Professions Code § 17200 fail because California law does not apply extraterritorially;
6. Each of plaintiffs' causes of action is preempted by federal law; and
7. As to Mr. Imle and Mr. Beach, each cause of action fails because neither Mr. Imle nor Mr. Beach participated in the alleged wrongful conduct.

Unocal bases this motion on Code of Civil Procedure § 437c, contending that there are no triable issues of material fact and Unocal is entitled to summary judgment and/or summary adjudication as a matter of law.

This Ruling only addresses Unocal's direct liability for Plaintiffs' tort claims. Plaintiffs' various theories of vicarious liability are addressed in the parties cross-motions for summary adjudication or summary judgment on vicarious liability and/or indispensable parties.

A defendant is entitled to summary judgment as to each cause of action where one or more of the elements cannot be established. (Code Civ. Proc., § 437c(a).) The party moving for summary judgment bears the initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850.) The burden shifts to plaintiff when a summary judgment motion prima facie justifies a judgment for the defendant. (Zuckerman v. Pacific Savings Bank (1986) 187 Cal.App.3d 1394, 1401.) In moving for summary judgment, a defendant "has met his burden of showing that a cause of action has no merit if he has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials of his pleadings to show that a triable issue of material fact exists but, instead, must set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Aguilar, 25 Cal.4th at p. 849, internal quotations omitted.)

The defendant need not conclusively negate such an element, but need only show that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. (Id. at pp. 853-854.) Once the defendant carries this burden, the burden shifts to plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (Id. at p. 849.) There is a

triable issue of material fact if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. (Id. at p. 850.)

This Court can and will only entertain competent evidence. (Biljac Associates v. First Interstate Bank (1990) 218 Cal.App.3d 1410, 1419 & fn. 3.)

I. Collateral estoppel

Collateral estoppel bars a party from relitigating an issue that a court has already adjudicated. To apply collateral estoppel (1) the issue sought to be precluded must be identical to that decided in the former proceeding; (2) the issue must have been actually litigated in the former proceeding; (3) it must have been necessarily decided in the former proceeding; (4) the prior decision must be final and on the merits; and (5) the party against whom preclusion is sought must be the same or in privity with the party in the prior proceeding. (Lucas v. County of Los Angeles (1996) 47 Cal.App.4th 277, 286; Vandenberg v. Superior Court (1999) 21 Cal.4th 815, 828.) Defendants have invoked the doctrine of collateral estoppel to bar plaintiffs from relitigating several issues of fact that were previously litigated in the federal courts. These factual findings include findings that: Unocal did not control the Myanmar military, nor did it participate in or influence the Myanmar military's unlawful conduct (Doe v. Unocal Corp. (C.D.Cal. 2000) 110 F.Supp.2d 1294, 1306-1307); that "[b]ecause Unocal's share does not make up a substantial part of the funding ... Unocal's participation would not be likely to affect the operation of the pipeline" (Doe v. Unocal Corp. (C.D.Cal. 1999) 67 F.Supp.2d 1140, 1147); and that "there are no facts suggesting that Unocal sought to employ forced or slave labor" (Doe, 110 F.Supp.2d at p. 1310). Because these issues were litigated and necessarily decided in the prior proceedings, those decisions were final and on the merits, and the parties are identical, those rulings are preclusive.

II. Choice of law

Unocal argues that Myanmar law applies to plaintiffs' claims for relief. California

follows a three step governmental interest analysis to resolve choice of law questions. (Washington Mutual Bank v. Superior Court (2001) 24 Cal.4th 906, 919.) First, the "foreign law proponent must identify the applicable rule of law in each potentially concerned state and must show it materially differs from the law of California." (Ibid.) "If a material difference is found, the court must then determine what interest, if any, each state has in having its own law applied ... Only if the trial court determines that the laws are materially different and that each state has an interest in having its own law applied, thus reflecting an actual conflict, must the court take the final step and select the law of the state whose interests would be 'more impaired' if its law were not applied." (Id. at p. 920.)

