IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

LARRY BOWOTO, et al.,

Plaintiffs,

v.

CHEVRON TEXACO CORP.,

Defendant

No. C 99-2506 SI

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO FILE FOURTH AMENDED COMPLAINT

On August 16, 2002, the Court heard argument on plaintiffs' motion to file their Fourth Amended Complaint. After carefully considering the arguments of the parties and the papers on file herein, the motion is GRANTED in part and DENIED in part, as set forth below.

BACKGROUND

This action was filed on May 27, 1999 by five Nigerian plaintiffs who alleged that defendant ChevronTexaco, Inc. ("ChevronTexaco") is involved in the commission of human rights abuses in Nigeria. Plaintiffs' initial complaint named 500 "Moe" defendants in addition to ChevronTexaco; this complaint was never served. Pl.'s Mot. at 4:20-21; Grenfell Decl. at ¶ 2. A First Amended Complaint, adding eighteen new plaintiffs and naming 50 "Moe" defendants, was filed and served on September 23, 1999. Id. at 4:21-24. On January 3, 2000, a Second Amended Complaint was filed by stipulation of the parties. Id. at 5:1-5. This complaint added new plaintiffs and clarified certain allegations. Id. On January 13, 2000, plaintiffs moved for leave to file a Third Amended Complaint naming an individual defendant and certain anonymous plaintiffs, and further clarifying certain allegations. Id. at 5:5-9. Presiding Judge Charles Legge granted plaintiffs leave, except as to the naming of the individual

defendant. Id. Plaintiffs' Third Amended Complaint alleges claims under the Alien Tort Claims Act,[1] as well as common law tort claims and a claim under California Business and Professions Code § 17200 for damage to plaintiffs' land and livelihood. See Proposed Fourth Amended Complaint ("FAC") at ¶¶ 82-167. On June 28, 2001, this case was reassigned to the undersigned district judge.

On June 28, 2002, plaintiffs filed in the instant motion for leave to file a Fourth Amended Complaint. Plaintiffs wish to add ChevronTexaco Overseas Petroleum Inc. ("CTOP"), a subsidiary of ChevronTexaco, as a defendant. Pl.'s Mot. at 3:13-18 In addition, plaintiffs seek to assert a claim under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"),[2] and a claim under California Business and Professions Code § 17200 for the making of false statements by a business to promote sales. Id. at 3:18-4:5. Plaintiffs base their RICO claim on Wiwa v. Royal Dutch Petroleum, 2002 WL 319887 (S.D.N.Y 2002), and their new § 17200 theory on a recent California Supreme Court Case, Kasky v. Nike, Inc., 119 Cal.Rptr.2d 296 (2002). Plaintiff also seeks leave to substitute as a plaintiff the wife of a deceased plaintiff, and to correct errors in the operative complaint. Id. at 4:5-9. Defendant ChevronTexaco does not oppose amendment to allege claims against CTOP under the Alien Tort Claims Act, nor does defendant oppose the amendment of allegations concerning individual plaintiffs. Def.'s Oppo at 1:6-9. Defendant opposes amendment to the extent that the Fourth Amended Complaint would allege: (1) plaintiffs' common law tort claims against CTOP; (2) a claim under RICO; and (3) a § 17200 theory based on the Kasky case. Id. at 1:1-6. Plaintiff's motion to amend is presently before this Court.

LEGAL STANDARD

Federal Rule of Civil Procedure 15 governs the amendment of complaints. It provides that if a responsive pleading has already been filed, the party seeking amendment may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. This rule reflects an underlying policy that disputes should be determined on

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[1] 28 U.S.C. § 1350

[2] 18 U.S.C. §§ 1961 et seq.

its, and not on the technicalities of pleading rules. See Foman v. Davis, 371 U.S. 178, 181-82 (1962). Accordingly, the Court must be very generous in granting leave to amend a compl int. ission Indians R Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989)

n for amending the complaint, the burden shifts to Ger :h Abbott Laboratories, 127 F.R.D. 529, 530 (N.D. Cal. 1989) (citing S G C Sieffhart, 803 F.2d 661, vil Proce lu 8-75 (1991).

the presence of bad faith on the part of the plaintiff, undue delay, prejudice to the defendant, futility of amendment, and that the plaintiff has previously amended ies, 866 F.2d at 1160; McGlinchy v. Shell Chemical Co., 845 F.2d 802, 809 (9th Cir. 1988) The Court has the discretion to determine whether the presence of any of these elements justifies refusal of a request to amend. Ascon P ti

