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 UNOCAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON: (1) ABSENCE OF VICARIOUS LIABILITY; AND (2) FAILURE TO JOIN INDISPENSABLE PARTIES

Hearing date: 6/3/02

Ruling date: 6/10/02

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

Unocal Defendants' Motion for Summary Judgment Based on Absence of Vicarious Liability is DENIED.

Unocal Corporation, Union Oil Company of California, John Imle and Roger C. Beach ("Unocal") move for summary judgment, pursuant to Code of Civil Procedure section 437(c), on all Plaintiffs' claims on the grounds that the Unocal defendants have no liability for the alleged tortious acts of individuals in the Myanmar military that give rise to the complaints because: (1) the defendants' liability derives solely from the defendant corporations' status as indirect minority shareholders in a corporation that carried out pipeline construction with which the tortious acts are associated; and (2) the undisputed facts and applicable law preclude plaintiffs from recovering under any theory of joint, vicarious or third-party liability alleged in the complaints. Alternatively, Unocal defendants move for summary judgment on all plaintiffs' claims on the grounds that the military and government of Myanmar and TOTAL are indispensable parties who cannot be joined in this action, and without whom relief cannot be granted without prejudice to the Unocal defendants.

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 as a matter of law.

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.)

1. 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 differ 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 on which this Court could decide the complex issues presented by these motions. Therefore, this Court will apply California law.

2. Creation of a "Yadana Project Joint Venture"

The terms of the MOU and PSC

Defendants argue that Plaintiffs' theory of vicarious liability fails because the onshore pipeline was built by an independent corporation, not a joint venture with the Myanmar government. In reply, Plaintiffs claim that the Petroleum Production Joint Venture covers "exploitation of natural gas and oil in the Andaman Sea and the construction of a pipeline through the Tenasserim region of Burma." (Doe Complaint, ¶¶ 33-35; Roe Complaint, ¶ 14.)

The existence of a joint venture is an issue of contract. (Cutter Labs, Inc. v. R. W. Ogle & Co. (1957) 151 Cal.App.2d 410, 415 ["whether parties have created such a relationship...depends on their actual intention, to be determined in accordance with the ordinary rules governing the interpretation of contracts"].) Where the agreement is expressed in writing, the written terms defining the nature and terms of the relationship govern. (McTigue v. Arctic Ice Cream Supply Co. (1912) 20 Cal.App. 708, 715.) "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.)

Defendant's contentions

The creation of the joint venture relationship and the formation of MGTC are governed by two contracts, the Memorandum of Understanding (MOU) and the Production Sharing Contract (PSC). The express terms of the contracts limit the

operations of the Petroleum Production Joint Venture to offshore exploration and development and grant MGTC exclusive authority to conduct pipeline construction and operation. (Miller Decl., ¶ 9; Peters Decl., Exh. A, pp. 2336-2428, 2433-2452.)

The MOU expressly contemplates two segments of the project, operated by two separate entities--the petroleum production joint venture and a separate gas transportation company. (MOU, § 2.3, Peters Decl., Exh. A, pp. 2440-2441.) The MOU limits the petroleum production joint venture's operations to the appraisal of the gas fields and to development and production of gas. (MOU § 2.3(a), p. 2440.)

The PSC limits the activities of the offshore entity to offshore drilling and exploration activities. (PSC, ¶ 2.2, Peters Decl., Exh. A, p. 2348.) The Production Operating Agreement (POA) confirms this geographical limitation. (POA, ¶ 1.17, Peters Decl., Exh F, p. 2187.) Thus, the MOU, PSC, and POA authorize the Petroleum Production Joint Venture created by the PSC only to conduct activities relating to offshore drilling and production activities.

The MOU specifically contemplates that pipeline construction and operation would be conducted exclusively by MGTC. (MOU, § 2.3(b), Peters Decl., Exh. A, pp. 2440-2441.) In the MOGE/MGTC agreement, MOGE, in its governmental capacity, granted MGTC "the exclusive right to develop, finance, construct, own, operate and maintain the Export Pipeline to transport Natural Gas from the MOATTAMA GAS FIELD." (MOGE/MGTC Agreement ¶ 2.1, Peters Decl., Exh. D, p. 2875.) MGTC's shareholders confirmed that its responsibility was gas transportation. (SCA Recital 3, Peters Decl., Exh. D, p. 2935, 2946.)