Unocal provides the declaration of an expert, Nyein Kyaw, as its source of Myanmar law. The Kyaw declaration consists of a ten-page, 48 paragraph "summary" of the laws of Myanmar applicable to this case, as well as the expert's legal opinions on this case. (See, e.g. Kyaw Decl., ¶¶ 31-38.) As the proponent of the foreign law, Unocal must identify the applicable rules of law in order to show that the law materially differs from the law of California. The Kyaw declaration is not an adequate basis on which to determine the issues in this case. (Sommer v. Gabor (1995) 40 Cal.App.4th 1455, 1469-1470 & fn. 5 ["The snippets and portions of German case law cited by appellants are simply not adequate for us to make any meaningful conclusions regarding the result of applying German law to the instant case...Appellants do not attach copies of the German cases or treatises cited in their briefs on appeal, nor do they request us to take judicial notice of any German statutes or case law].)

Defendants assert that Kyaw's "detailed analysis" of Myanmar law is sufficient and is "consistent with the traditional practice of looking to expert interpretation for the content of foreign law," citing Gallegos v. Union-Tribune Publishing Co. (1961) 195 Cal.App.2d 791, 797. However, in that case the "trial court received extensive material and made independent research to determine the law of Mexico on libel as applied to the case," and the parties provided translations of the primary sources of law. Unocal has gone to no such effort here.

Kyaw's ten page "summary" of Myanmar law falls closer to Sommer than to Gallegos. The "snippets and portions" of Myanmar law cited by Kyaw are not inadequate to identify a conflict for a choice of law analysis and are an insufficient basis for this Court to decide the complex issues in this case. Therefore this Court will apply California law.

III. Aiding and abetting

"In the civil arena, an aider and abettor is called a cotortfeasor. To be held liable as a cotortfeasor, a defendant must have knowledge and intent.... A defendant can be held liable as a cotortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to be, committed, and acted with the intent of facilitating the commission of that tort." (Gerard v. Ross (1988) 204 Cal.App.3d 968, 983; accord Fiol v. Doellstedt (1996) 50 Cal.App.4th 1318, 1326; Orser v. George 252 Cal.App.2d 660, 667; Lavine v. Superior Court (1965) 238 Cal.App.2d 540, 544.) Aiding and abetting liability requires that defendant's conduct "constitutes a breach of duty and gives substantial assistance or encouragement." (Saunders v. Superior Court (1994) 27 Cal.App.4th 832, 846.) In order to create a triable issue of material fact, plaintiffs must present evidence from which this court may draw an inference that Unocal intended to facilitate the tortious conduct of the Myanmar military *and* substantially assisted or encouraged the commission of those torts.

Plaintiffs argue that Unocal aided and abetted SLORC's forced labor operation by: providing financial and material support to the security forces (Plaintiffs' Separate Statement No. 13); coordinating the operation to those forces (Plaintiffs' Separate Statement No. 11); discussing whether the military would provide security and that the project would coordinate the position of security. (Plaintiffs' Separate Statement No. 11); sharing aerial maps with the military (Collingsworth Depo., Exh. 2012, ¶ 27); informing the military of the next day's activities and controlling the army's position through their security officers (Exhibit 1044, p. 24822); and paying cash calls to cover Project expenses (Longerich Depo., 18-19, 36, 49; Exhs. 232, 250).

None of these facts show in any way that Unocal "acted with the intent of facilitating the commission of [the Myanmar military's] tort[s]." (Gerard v. Ross, supra, 204 Cal.App.3d 968, 983.) As the District Court found, "there are no facts suggesting that Unocal sought to employ forced or slave labor. In fact, the Joint Venturers expressed concern that the Myanmar government was utilizing forced labor in connection with the Project. In turn, the military made efforts to conceal its use of forced labor. The evidence does suggest that Unocal knew that forced labor was being utilized and that the Joint Venturers benefitted from the practice." (Doe v. Unocal (C.D.Cal. 2000) 110 F.Supp.2d 1294, 1310.)

