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7 UNITED STATES DISTRICT COURT  
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 LARRY BOWOTO; **OLA OYINBO, as** ) Case No.: C99-2506 SI  
10 **ADMINISTRATOR OF THE ESTATE of her** )  
11 **deceased husband BOLA OYINBO; BASSEY** ) **MEMORANDUM IN SUPPORT**  
12 **JEJE; SUNDAY JOHNBULL IROWARINUN,** ) **OF PLAINTIFF'S MOTION**  
13 individually and as Administrator of the Estate of his ) **FOR LEAVE TO FILE**  
14 deceased brother AROLIKA IROWARINUN, and as ) **FOURTH AMENDED**  
15 GUARDIAN AD LITEM for the minors BOSUWO ) **COMPLAINT**  
16 SEBI IROWARINUN, ORIOYE LALTU )  
17 IROWARINUN, AMINORA JAMES )  
18 IROWARINUN, OLORUNWA DANIEL )  
19 IROWARINUN, ENIESORO IROWARINUN, )  
20 JOSEPH SUNDAY IROWARINUN, ADEGORYE )  
21 OLORUNTIMJEHUM IROWARINUN, )  
22 MONOTUTEGHA IROWARINUN, )  
23 OLAMISBODE IROWARINUN, IBIMISAN )  
24 IROWARINUN; MARGARET IROWARINUN; )  
25 ROSELINE IROWARINUN; MARY )  
26 IROWARINUN; **MENEKIEI JOB, individually** )  
27 **and as ADMINISTRATOR OF THE ESTATE OF** )  
**SHADRACK OLOKU; BENSON EDEKU,** )  
individually and as ADMINISTRATOR OF THE )  
ESTATE OF TIMI OKORU; ANTHONY )  
LAWRURU, individually and as )  
ADMINISTRATOR OF THE ESTATE OF )  
KEKEDU LAWRURU; **HENRY BABULOGBA,** )  
**individually and as ADMINISTRATOR OF THE** )  
ESTATE OF BRIGHT **BABULOGBA; JOHN** )  
IKENYAN, individually and as ADMINISTRATOR )  
OF THE ESTATE OF AGBAGBAEDI IKENYAN; )  
RHODA EFERASUA, as GUARDIAN AD LITEM )  
FOR EBIERE EFERASUA, A MINOR; OBELE )  
IGNONI ADMINISTRATOR OF THE ESTATE OF )  
MONIMA OTEE; ROBINSON UROUPA, )  
ADMINISTRATOR OF THE ESTATE OF )  
BRIPALE UROUPA, )  
Plaintiffs, )  
v. )

26 **CHEVRONTEXACO CORPORATION,**  
27 **CHEVRONTEXACO OVERSEAS**

1 **PETROLEUM INC., AND MOES 2-50,**

2 Defendants.

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## 4 I. INTRODUCTION

5 This case arises out of Defendant ChevronTexaco, Inc.’s (formerly “Chevron Corp.”)  
6 involvement in the commission of gross human rights violations in Nigeria. These abuses  
7 include the shooting of peaceful protestors at Chevron’s Parabe offshore oil drilling platform,  
8 and the attack upon and destruction of two villages, Opia and Ikenyan, near Chevron facilities.  
9 Plaintiffs allege that ChevronTexaco, along with its wholly-owned subsidiary ChevronTexaco  
10 Overseas Petroleum Inc., (“CTOP”, formerly “Chevron Overseas Petroleum, Inc.” or “COPI”)  
11 and their wholly-owned subsidiary, Chevron Nigeria Ltd. (“CNL”), participated in these attacks,  
12 in conjunction with the Nigerian military, and/or that the U.S.-based corporations are indirectly  
13 or vicariously liable for abuses. Plaintiffs herein seek leave to file a Fourth Amended  
14 Complaint, a copy of which is attached to the Motion as Exhibit A, with proposed amendments  
15 marked in bold.

16 CTOP’s role in the events at issue was only recently revealed in discovery.  
17 Accordingly, CTOP is not named in the operative complaint. Plaintiffs seek leave to amend the  
18 complaint to add CTOP as a defendant by substituting CTOP’s name for the defendant named as  
19 MOE 2 in earlier complaints. Plaintiffs also bring this motion to add allegations asserting claims  
20 against ChevronTexaco and CTOP pursuant to two recently decided cases.