DISCUSSION

motion is GRANTED

itly allege several c ion law tort claims against defendant Ch ult, intentional and negligent infliction of emotional distress, i per se, and a claim entitled "civil conspiracy

are time barred. Def.'s Oppo. at 2:18-14:7

The statut § 340(3). It is undisputed that the one year statue of limitations has el See Def.'s Oppo. at 2:23-

3:4. A plaintiff may, however, designate a defendant by a fictitious name when the plaintiff is ignorant of the defendant's name; the plaintiff must then amend its complaint when the defendant's true name is discovered. Cal. Code Civ. P. § 474. The deadline for naming a Doe defendant is set by a provision of the Civil Procedure Code which states: "The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision an action is commenced at the time the complaint is filed." Cal. Code. Civ. P. § 582.10. Accordingly, in the absence of tolling or other exceptions to the statute, plaintiffs had three years from the filing of this action on May 27, 1999, or until May 27, 2002, to amend their complaint and serve CTOP.

Plaintiffs filed the present motion on June 28, 2002, one month after the expiration of three years from the inception of this case. Plaintiffs assert that their proposed amendments are nonetheless timely under several alternative theories: (1) the statue of limitation was tolled by impracticability or by a stay issued by this Court; (2) CTOP is estopped from arguing that plaintiffs' claims are time barred; (3) CTOP entered a general appearance on May 7, 2002, thereby preventing plaintiffs' claims from being time-barred; and (4) the three-year period for service has not run as to plaintiffs who joined this action after the filing of the initial complaint. Pls.'s Mot. at 13:9-17:11; Pls.'s Reply at 2:6-5:10. In addition, plaintiffs maintain that their claims are not time-barred because they relate back to the filing of the initial complaint under Federal Rule of Civil Procedure 15(c)(3). Pls.'s Mot. at 17:13-19:6; Pls.'s Reply at 5:13-7:7. The Court addresses each of these theories in turn.

1. Tolling by Impracticability or Stay

In their opening brief, plaintiffs contend that the running of the three-year statute of limitations was tolled for a twenty-one day period between May 17 and June 7, 2002 as a result of an order by this Court that the parties meet and confer regarding plaintiffs' proposed amendments to their complaint. Pls.'s Mot. at 14:7-22. Plaintiffs assert their tolling theory under California Code of Civil Procedure § 583.240, which excludes time under certain specific circumstances, and includes a final provision in which time is excluded when "[s]ervice, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control." Cal. Code Civ. P. § 583.240(d). In opposition, defendant

maintains that, at the case management conference of May 17, 2002, this Court ordered the parties to meet and confer concerning discovery disputes, not plaintiffs' motion to amend. Def.'s Oppo. at 8:10-9:18. In addition, defendant argues that plaintiffs circumstances do not fall under § 583.240(d), which is strictly construed against the party asserting tolling; moreover, argues defendant, even if tolling occurred, plaintiffs' would only have had until June 17, 2002, not June 28, 2002, to file their motion to amend. Id.

This Court finds plaintiffs' theory wholly unpersuasive. This Court did not issue any order preventing plaintiff from effecting service on a defendant. A directive that the parties meet and confer, whatever the intended subject of the conference, would not operate to render service impracticable. Moreover, the Court agrees with defendant that, even assuming that the untranscribed events of the May 17, 2002 conference resulting in tolling, plaintiffs' present motion was not timely filed. On May 17, 2002, all but ten days of the three year limitations period had expired. Thus, on June 7, 2002, the date identified by plaintiffs as the end of the tolling period, plaintiffs had ten days, or until June 17, 2002, to file their motion to amend. See, e.g., Highlanders, Inc. v. Olsan, 77 Cal. App. 3d 690, 695 (1978) This motion was not filed until June 28, 2002.

In their reply brief, plaintiffs assert a new tolling theory under California Code of Civil Procedure §§ 583.240(b) and 356. Pls.'s Reply at 2:6-3:19. Plaintiffs contend that the statute of limitations was tolled during the four-month period between February 14, 2000 and June 16, 2000 during which discovery was stayed pending a hearing on defendant's motion to dismiss. Pls.'s Reply at 2:6-3:19.