As to the issue of "substantial assistance," plaintiffs' evidence in Separate Statement No. 11 shows that Unocal did share maps with the Myanmar military, but shows that most of the conduct involving coordinating the project with security was carried out by TMEP and TOTAL officials. Separate Statement No. 13 details the financial and material support Unocal provided to the Myanmar military. The evidence of "substantial assistance" in committing the torts consists of documents showing: payments for food for the army and villagers (13(a)); payment to villagers hired for the project (13 (b), (c), (d)); a cable reporting that the project gave the military a bulldozer "so that they would not bother the villagers near the pipeline" (13 (e)); Imle's insistance that the villagers be paid (13 (f)); a TMEP report stating that anyone recruited receive a salary, food and medical care, and that food rations had been given to the authorities to reduce the burden on the villages (13 (g)); TOTAL provided some trucks to soldiers (13 (h), (i); TOTAL provided food to soldiers (13 (j), (n), (o), (p), (r), (s), (t); U.S. Embassy cables containing hearsay (13 (k), (m); and a TOTAL document with the cryptic comment "Bull dozer work in the villages" (13 (q)). The U.S. Embassy cables and TOTAL internal documents that Plaintiffs cite have been properly objected to by defendant on hearsay grounds. The Court sustains these objections.

In determining whether the defendant gave substantial assistance, "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the

time of the tort, his relation to the other and his state of mind are all considered." (Orser, supra, 252 Cal.App.2d at p. 669.) At most, plaintiffs evidence shows that Unocal provided maps to the military, and was aware that TOTAL and TMEP were providing food, trucks, a bulldozer and possibly payment to the military for security. The acts described in plaintiffs' evidence do not rise to the level of substantial assistance to the military's alleged tortious acts of forced labor, assault, forced relocation and rape. This evidence does not create a triable issue of fact on the issue of whether Unocal gave substantial assistance or encouragement to the Myanmar military in its commission of human rights violations.

Plaintiffs also argue that Unocal is vicariously liable for the torts committed against plaintiffs based on its joint venture and agency relationship with SLORC. The Court is aware of Plaintiffs' theories of vicarious liability, and adopts its rulings made in Defendants' and Plaintiffs' motions for summary judgment and summary adjudication as to the vicarious liability issues.

IV. Causation

To demonstrate actual or legal causation, plaintiffs must show that Unocal's conduct was a "substantial factor" in bringing about the injury. (Saelzler v. Advanced Group 400 (2001) 25 Cal.4th 763, 778.)

> "The first element of legal cause is cause in fact: i.e., it is necessary to show that the defendant's negligence contributed in some way to the plaintiff's injury, so that 'but for' the defendant's negligence the injury would not have been sustained. If the accident would have happened anyway, whether the defendant was negligent or not, then his negligence was not a cause in fact, and of course cannot be the legal or responsible cause. The 'but for' rule has traditionally been applied to determine cause in fact. [Citations.] [¶] The Restatement formula uses the term 'substantial factor' 'to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead

reasonable men to regard it as a cause.' [Citation.] And 'the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.'" (6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 968, pp. 358-359.) The Supreme Court has observed that the "'substantial factor' test subsumes the 'but for' test. 'If the conduct which is claimed to have caused the injury had nothing at all to do with the injuries, it could not be said that the conduct was a factor, let alone a substantial factor, in the production of the injuries.'" (Mitchell v. Gonzales (1991) 54 Cal.3d 1041, 1052, 819 P.2d 872; accord Nola M., supra, 16 Cal.App.4th at p. 439; Lopez v. McDonald's Corp. (1987) 193 Cal. App. 3d 495, 515. n6, 238 Cal. Rptr. 436)

(Sandoval v. Bank of America (2002) 94 Cal.App.4th 1378, 1384-1385.)

Plaintiffs' theory that Unocal directly caused plaintiffs' injuries is based on evidence that Unocal made four decisions which contributed significantly to plaintiffs' injuries: (1) to negotiate for the Project, knowing negotiation would cause SLORC to militarize the region (Plaintiffs' Separate Statement Nos. 15, 16, 40); (2) to join the Project knowing that the military would commit human rights abuses if given a role in the Project (Plaintiffs' Separate Statement Nos. 1, 2); (3) to agree to use the military to provide security (Plaintiffs' Separate Statement No. 9); and (4) to continue using the military after it knew that abuses were being committed. (Plaintiffs' Separate Statement No. 5). Essentially, plaintiffs argue that Unocal caused their injuries by investing in the project and by employing the military in connection with the project.