21 First, on February 28, 2002, Judge Kimba Wood of the Southern District of New York  
22 held in *Wiwa v. Royal Dutch Petroleum*, 2002 WL 319887, 2002 U.S. Dist. LEXIS 3293  
23 (S.D.N.Y. 2002), that RICO claims were actionable in circumstances similar to those at bar.<sup>1</sup>  
24 Plaintiffs therefore seek to amend the complaint to include a RICO claim. Second, on May 2,  
25

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26 <sup>1</sup>*Wiwa* involved a RICO claim against an oil company for conspiring to commit abuses with  
27 the Nigerian military.

1 2002, the California Supreme Court held in *Kasky v. Nike, Inc.*, 119 Cal.Rptr. 296 (2002), that a  
2 business that makes false or misleading statements about its own products or operations, in order  
3 to promote or defend its sales and profits, can be held liable under Cal. Business and Professions  
4 Code §17200. Plaintiffs allege that ChevronTexaco Corporation and/or CTOP have made false  
5 and misleading statements regarding the attacks on Parabe, Opia and Ikenyan and Chevron's  
6 relationship with the Nigerian military involved in those attacks. These statements concern  
7 defendants' operations and the manner in which their products are produced. Accordingly,  
8 plaintiffs seek to amend the existing §17200 claim to include facts supporting a *Kasky* theory of  
9 liability. Plaintiffs also seek to amend the complaint to correct a few errors in the Third  
0 Amended Complaint relating to the names of certain plaintiffs. Defendants have agreed to these  
1 changes. Lastly, the Fourth Amended Complaint reflects the Court's substitution of plaintiff  
2 Bola Oyinbo's wife as a plaintiff, since Mr. Oyinbo has passed away and his wife represents his  
3 estate.

4 CTOP stipulates that it can be added as a defendant for purposes of plaintiffs' Alien  
5 Tort Claims Act, 28 U.S.C. §1350, claims and plaintiffs' §17200 claims, but opposes amending  
6 in CTOP for purposes of plaintiffs' state common law claims, asserting that those claims are  
7 time-barred. ChevronTexaco and CTOP also oppose the addition of a *Kasky* theory and a RICO  
8 claim. Plaintiffs herein demonstrate that none of the proposed amendments are prejudicial,  
9 brought for the purposes of delay or in bad faith or are futile, and that plaintiffs' state common  
0 law claims are not time-barred. Accordingly, plaintiffs' motion for leave to file the Fourth  
1 Amended Complaint should be granted.

## 22 **II. PROCEDURAL HISTORY**

23  
24 This case was originally filed on May 27, 1999 on behalf of five plaintiffs.<sup>2</sup> The initial  
25 complaint named 500 Moe defendants. It was never served. On September 23, 1999, plaintiffs

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26 <sup>2</sup> These plaintiffs were Larry Bowoto, Bola Oyinbo, Bassey Jeje, Sunday Johnbull  
27 Irowaninu, and the estate of Arolika Irowaninu.

1 filed their First Amended Complaint, which was personally served on defendant ChevronTexaco  
2 on that same date. The FAC named 50 “Moe” defendants and added claims on behalf of 18 new  
3 plaintiffs.<sup>3</sup> On November 10, 1999, defendant ChevronTexaco filed a motion to dismiss the  
4 FAC (“Dismissal Motion”). On January 3, 2000, in order to respond to concerns raised in  
5 ChevronTexaco’s Dismissal Motion that the FAC allegations were unclear about how certain  
6 plaintiffs were injured, as well as to add plaintiffs who learned of the case after the filing of the  
7 FAC,<sup>4</sup> the parties filed a stipulation and order with this Court, along with a proposed Second  
8 Amended Complaint (“SAC”), which the Court ordered filed. On January 13, 2000, plaintiffs  
9 filed a motion for leave to file the Third Amended Complaint, seeking to substitute an individual  
10 defendant for Moe 1, name certain anonymous plaintiffs and clarify how certain plaintiffs were  
11 injured. The Court granted leave to file the Third Amended Complaint except as to adding the  
12 individual defendant, and denied ChevronTexaco’s motion to dismiss.