The Court finds this theory to be without merit. Section 583.240(b) excludes time during which: "[t]he prosecution of the action or proceedings in the action was stayed and the stay affected service." Cal. Code. Civ. P. § 583.240(b). Section 356 states: "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." Cal. Code. Civ. P. § 356. Judge Legge's order staying discovery did not in any way inhibit plaintiffs' ability to effect service on CTOP. The authority cited by plaintiffs is consistent with this conclusion. United Pacific-Reliance Insurance Co. v. DiDomenico, 173 Cal.App.3d 673 (1985) is devoted to an entirely separate issue. See 173 Cal.App.3d at 675 ("The sole issue is whether the statute of limitations has commenced to run on a

declaratory relief action to determine the obligation to provide coverage under an insurance policy, where no breach has occurred and no right to coercive relief has accrued."). Plaintiffs' present argument depends upon a footnote in which a party's assertion of the statute of limitations was rejected on three grounds, one of which was that "an order was issued staying discovery within one month after the first declaratory action was commenced." Id. at 675 n.1 This Court is unpersuaded that this statement of the California Court of Appeal, made in passing in a footnote among two additional bases for the court's decision, represents California law on this question. Moreover, the case cited by the DiDomenico court, Hoover v. Galbraith, 7 Cal.3d 519 (1972), allows tolling only during periods in which a plaintiff is "legally prevented from taking action to protect his rights." 7 Cal.3d at 525-27. Similarly, the second case upon which plaintiffs rely, Highland v. Superior Court, 222 Cal.App.3d 637 (1990), concerned an order which read: "From and after January 20, 1984, plaintiff is prohibited from serving any defendant not served on or before January 20, 1984." 222 Cal.App.3d at 640-41. This order self-evidently barred the service of additional defendants, and provides no support for plaintiffs' position. Accordingly, the Court finds plaintiffs' tolling arguments to be without merit.

2. Estoppel

Plaintiffs argue that defendant is estopped from asserting that the proposed amendments are untimely because, in response to plaintiffs' March 8, 2002 statement of their intent to add CTOP as a defendant, "defense counsel asked to see the proposed amendment, and inquired as to whether plaintiffs would agree in a stipulation adding CTOP not to rely on CTOP's joinder as a basis for seeking additional discovery or extending the discovery deadlines . . CTOP's counsel concluded by stating, 'After receiving that information, we will consider your request and let you know our position.'" Pls.'s Mot. at 15:9-17. Plaintiffs sent the proposed amendment to defendant on May 13, 2002. Id. at 15:18-22. Plaintiffs assert that defendant's request induced plaintiffs to delay service "until after it received a response from CTOP regarding plaintiffs' May 13th letter." Id. at 15:23-25.

The Court rejects plaintiffs' argument. The single case upon which plaintiffs rely, Tresway Aero, Inc. v. Sup. Ct. (Dent), 5 Cal.3d 431, 440 (1971), affirmed the rule that "a person may not lull another into a false of security by conduct causing the latter to forebear to do something which

he otherwise would have done and then take advantage of the inaction caused by his own conduct." 5 Cal.3d at 437-38. In Tresway, the defendant had accepted a defective summons, then obtained from plaintiff a twenty-day extension of time in which to answer the complaint. Id. at 434. The court found that the "defendant's maneuver in getting additional time to plead resulted in plaintiff's failure to serve summons," within the statutory period. Id. at 441. By requesting the extension, the defendant had led the plaintiff to believe that the service of summons was effective, thereby lulling the plaintiff into a false sense of security. Id. at 441-42.

This case is self-evidently distinguishable from Tresway. The letter upon which plaintiffs rely contains no suggestion that defendant agreed to release plaintiffs from the three-year statute of limitations. See Herz Decl. Ex. 3. There is no indication that defendant acted deceitfully, attempting to lull plaintiffs into a failure to comply with the statute of limitations. Accordingly, this Court declines to exercise its equitable powers to relieve plaintiffs of their statutory obligations.

3. Defense Counsel's Entrance of a General Appearance

Plaintiffs contend that the statute of limitations does not apply because defense counsel, who represents both ChevronTexaco and CTOP, made a general appearance on behalf of CTOP. Pls.'s Mot. at 16:9-16. In particular, plaintiff asserts that, at the case management conference on May 17, 2002, counsel failed to indicate that counsel was appearing only for ChevronTexaco and not for CTOP. Id. (citing Cal. Code Civ. P. § 583.220: "The time within which service must be made pursuant to this article does not apply if the defendant enters into a stipulation in writing or does another act that constitutes a general appearance in the action.").

The Court finds plaintiffs' position to be without merit. As defendant points out, plaintiffs' argument is premised, not on any affirmative step taken by defense counsel on CTOP's behalf, but rather merely on defense counsel not having said that it was not representing CTOP at the May 17 conference. See Def.'s Oppo. at 11:17-12:9. An appearance is considered "general" if the defendant acts in a manner, "showing of a purpose of obtaining any ruling or order of the court going to the merits of the case." California Overseas Bank v. French American Banking Corp., 154 Cal.App.3d 179, 184 (1984). Plaintiffs do not suggest that defense counsel attempted to obtain any benefit for CTOP at the case

management conference.