Plaintiffs' evidence to the contrary

In support of the their theory of a larger "Yadana Project Joint Venture," Plaintiffs also rely on provisions of the PSC and MOU. Plaintiffs argue that the scope of the joint venture, as established by these contracts and the intent of the parties as

reflected by their conduct, includes onshore activities, and the contracts tie the exploitation of the Mottama gas field to the construction of the pipeline. (See MOU §§ 2.1 and 2.1(c), p. 2436-7, 2439 [MOU describes the entire project, including gas production and transportation]; Longerich at pp. 16, 64; PSC §§1.19, 1.31, 2.2, 6.1, 8.10, 17.2(h) [contractor controls petroleum operations, including gas transportation; capital expenditures include gas pipelines; contractor has access to facilities wherever located.) Plaintiffs also point out that the formation of MGTC was a condition precedent to a declaration of commercial discovery and gas field development. (Peters Decl., Exh. A, MOU § 2.1(a)(i)-(v), pp. 2438-2439; MOU p. 2435; Exh. 463.) Plaintiffs also offer evidence that financial calculations were made on the basis of the entire project for income and expenses. (Exh. 1037, pp. 9336-9338; Exh. 1038, p. 54417.)

Plaintiffs evidence also shows substantial onshore activities occurred during the two year period between the signing of the MOU and PSC and the formation of MGTC, inconsistent with Unocal's assertion that MGTC was solely responsible for all ground activities. (Lipman, pp. 81-84; Longerich, pp. 78-79; Exhs. 1003, 1004-1007; 1010, 1073; see generally Plaintiffs' Separate Statement Nos. 32-60.)

In support of their larger joint venture theory, Plaintiffs also rely on a Unocal press release, a letter that discusses the tax implications of the formation of MGTC, and the statements of Unocal employees. The Unocal press release states: "The co-venturers' involvement in the Yadana Project consists of development of the Yadana field and construction of that portion of the pipeline extending from the Yadana field to the Thai border." (Exh. 49, p. 3; see also Exh. 30, p. 14827; Exh. 37, p. 240; Exh. 82, p. 16576.) Unocal argues that such a shorthand description of a business relationship in a press release does not serve to create a legally binding relationship between the parties. (Kloke v. Pongratz (1940) 38 Cal.App.2d 395, 402; Estate of Raphael (1949) 91 Cal.App.2d 931, 940; Smalley v. Baker (1968) 262 Cal.App.2d 824,

838.) While this release itself does not create a joint venture, it is evidence of the existence of a joint venture.

Next, plaintiffs cite to a letter discussing the tax implications of the formation of MGTC. (Chomsky Decl., Exh. C.) Plaintiffs assert that this letter establishes that MGTC was created solely for tax purposes.

Plaintiffs also rely on statements made by Unocal employees to support their joint venture theory. The Grove email (Exh. 216, p. 18392, ¶ 2) states Grove's belief that gas production and pipeline transportation were necessary parts of a single project. At page 111 of his deposition, Lipman, in discussing the Petroleum Production Joint Venture, stated "[t]he joint venture is really a part of the documents in '93 that assigned to us those rights and we became a party to the Production Sharing Contract." (Lipman, p. 111.) At deposition, Lipman was answering the question: "What is the Production Sharing Contract?" His answer appears to refer to the Petroleum Production Joint Venture, rather than an existing Yadana Project Joint Venture. Plaintiffs also cite to the declaration of Joe D. Cecil, an Assistant Comptroller for Unocal. Mr. Cecil defines the "Yadana natural gas development project, [as] consisting of an offshore gas field and a transportation pipeline to Thailand (the 'Project')" and refers to Unocal's participation in the "Project." (Richardson 2d Supp. Decl., Exh. 29, ¶¶ 1, 2.)

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. (Aguilar, supra, 25 Cal.4th at p. 850.) Viewed as a whole, Plaintiffs' evidence regarding the contractual language and the intent of the parties, as reflected by their conduct, would allow a reasonable trier of fact to make a finding that would support Plaintiffs' theory of a larger "Yadana Project Joint Venture."