### 13 14 **III. STATEMENT OF FACTS**

#### 15 **A. Discovery Has Recently Revealed Evidence That CTOP Was Involved In or** 16 **Responsible For The Abuses at Parabe, Opia and Ikenyan.**

17 During the course of discovery, plaintiffs have learned that, at all relevant times, CTOP  
18 wholly owned Chevron Nigeria Ltd. and funded its capital budget. Chevron Corporation’s  
19 Response to Plaintiffs’ Special Set of Interrogatories Pursuant to Court Order of March 16, 2001

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20  
21 <sup>3</sup> In addition to those who commenced the lawsuit, the First Amended Complaint was filed  
22 on behalf of Margaret Irowarinun, Roseline Irowarinun, Mary Irowarinun, Bosuwo Sebi  
23 Irowarinun, Orioye Laltu Irowarinun, Aminora James Irowarinun, Olorunwa Daniel  
24 Irowarinun, Guisasoro Irowarinun, Joseph Sunday Irowarinun, Adegorye Oloruntimjehum  
25 Irowarinun, Monotutegha Irowarinun, Olamisbode Irowarinun, Ibimisan Irowarinun, the  
26 Estate of Shadrack, the Estate of Timi Okoru, the Estate of Kekedu Lawruru, the Estate of  
27 Bright Pablogba, and the Estate of Agbagbaedi Ikenyan.

<sup>4</sup> The plaintiffs added in the Second Amended Complaint are John Ikenyan, Rhoda Eferasua  
as Guardian ad Litem for Ebiere Eferasua, Obele Ignoni as Administrator for the Estate of  
Monima Otee and Robinson Uroupa as Administrator for the Estate of Bripale Uroupa.

1 Number 4(3), 4(4); (Herz Decl. Exh. 7); Matzke dep. at 134, 173; (Herz Decl. Exh. 8). Plaintiffs  
2 have also recently learned that CNL paid the Nigerian military a per diem for security. These  
3 payments were reviewed and/or approved by CTOP. *E.g.* Kirkland depo. 45-51; (Herz Decl.  
4 Exh. 9); C 1776-1779 (Herz Decl. Exh. 10).

5 Recent discovery has revealed that the top management of CNL and the person  
6 responsible for managing the events at Parabe were all on assignment from CTOP. George  
7 Kirkland and Thomas Schull were the two highest ranking executives at CNL at the time of the  
8 incidents in question, and Scott Davis headed the CNL team set up to deal with the Parabe  
9 incident. Declaration of Thomas J. Schull in Support of Defendant's Motion to Dismiss ¶¶ 1, 2  
0 (Herz Decl. Exh. 11). Moreover, Davis advised Schull the day before the attack on Parabe that  
1 Davis' team had concluded that CNL should ask the Nigerian authorities to "restore order on the  
2 Parabe platform." Schull Decl. ¶ 3. Schull and Kirkland "concurred" in that decision. Schull  
3 Decl. at ¶¶ 3, 4.

4 Documents produced as late as February, 2002 and a deposition taken in the same  
5 month have revealed the connection between CTOP and these key actors. All three of these  
6 people were transferred to CNL by and/or were working for, or on assignment from, COPI. *E.g.*  
7 Schull Dep. at 27-32, (Herz Decl. Exh. 12); C17763, C17764, C17765, produced in February,  
8 2002 (Herz Decl. Exh. 13). In addition, discovery has revealed that CNL personnel were in  
9 communication with CTOP employees assigned to its public relations department and within  
10 CTOP upper management just prior to the summoning by CNL of the Nigerian military "to deal"  
11 with the situation on the Parabe platform. *E.g.* C 17523-526, produced by defendant on October  
12 29, 2001 (Herz Decl. Exh. 14).<sup>5</sup>

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13  
14  
15 <sup>5</sup>The communications are addressed to James Bates, Joe Lorenz, and Pam Low. C 17523-526  
16 (Herz Decl. Exh. 14). Bates was the Nigeria Business Unit leader/liaison "to COPI  
17 management in San Ramon," and Lorenz was with COPI public affairs. Schull Dep.  
at 194-197, (Herz Decl. Exh. 12).

1           Moreover, defendants ChevronTexaco and/or CTOP, in describing the events at  
2 Parabe, Opia and Ikenyan and Chevron's relationship with the Nigerian military involved in  
3 those attacks, have made false and/or misleading statements to the general public in California.  
4 These false statements include assertions that no Chevron entity had any role in and/or provided  
5 any material support for the attack on Parabe, that no Chevron entity paid the soldiers involved  
6 in the attack on Parabe, and that no Chevron personnel or equipment were involved in the attacks  
7 on Opia and Ikenyan. ChevronTexaco and/or CTOP also falsely stated to the media and to the  
8 public that the occupants of the Parabe platform were armed with guns and/or machetes; that  
9 they refused to provide medical access; and that they provoked the violence by attacking the  
10 soldiers and attempting to seize their weapons. With regard to both the occupants of the  
11 platform and villagers at Opia and Ikenyan, ChevronTexaco and/or CTOP falsely represented  
12 that their purpose was to demand ransom. www.chevron.com (Herz Decl. Exh. 15 ); See  
13 Declaration of Michael S. Sorgen filed herewith which attaches some of the documents produced  
14 in discovery containing the above representations.