Plaintiffs rely upon Mansour v. Superior Court, 38 Cal.App.4th 1750 (1995), for the proposition that an appearance at a case management conference can constitute a general appearance. Pls.'s Mot. at 16:14-19. That holding, however, was later rejected. See Nam Tai Electronics v. Titzer, 93 Cal.App.4th 1301,1308-09 (2001)("[W]e do not believe appearance at a hearing whose purpose is to inform the court of the status of the case should be deemed a general appearance."). Moreover, Mansour is distinguishable. In that case, the defense attorney had not only appeared at a case management conference, but had assisted in the preparation of a joint case management statement, appeared at another hearing on their the defendant's behalf, and issued two deposition subpoenas on the defendant's behalf. Mansour, 38 Cal.App.4th at 1757. In this case, defense counsel took no action on CTOP's behalf, and CTOP cannot be said to have entered a general appearance.

4. Effect of After-Added Plaintiffs on the Statute of Limitations

Plaintiffs maintain that, even if the statute of limitations has run as to the plaintiffs who were named in the initial complaint in this action, it has not run as to plaintiffs who were added in later amendments to the complaint. Pls.'s Mot. at 17:2.

This argument is patently meritless. Section 583.210 expressly provides that defendants must be served "within three years after the action is commenced against the defendant," and defines the commencement of the action as "the time the complaint is filed." Cal. Code Civ. P. § 583.210(a). This action was commenced against ChevronTexaco and unnamed "Moe" defendants on May 27, 1999. Plaintiffs now name CTOP as one of these Moe defendants. The inclusion of additional plaintiffs in later versions of the complaint is irrelevant to the application of the three-year statute of limitations of § 583.210(a) to this case.

5. Relation Back Under the Federal Rules

Finally, plaintiffs maintain that their claims against CTOP are properly asserted under Federal Rule of Civil Procedure 15(c)(3). Pls.'s Mot. at 17:13-19:6. Rule 15(c)(3) provides that an amendment to a pleading relates back to the date of the original pleading when the amendment "changes the party

or the naming of the party against whom a claim is asserted," the new defendant "has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits," and the new party "know or should have know that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." Fed. R. Civ. P. 15(c)(3).

Defendant contends that this provision, by its terms, applies only to cases in which the plaintiff was mistaken as to the identity of the proper defendant, and not to cases in which a plaintiff's assessment of a defendant's liability changes after the statute of limitations has run. Def.'s Oppo. at 5:4-8:5. This Court agrees. Plaintiffs do not suggest that they were previously unaware of CTOP's identity. Thus, plaintiffs made a conscious choice to sue ChevronTexaco and not CTOP, and are barred from joining CTOP after discovering CTOP's responsibility for the complained-of acts. Louisiana-Pacific Corp. v. ASARCO, Inc., 5 F.3d. 431, 434 (9th Cir. 1993). Rule 15(c)(3) applies in cases in which a plaintiff was unaware of, or made a mistake concerning, a defendant's identity. See Worthington v. Wilson, 8 F.3d 1253, 1256-57 (7th Cir. 993) It does not apply to the instant case, in which both parties' initial disclosures of November 1999 included documents containing reference to CTOP. See Grenfell Decl. at ¶ 3 Plaintiffs' argument based on Rule 15 therefore fails

Plaintiffs' request for leave to assert their common law tort claims against CTOP is DENIED.

B. Addition of RICO and Kasky Claims Under Fed. R. Civ. P. 15(a)

The parties dispute whether leave to add RICO and Kasky claims to plaintiffs' complaint is properly granted under Federal Rule of Civil Procedure 15(c). Pls.'s Mot. at 8:22-12:4; Def.'s Oppo. at 20:8-24:4. Rule 15 provides that "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Thus, courts are generous in granting leave to amend a complaint. Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990). Once a plaintiff has offered a legitimate reason for its proposed amendment, the defendant must demonstrate why leave to amend should be denied. Genentech, Inc. v. Abbott Laboratories, 127 F.R.D. 529, 530 (N.D. Cal. 1989) (citing Senze-Gel Corp. v. Sieffhart, 803 F.2d 661, 666 (Fed. Cir. 1986)). Leave to amend may be denied if the defendant makes a showing of bad faith, undue delay, prejudice to the defendant, or futility of the proposed amendment. See Ascon Properties, 866 F.2d at 1160; McGlinchy v. Shell Chemical Co., 845 F.2d 802, 809 (9th Cir.

1988). The determination of whether the presence of these elements justifies refusal of a request to amend rests in the discretion of the court. Ascon Properties, 866 F.2d at 1160.