A. Decision to invest in the project

The Ninth Circuit found that "Plaintiffs present no evidence, and it seems impossible that they would uncover any, suggesting that the pipeline project would not have gone on without TOTAL's dealings with Unocal. As TOTAL points out, it is far from

undercapitalized. Moreover, TOTAL agreed to take on the Yadana Project before seeking bids from potential partners. Consequently, it appears from the evidence presented to date that Unocal's negotiations with TOTAL and MOGE were not necessary to the initiation of the project. Consequently, there is no evidence that TOTAL would not have gone forward with the project but for its negotiations, agreements and consultations with Unocal in California." (Doe v. Unocal Corp. (9th Cir. 2001) 248 F.3d 915, 925.) Similarly, the District Court found that "Because Unocal's share does not make up a substantial part of the funding ... Unocal's participation would not be likely to affect the operation of the pipeline." (Doe v. Unocal Corp. (C.D. Cal. 1999) 67 F.Supp.2d 1140, 1147.)

Plaintiffs still present no evidence showing that the pipeline project would cease absent Unocal. Plaintiffs also failed to show that any action taken by Unocal (i.e., protesting to the Myanmar government, threatening to withdraw its investment, actually withdrawing its investment) would have made a difference. Plaintiffs correctly note that "proximate cause" is not the correct legal test in determining causation in California. However, the California Supreme Court has observed that the "substantial factor test subsumes the but for test." (Sandoval, 94 Cal.App.4th at pp. 1384-1385.) As a result, the but for test is incorporated in the more general "substantial factor" test. Because plaintiffs cannot show that it was more probable than not that the project would not have gone forward had Unocal decided not to invest in MGTC, or that any action Unocal could have taken would have made a difference, Unocal's decision to invest was not a substantial factor in bringing about plaintiffs' injuries. (Sandoval, 94 Cal.App.4th at pp. 1384-1385.)

B. Decision to employ the military

In support of this argument Plaintiffs cite U.S. Embassy cables to which defendants have objected to as hearsay. The court sustains these objections.

Plaintiffs' primary evidence that Unocal utilized the military for security is section 17.1(c) of the Production Sharing Contract and several TOTAL reports. (Plaintiffs' Separate

Statement, No. 9.) PSC section 17.(c) provides that MOGE shall provide "security ... as may be requested by the Contractor." The PSC was negotiated in 1992 by TOTAL and MOGE. (Peters Decl., Exh. A, p. 2336-2452.) Under the PSC, MOGE is not required to provide security absent a request by the "Contractor." There is no evidence of such a request.

The TOTAL reports cited by plaintiffs do not mention Unocal. These reports confirm that the region was militarized and that TOTAL was coordinating its operations with the military. These reports do not show that Unocal was responsible for hiring or utilizing the military.

Plaintiffs' evidence does not create a triable issue of fact as to whether Unocal itself utilized the Myanmar military, and therefore does not establish that the strategic decision to utilize the military was a substantial factor in causing plaintiffs' injuries.

V. Intent required for intentional torts

Plaintiffs have alleged five intentional tort causes of action: battery, assault, false imprisonment, intentional infliction of emotional distress, and conversion. (Roe Complaint, ¶¶ 68-91, 110-112; Doe Complaint, ¶¶ 159-174, 191-193.) Unocal argues that there is no evidence that it acted with the requisite intent to be held liable for plaintiffs' injuries.

"Intent is broader than a desire or purpose to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does." (Gomex v. Aquistaspace (1996) 50 Cal.App.4th 740, 743.) "[M]ere knowledge and appreciation of a risk--something short of substantial certainty--is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong." (Keeton et al., Prosser and Keeton on Law of Torts (5th ed. 1984) § 8, pp. 35-36.)

Plaintiffs do not present any evidence that Unocal actually intended to commit the intentional torts alleged in the Doe and Roe complaints. However, Plaintiffs' Separate

Statement Facts Nos. 1, 2, 3 and 5 present evidence that Unocal had specific knowledge before investing in MGTC, and through out the pipeline construction process, that the Myanmar military used forced labor, attacked civilians and forcibly relocated villages. As the District Court found, "there are no facts suggesting that Unocal sought to employ forced or slave labor. In fact, the Joint Venturers expressed concern that the Myanmar government was utilizing forced labor in connection with the Project. In turn, the military made efforts to conceal its use of forced labor. The evidence does suggest that Unocal knew that forced labor was being utilized and that the Joint Venturers benefitted from the practice." (Doe v. Unocal (C.D.Cal. 2000) 110 F.Supp.2d 1294, 1310.) This evidence is sufficient to create a triable issue of fact as to substantial certainty.