3. Was MGTC the alter ego of the larger "joint venture"?

The corporate form may be disregarded where "(1) there is such a unity of interest and ownership between the corporation and the individual or organization controlling it that their separate personalities of no longer exist, and (2) failure to disregard the corporate identity would sanction a fraud or promote injustice." (Webber v. Inland Empire Investments, Inc. (1999) 74 Cal.App.4th 884, 899.) Relevant factors include the use of a corporation for a single venture, control of day-to-day operations, the commingling of funds and other assets, the disregard of legal formalities, treatment by parents of corporate assets as its own, and the sharing of offices and employees. (Associated Vendors, Inc. v. Oakland Meat Co. (1963) 210 Cal.App.2d 825, 838-840.) The essence of the alter ego doctrine is that the parent controls the subsidiary to "such a degree as to render the latter the mere instrumentality of the former." (Calvert v. Huckins (E.D.Cal. 1995) 875 F.Supp. 674, 678.)

The alter ego doctrine "'does not depend on the presence of actual fraud,' although 'it is designed to prevent what would be fraud or injustice, if accomplished.'" (Trans-World International v. Smith-Hemion Productions (C.D.Cal. 1997) 972 F.Supp. 1275, 1290.) Undercapitalization is a sufficient indicator of fraud under California law. (Slottow v. American Cas. Co. (9th Cir. 1993) 10 F.3d 1355, 1360; Platt v. Billingsly (1965) 234 Cal.App.2d 577, 583.)

However, "[a]lter ego is an extreme remedy, sparingly used." (Sonora Diamond Corp. v. Superior Court (2000) 83 Cal.App.4th 523, 539.) "The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard." (Ibid.; accord Associated Vendors,

Inc. v. Oakland Meat Co., supra, 210 Cal.App.2d at p. 842.)

Defendants argue that there is no community of interest because the joint venture does not have an ownership interest in MGTC. However, Plaintiffs unity of interest theory is that the joint venturers are the shareholders of MGTC, that is, TPP, UIPC, PTTEPI and MOGE. The PSC requires that the same entities who have an interest in the foreign participants share of the PSC are required to have the same interest in MGTC. (Peters Decl., Exh. A, MOU p. 2445; Peters Decl., Exh. K, Export Gas Transportation Agreement, p. 2838.) Unity of interest requires that the two entities have common ownership, not that one entity owns the other. (McLaughlin v. L. Bloom Sons Co. (1962) 206 Cal.App.2d 848, 851.)

As to the requirement of fraud or injustice, Plaintiffs assert that MGTC was inadequately capitalized at formation, and that Unocal was hiding behind MGTC knowing that tortious conduct was occurring. Plaintiffs' evidence of undercapitalization is that when MGTC was capitalized, the cost of pipeline construction was estimated at $580 million (Exh. 261, p. 5446); the shareholders made only nominal capital contributions, including Unocal's share of $30,000 (Chomsky Decl., Exh. J, Longerich, pp. 17-19, 80-81); Unocal had to submit its annual report to ensure MGTC's solvency (Longerich, pp. 93-94; Exh. 221); MGTC was financed by cash calls (Longerich, 17-19, 36, 49; Exhs. 232, 250); and the parent companies of MGTC shareholders were required to guarantee payments for bid packages of goods and services to the Yadana project (Chessum, pp. 113-115; Exh. 138.)

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. (Aguilar, supra, 25 Cal.4th at p. 850.) Plaintiffs' evidence regarding their alter ego theory would allow a reasonable trier of fact to make a finding that would support Plaintiffs' theory and is sufficient to

survive summary judgment.

Other grounds to disregard MGTC's corporate form

Plaintiffs also argue that where a joint venture chooses to conduct its activities through a corporation, courts will summarily disregard the corporate form, contending that the activities of the corporation are those of the joint venture and the joint venture remains liable. (Opposition, p. 25, citing Weinstock v. Carpet, Inc. (1965) 234 Cal.App.2d 809, 814-815; Hargiss v. Royal Air Properties (1962) 206 Cal.App.2d 406, 412; Drdlik v. Ulrich (1962) 203 Cal.App.2d 360, 365; Hillman v. Hillman Land Co. (1947) 81 Cal.App.2d 174, 184.) Plaintiffs misapply these cases. Piercing the corporate veil of a corporation established by a joint venture is not so simple as Plaintiffs would have. Plaintiffs' cases say that formation of the corporation does not preclude a finding of joint venture--however, the cases still apply the alter ego tests to determine whether liability is proper.