15           **B. Plaintiffs Have Conducted a Good Faith Meet and Confer With Defendants To**  
16           **Narrow Any Disputes and Determine Which Proposed Amendments Defendants**  
17           **Contest.**

17           As a result of the revelations described above, and in light of Judge Wood's February  
18 28<sup>th</sup> decision in *Wiwa*, plaintiffs by letter dated March 8, 2002 initiated a meet and confer  
19 process with defense counsel regarding whether ChevronTexaco and CTOP would stipulate to  
20 amending the complaint to add CTOP as a defendant, and to adding RICO claims against both  
21 ChevronTexaco Corp. and CTOP. (Herz Decl. Exh.1). In his March 12, 2002 response, defense  
22 counsel indicated that ChevronTexaco would not stipulate to amending in the RICO claim, but  
23 would consider stipulating to the addition of CTOP after seeing the proposed amendments. (Herz  
24 Decl. Exh. 2).

25           After an exhaustive review of the evidence relating to CTOP revealed thus far in  
26 discovery, plaintiffs on May 13, 2002 sent counsel for ChevronTexaco the proposed Fourth  
27 Amended Complaint and asked by accompanying letter if defense counsel would be willing to

1 stipulate to its filing. (Herz Decl. Exh. 3) The proposed Fourth Amended Complaint sought to  
2 add CTOP for all claims, substitute Bola Oyinbo's wife as a plaintiff since Mr. Oyinbo has  
3 passed away and his wife represents his estate, and make a few corrections to the Third  
4 Amended Complaint concerning the names of plaintiffs. The proposed complaint also sought to  
5 amend plaintiffs' existing §17200 claim to include allegations regarding false and misleading  
6 statements made by ChevronTexaco Corporation and/or CTOP which subject defendants to  
7 liability under the California Supreme Court's May 2, 2002 opinion in *Kasky v. Nike, Inc.*

8 On May 17, 2002, the Court conducted a case management conference. There, the  
9 Court indicated that CTOP could be added as a defendant, but ordered the parties to further  
10 "meet and confer" about the scope of the allegations that would be allowed, with a particular  
11 emphasis on the new theory sought to be asserted under §17200, since defense counsel stated  
12 they had not yet reviewed or commented on the new allegations plaintiffs proposed to add.  
13 (Traber Decl.). On May 28, defense counsel indicated to plaintiffs' counsel defendants'  
14 willingness to stipulate to the addition of CTOP for claims brought under the Alien Tort Claims  
15 Act and for plaintiffs' §17200 claim. (Herz Decl. Exh. 4). Defendant refused to stipulate,  
16 however, to amending in CTOP for purposes of plaintiffs' state common law claims, asserting  
17 that the time for substituting in a Moe defendant for the 5 plaintiffs who commenced the lawsuit  
18 had expired. Defendants apparently assumed that the period expired the day before, on May 27,  
19 2002. Defendant also refused to stipulate to the amending of plaintiffs' §17200 to assert *Kasky*  
20 theories of liability.

21 Plaintiffs continued the meet and confer process via a June 6 letter setting forth  
22 plaintiffs' basis for believing that the proposed common law claims against CTOP are not time  
23 barred and that the *Kasky* theory of liability is appropriately raised. (Herz Decl. Exh. 5).  
24 Defendants responded by letter on June 7, clarifying which claims CTOP asserts are time-barred,  
25 reiterating their position that plaintiffs' state common law claims are time-barred without  
26 addressing plaintiffs' proposed *Kasky* amendment, and confirming the parties' agreement that  
27 the stipulation to add CTOP for purposes of plaintiffs' other claims would not serve as a basis

1 for extending Phase I discovery. (Herz Decl. Exh. 6). Also on June 7, the Court held another  
2 case management conference at which it set hearing on the motion to amend for August 16,  
3 2002.