However, Unocal was not the actor as to the intentional tort causes of action. The actor/tortfeasor was the Myanmar military. Plaintiffs' evidence may show that Unocal's knowledge may have approached a substantial certainty that the military would commit abuses, but without a theory making Unocal the actual tortfeasor, summary adjudication in favor of Unocal is warranted as to the intentional tort causes of action. Vicarious liability issues are addressed in the rulings to defendants' and plaintiffs' companion motions regarding vicarious liability and indispensable parties. The only issue addressed in this ruling is the direct liability of Unocal as to the tort causes of action.

VI. Duty

Plaintiffs allege five negligence claims: negligent infliction of emotional distress, negligence, negligence per se, negligent hiring and negligent supervision. To prevail on a negligence claim, plaintiff must show that defendant owed and breached a legal duty to the plaintiff. (Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666, 671.) The existence of a duty is a question of law. (Sharon P. v. Arman, Ltd. (1999) 21 Cal.4th 1181, 1188.)

A person owes no duty to control the conduct of a third person to prevent him from causing physical harm to another, absent a special relationship between the defendant and the

plaintiff or the person whose conduct needs to be controlled. (Wise v. Superior Court (1990) 222 Cal.App.3d 1009, 1013.) A special relationship does not exist between the defendant and tortfeasor unless the defendant has the ability to control the third party. (Lopez v. McDonald's Corp. (1987) 193 Cal.App.3d 495, 515.) Unocal did not have control over the Myanmar military. (See Part I, *ante*.)

However, a person also owes a legal duty "not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct ... of a third person." (Lugtu v. California Highway Patrol (2001) 26 Cal.4th 703, 716.) Where the "defendant has made plaintiffs' position worse and has created a foreseeable risk of harm from the third person" such conduct "which contributes to, increases or changes the risk of harm that would otherwise existed" creates a duty to prevent foreseeable harm. (Pamela L. v. Farmer (1980) 112 Cal.App.3d 206, 209, 211-212.)

Unocal argues that absent its ability to control the military and without a special relationship with the Myanmar military, no duty exists on the part of Unocal to these plaintiffs. Unocal points to the District Court finding that "there are no facts suggesting that Unocal sought to employ forced or slave labor. In fact, the Joint Venturers expressed concern that the Myanmar government was utilizing forced labor in connection with the Project. In turn, the military made efforts to conceal its use of forced labor. The evidence does suggest that Unocal knew that forced labor was being utilized and that the Joint Venturers benefitted from the practice." (Doe v. Unocal (C.D.Cal. 2000) 110 F.Supp.2d 1294, 1310.)

While it cannot be said here that Unocal's investment *placed* plaintiffs in a risky situation (Lugtu v. California Highway Patrol, supra, 26 Cal.4th at p. 716) or *created* a risk of harm from a third person (Pamela L. v. Farmer, supra, 112 Cal.App.3d at pp. 209, 211-212), the evidence shows that Unocal certainly knew and appreciated the risk of harm in which plaintiffs were placed. The District Court decision intimates that Unocal knowingly benefitted from slave labor. Although plaintiffs have not proved it, there is a possibility that Unocal's

investment perpetuated the risk. However, that is not the test as enunciated in Lugtu and Pamela L. Under these facts, Unocal did not owe a duty to these plaintiffs.

VII. Section 17200 and California Constitutional claims

This Court has already ruled on demurrer that these claims are viable. (See Ruling on Demurrer, pp. 1-2.) A Business and Professions Code section 17200 claim may be brought in California for injuries occurring outside of California as long as some of the wrongful conduct occurred within California. (Diamond Multimedia Systems, Inc. v. Superior Court (1999) 19 Cal.4th 1036, 1065; Norwest Mortgage, Inc. v. Superior Court (1999) 72 Cal.App.4th 214, 224-225 & fn. 13.) Plaintiff has produced evidence showing that some acts giving rise to the unlawful conduct occurred in California, such as funding policy decisions. (See Collingsworth Decl., Exhs. 6, 37, 38, 45, 65, 464, 465; Chessum Depo. 41-45; Richardson Decl., Exh. 66.)