Here, the Court finds that plaintiffs have sufficiently justified their proposed amendments to meet the generous standard set out by Rule 15(a). Plaintiffs indicate that information linking CTOP to the events underlying this action became known after plaintiffs filed their Third Amended Complaint. See Pls.'s Mot. at 5:14-7:5; Herz Decl., Exs. 7-14. In particular, plaintiff learned that CTOP wholly owned Chevron Nigeria, Ltd. and funded its capital budget; that CTOP management was involved in decision making concerning the events at issue, particularly the decision to seek assistance from the Nigerian military; and that CTOP may have made some of the public statements upon which plaintiffs' Kasky claim rests. Id.

The Court does not find undue delay or undue prejudice to arise from plaintiffs' proposed amendments. The timing of plaintiffs' present motion is sufficiently justified by the relatively recent discovery just described, and by the decisions upon which plaintiffs' claims are based. The California Supreme Court's decision in Kasky v. Nike, finding businesses that make false statements about their products or operations to be liable under California Business and Professions Code § 17200, came down on May 2, 2002. Kasky v. Nike, Inc., 119 Cal.Rptr. 296 (2002). Wiwa v. Royal Dutch Petroleum, 2002 WL 319887 (S.D.N.Y 2002), upholding RICO claims against an oil company for conspiring with the military to commit abuses, was decided on February 28, 2002. Under these circumstances, the Court does not find undue delay, nor does the Court find plaintiffs' present request to be motivated by bad faith.

Further, the Court is unpersuaded by defendant's assertion of undue prejudice. See Def.'s Oppo. at 21:10-23:19. Defendant contends that the amendments would require additional discovery to be conducted on issues different from those so far raised in this action. Id. As plaintiffs point out, however, no trial date has been set, the discovery cut off is several months away, and the new issues cited by defendant are primarily legal, rather than factual. In addition, although this case has been pending for three years, the bifurcation of discovery, and discovery disputes which have since arisen, have delayed the progress of discovery such that merits discovery has essentially just begun. Under these circumstances, the Court finds that defendant has not made a showing of undue prejudice.

Finally, defendant maintains that the addition of plaintiffs' proposed RICO and Kasky claims would be futile. In particular, defendant contends that, as to the proposed RICO claim, plaintiffs lack standing because their allegations concern personal, rather than economic injury. Def.'s Oppo. at 14:16-15:6. In reply, plaintiffs identify portions of the proposed Fourth Amendment Complaint alleging damage to homes, livestock, and other property. Pls.'s Reply at 7:10-25; FAC at ¶¶ 67, 68, 71 Defendant also argues that the alleged RICO violations lack the requisite connection to United States commerce under the "conduct" test and the "effects" test. Def.'s Oppo. at 15:9-16:14. Relying in part on the recent W wa decision, plaintiffs maintain that COPI and Chevron employees in the United States participated in the events in Nigeria, and that the acts at issue resulted in defendant enjoying an unfair advantage in the United States oil market. Pls.'s Reply at 8:2-9:15. Likewise, in response to defendant's claims that plaintiffs lack standing to assert Kasky claims, and that the Kasky rule constitutes a prior restraint on speech, plaintiffs present counter arguments sufficient to justify amendment. Def.'s Oppo. at 16:17-20:4; Pls.'s Reply at 10:1-12:2. A proposed amendment is "futile" only if no set of facts can be proven under which the amendment would constitute a valid claim. Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988). The Court does not find conclusive evidence of futility on the face of plaintiffs' proposed Fourth Amended Complaint. The objections raised by defendant are properly addressed in the context of a motion to dismiss, a motion for more definite statement, or a motion for summary judgment.

As to plaintiffs' proposed RICO and Kasky claims, plaintiffs' motion for leave to amend their complaint is GRANTED. As the Court noted at oral argument, however, defendant has raised serious questions concerning plaintiffs' standing to bring a Kasky claim. Given the extremely stringent standard for a showing of futility, leave to add the Kasky claim will be granted, but plaintiffs are advised to allege their new claims with the greatest degree of specificity possible.

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CONCLUSION

For the foregoing reasons, plaintiffs' motion for leave to file a Fourth Amended Complaint is hereby GRANTED in part and DENIED in part. Plaintiffs are directed to file a revised Fourth Amended Complaint in conformance with this order **no later than August 30, 2002.** [docket # 188]

IT IS SO ORDERED.

Dated: August 16, 2002

SUSAN ILLSTON
United States District Judge

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United States District Court
for the
Northern District of California
August 19, 2002

CERTIFICATE OF SERVICE

Case Number:3:99-cv-02506

Bowoto

vs

Chevron Corporation

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 19, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Deputy Clerk