4. Liability of the "joint venture" for the acts of the military

a. Joint venture

Plaintiffs argue that Unocal is liable for the acts of the military because the Government of Burma was its joint venturer. A party is liable for the acts of its joint venturer. (9 Witkin, Summary of Cal. Law (9th ed. 1989) Partnerships, § 21, p. 421.) Assuming that a lager "Yadana Project Joint Venture" existed, there is no basis for imputing the acts of the Burmese military to MOGE and then through MOGE to MGTC.

Plaintiffs state that it "is doubtful that MOGE ever operates other than as the agent of the military," but cite no evidence relevant to this proposition. The evidence Plaintiffs cite to support imputing liability from the Myanmar military to MOGE include: (1) according to Lipman, the PSC gas rights were given to the joint venturer by the government "through MOGE" (Lipman, p. 111); (2) the negotiations for the project were led on the Burmese side by a military officer, Commander TinTun, the

director of the Energy and Planning Department (Bradley Depo., pp. 62-63); (3) MOGE detailed how the contractor would calculate taxable income and granted tax exemptions (Peters Decl., Exh. A, PSC § 9.11, p. 2367; MOU § 4(c), p. 2443; Side Letter, ¶¶ 3, 4, p. 2430); (4) MOGE undertook to provide security, meant to be carried out by the military (Peters Decl., Exh. A, PSC § 17.1(c), p. 2383); (5) the PSC mandated payment in U.S. dollars. (Id., § 23.7, p. 2396). These facts would not allow a reasonable trier of fact to infer that liability passed vicariously from the Myanmar military to MOGE, the governmental entity responsible for administering oil and gas rights.

b. Sovereign immunity

Unocal argues that to the extent that any joint venture with the Myanmar military existed, the sovereign immunity of the Myanmar government would extend to Unocal, citing Corporations Code section 15013 and Caplan v. Caplan (1935) 268 N.Y. 445, 451. The defense of sovereign immunity is personal to the government of Myanmar; Unocal may not benefit from the sovereign immunity which protects MOGE and the government of Myanmar from liability. (Campbell v. Harris-Seybold Press Co. (1977) 73 Cal.App.3d 786, 791; Cardenas v. Ellston (1968) 259 Cal.App.2d 232; Restatement 2d, Agency § 217(b)(ii) & com.)

c. Agency/Independent contractor theories of vicarious liability

Plaintiffs argue, in the alternative, that if the Burmese government was not a participant in the joint venture, the joint venturers are still liable as principals for the acts of the army. A principal is liable for the intentional torts of his agent committed within the scope of the employment. (Farmers Ins. Group v. County of Santa Clara (1995) 11 Cal.4th 992, 1004.) This includes acts committed by police officers hired to provide security. (McChristian v. Popkin (1946) 75 Cal.App.2d 249, 256.) Whether an agent's act is within the scope of employment depends on whether the act was

foreseeable by the principal. (Farmers Ins. Group, supra, 11 Cal.4th at p. 1004.) This is ordinarily a jury issue. (Temple v. Southern Pac. Transportation Co. (1980) 105 Cal.App.3d 988, 995.)

To authorize an agent, all that is required is conduct by each party manifesting acceptance of a relationship where one party is to perform work for the other under the latter's direction. (Hanks v. Carter & Higgins of California, Inc. (1967) 25 Cal.App.2d 156, 161.) Agency can be established by a precedent authorization or by subsequent ratification. Ratification of the unauthorized acts of another may be established by the principal's knowing acceptance or retention of the benefits of the act. (Civ. Code, § 2310; Schultz Steel Co. v. Hartford Accident & Indem. Co. (1986) 187 Cal.App.3d 513, 523.) Failure to discharge an employee who the principal knows has committed a wrongful act is evidence of ratification. (Shoopman v. Pacific Greyhound Lines (1959) 196 Cal.App.2d 848, 856.) Passive acceptance constitutes implied ratification. (Gates v Bank of America (1953) 120 Cal.App.2d 571.)

Plaintiffs' first argument is that under the PSC and the MGTC/MOGE contracts, that the military was responsible for security for the project. (Peters Decl., Exh. A, PSC § 17.1(c); Exh. 69, p. 27297; Exh. 1010, pp. 4571-4598, 4572; Beach, pp. 129-130; Peters Decl., Exh. D., MGTC agreement, § 6.1, p. 2878.) Plaintiffs' evidence shows that in exchange for security, the Project provided food, money and medical assistance for the military assigned to the project. (Exh. 144, p. 14705; Exh. 181, pp. 25071-25086; Beach, p. 90; Lipman, pp. 289-290, 293, 295; Exhs. 73; 84, 181.)