Unocal argues that the Ninth Circuit has found that no significant conduct relating to the pipeline occurred in California, citing Doe v. Unocal Corp. (9th Cir. 2001) 248 F.3d 915, 924.) That is an incorrect interpretation of the holding in that case. The Ninth Circuit held that Total did not have sufficient minimum contacts with the State of California sufficient for the court to exercise personal jurisdiction over Total.

Summary adjudication is denied as to the Business and Professions Code section 17200 and California Constitution claims.

VIII. Preemption

This Court has already ruled that plaintiffs' claims are not preempted by federal law. (See Ruling on Demurrer, pp. 4-5.) Further, the federal court twice held that plaintiffs' claims do not conflict with the Burma Sanctions Act, and the State Department concluded that plaintiffs' claims do not conflict with U.S. foreign policy. (Doe v. Unocal Corp. (C.D.Cal 1997) 963 F.Supp. 880, 895-896, fn. 17; National Coalition Gov't of Burma v. Unocal, Inc. (C.D.Cal. 1997) 176 F.R.D. 329, 355, fn. 31, 361-362.)

IX. Liability of individual defendants

Corporate officers and directors cannot be held liable for the corporation's torts based merely on their positions as officers and directors. (Armato v. Baden (1999) 71 Cal.App.4th 885, 895.) "An officer will not be liable for torts in which he does not personally participate, of which he has no knowledge, or to which he has not consented." (Id. at p. 894.) A plaintiff cannot merely rely on general allegations of tortious conduct by a corporation to maintain a tort claim against an officer or director in his personal capacity. To avoid summary judgment, a plaintiff must show: (1) that the officer or director specifically authorized, directed, or participated in the allegedly tortious conduct; or (2) that although they specifically knew or reasonably should have known that some hazardous activity under their control could injure plaintiff, they negligently failed to take action to avoid the harm; and (3) that an ordinary prudent person, knowing what the officer or director knew at the time, would not have acted similarly under the circumstances. (Cody F. v. Falletti (2001) 92 Cal.App.4th 1232, 1245.)

Plaintiffs' evidence that Imle and Beach participated in the tortious conduct is found at Plaintiffs' Separate Statement No. 42. These facts allege "misrepresentations" made by Imle and Beach, that they "either knew or should have known to be false," to convince investors and employees that there were no human rights abuses occurring on the Yadana Project. These statements are not a basis for showing that Beach or Imle specifically authorized, directed, or participated in the allegedly tortious conduct of the Myanmar military. Imle and Beach cannot be found liable under the "participation" prong under these facts.

Plaintiffs' evidence that Imle and Beach specifically knew or reasonably should have known that some hazardous activity under their control could injure plaintiff, and negligently failed to take action to avoid the harm appears at Plaintiffs' Separate Statement No. 43. This evidence tends to show that with respect to labor *contracting*, Unocal had control over pay and recruitment; that a TOTAL official was able to convince a military leader not to move a village; and also contains an obscure reference that "Imle needs to tell the Govt. to change behavior." It is unclear to exactly what behavior this last fact (quoted from notes taken at a meeting between

Steve Ohnimus and TOTAL officials) refers. This evidence does not create a triable issue of material fact as to whether the activity of the Myanmar military was under Imle's and Beach's control and that they negligently failed to take action to avoid the harm. Further, since Unocal did not control the Myanmar military, plaintiffs have not indicated what Beach and Imle could or should have done to control the military's actions. Imle and Beach cannot be found liable under the "negligence" prong under these facts. Summary adjudication in favor of Imle and Beach is warranted.

The court notes that no motions for summary judgment or adjudication have addressed the cause of action for unjust enrichment, which remains viable.

In sum:

Unocal's motion for summary adjudication is GRANTED as to the intentional tort and negligence causes of action as to direct liability only. This ruling does not address vicarious liability issues. Summary adjudication in favor of individual defendants Imle and Beach is GRANTED. Summary adjudication is DENIED as to the Business and Professions Code section 17200 violations and California Constitution claims.

IT IS SO ORDERED.

Dated
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Victoria Gerrard Chaney

Judge