Plaintiffs' second argument is that if the military's role in the project was not contractual, then the military was an agent of the joint venture. Plaintiff offers some evidence tending to show that the joint venture did, to some extent, direct the operations of the military. (Exh. 1044, pp. 24822; Exh. 81, pp. 25071-25072; Exh. 1044, p. 24822; Chomsky Decl., Exh. G, p. 000029, 27.) Plaintiffs contend that the joint venture

ratified the agency relationship by accepting and retaining the benefits of the Myanmar military's security and infrastructure operations. (See Doe, supra, 110 F.Supp.2d at p. 1310 ["The evidence does suggest that Unocal knew that forced labor was being utilized and that the Joint Venturers benefitted from the practice"].)

Finally, plaintiffs argue that if the army was not an agent of the joint venture, then it was an independent contractor. Where an employer lacks the legal right to control the employee's activities, the employee is an independent contractor. (Malloy v. Fong (1951) 37 Cal.2d 356, 370.) Plaintiffs present evidence that the joint venture directed the army to accomplish certain tasks, including security and the preparation of roads and helipads. (See, e.g., Chomsky Decl., Exh. G at 000029, ¶ 27.) A party is liable for the acts of an independent contractor where the employer should have recognized the harm as likely given the methods adopted by the contractor (Toland v. Sunland Housing Group, Inc. (1998) 18 Cal.4th 253), or where the employer negligently selected the contractor (Chevron USA v. Superior Court (1992) 4 Cal.App.4th 544, 549). The joint venture knew harm was likely, given the military's human rights record. (See, e.g. Exh. 476.)

Because Plaintiffs' evidence would allow a reasonable trier of fact to find that the military was contractually responsible for security, or that the military was an agent or independent contractor hired by the joint venture, sufficient evidence exists to allow plaintiffs to proceed on their independent contractor and agency theories. Summary judgment is not warranted on these grounds.

5. Are MOGE, TOTAL and MGTC indispensable parties under Code of Civil Procedure section 389?

Defendants assert that MOGE, TOTAL and MGTC are indispensable parties to this action. Code of Civil Procedure section 389 provides:

(a) A person who is subject to service of process and whose

> joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.
>
> (b) If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder.

The joinder of these parties is infeasible, as the court does not have personal jurisdiction over these parties, and the Myanmar government enjoys sovereign immunity. (Doe v. Unocal Corp. (9th Cir. 2001) 248 F.3d 915, 931; Doe v. Unocal Corp. (C.D.Cal. 1997) 963 F.Supp. 880, 889.) However, the issue of whether MOGE, TOTAL and MGTC are indispensable parties has already been litigated between these parties. In Doe v. Unocal Corp. (C.D.Cal. 1997) 963 F.Supp. 880, 889 and NCGUB v. Unocal, Inc. (C.D.Cal. 1997) 176 F.R.D. 329, 358, the court held that the absence of MOGE and the government of Myanmar would not preclude plaintiffs from obtaining the

compensatory relief they requested. Because the parties and the applicable law are identical, Unocal is collaterally estopped from relitigating this issue. (See Lucas v. County of Los Angeles (1996) 47 Cal.App.4th 277, 286 [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].)

6. Is summary judgment warranted?

Unocal brings this motion for summary judgment only under Code of Civil Procedure section 437c. "Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc, § 437c, subd. (a).) "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) Summary judgment is denied for two reasons: (1) triable issues of fact exist as to plaintiffs' theories of vicarious liability, as stated above; and (2) even if defendants were entitled to summary adjudication on the vicarious liability issues, plaintiffs' causes of action for violations of the California Constitution, Business & Professions Code section 17200, and unjust enrichment survive. For those reasons, Unocal is not entitled to judgment as a matter of law, and Unocal's motion is denied.

In Sum:

Unocal Defendants' Motion for Summary Judgment Based on Absence of Vicarious Liability is DENIED.

IT IS SO ORDERED.

Dated 6/10/02

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Victoria Gerrard Chaney

Judge