#### 4 5 **IV. PLAINTIFFS' AMENDMENTS ARE PROPER UNDER F.R.C.P. 15(a).**

6 Rule 15(a) of the Federal Rules of Civil Procedure provides that after a response has  
7 been filed to a pleading, the pleading may be amended "only by leave of court . . . ; and leave  
8 shall be freely given when justice so requires." Courts must heed carefully the command of Rule  
9 15(a) by freely granting leave to amend when justice requires. *Foman v. Davis*, 371 U.S.178, 182  
10 (1962); *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 765 (9th Cir. 1986). A trial  
11 court's discretion "must be guided by the underlying purpose of Rule 15 to facilitate decisions  
12 on the merits, rather than on the pleadings or technicalities." *United States v. Webb*, 655 F.2d  
13 977, 980 (9th Cir. 1981). Accordingly, Rule 15's policy favoring amendment should be applied  
14 with "extreme liberality." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

15 This liberality in granting leave to amend is not dependent on whether the amendment  
16 will add causes of action or parties. It is, however, subject to the qualification that  
amendment of the complaint does not cause the opposing party undue prejudice, is not  
sought in bad faith, and does not constitute an exercise in futility.

17 *Id.* at 186 (citations omitted). The party opposing amendment bears the burden of showing  
18 prejudice. *Id.* at 187. Since the proposed amendments would not cause undue prejudice, are not  
19 sought in bad faith and would not be futile, plaintiffs' motion should be granted in its entirety.

20 **A. Plaintiffs have moved in a timely fashion to add CTOP as a defendant and to**  
21 **add a RICO claim and a Kasky theory and these amendments are not sought**  
22 **for purposes of delay or in bad faith.**

23 Plaintiffs have promptly moved to amend their complaint after discovering CTOP's  
24 role in the joint Chevron/Nigerian military attacks which injured and killed plaintiffs. Plaintiffs  
25 have not acted for the purpose of delay or in bad faith in failing to move earlier to amend their  
26 pleading. Similarly, plaintiffs have moved to add a RICO claim and a *Kasky* theory within four  
27 and two months respectively of when the decisions upon which plaintiffs rely were filed.

1           **B. Failure to allow plaintiffs to add CTOP as a defendant and to add a RICO**  
2           **claim and a *Kasky* theory would result in a grave injustice, while amending**  
3           **the complaint would not cause undue prejudice to the defendants.**

4           More than sufficient reason exists based on information recently disclosed in discovery  
5           to amend the complaint to state claims directly against CTOP. Similarly, as is detailed below,  
6           sufficient basis exists to amend in a *Kasky* theory.<sup>6</sup> Accordingly, failure to allow plaintiffs to  
7           amend the complaint would work a grave injustice on plaintiffs because it would result in the  
8           loss of meritorious claims against two of the Chevron entities responsible for the decisions which  
9           led to their deaths and injuries.

10           Adding CTOP as a defendant would not result in any injustice to defendants. CTOP  
11           had notice of this case from the outset. ChevronTexaco and CTOP are part of an integrated  
12           energy company with overlapping management. For example, Richard Matzke simultaneously  
13           served as president of CTOP and vice-chairman of ChevronTexaco. As plaintiffs learned in  
14           discovery, CTOP oversees the operations of ChevronTexaco's foreign subsidiaries, by for  
15           example, reviewing their business plans and projects. *E.g.* Matzke dep. at 40-41; (Herz Decl.  
16           Exh. 8). The presidents of overseas subsidiaries of Chevron Corp. prior to the merger with  
17           Texaco reported to COPI. Schull dep. at 42-43; (Herz Decl. Exh. 12). Given this, as well as  
18           CTOP's involvement in the incidents in Nigeria which give rise to this case, and the fact that it is  
19           represented by the same counsel as ChevronTexaco, CTOP can be presumed to have known  
20           about this case since its inception. *See G.F. Co. v. Pan Ocean Shipping Co., Ltd.*, 23 F.3d 1498,  
21           1503 (9<sup>th</sup> Cir. 1994).

22           The fact that CTOP shares counsel with ChevronTexaco also demonstrates that CTOP  
23           cannot claim any prejudice in conducting its defense. Moreover, the case is still in Phase I of  
24           discovery, which relates solely to whether Chevron's U.S.-based entities have a sufficient

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25           <sup>6</sup>Sufficient basis also exists to amend in plaintiffs' RICO claim. Since, however, defendants  
26           have not stated their basis for opposing the proposed RICO amendment, (Herz Decl. Exh. 2),  
27           they have not suggested that they believe such amendment would be futile. Plaintiffs  
            therefore do not discuss this issue herein.

1 relationship with the events in Nigeria to hold them liable. Since discovery concerning plaintiffs'  
2 substantive allegations has not commenced, CTOP has no argument that it has been prejudiced  
3 due to some inability to investigate plaintiffs' claims.

4 Indeed, counsel for the defendants has stipulated to adding CTOP as a defendant for  
5 purposes of plaintiffs' Alien Tort Claims Act and §17200 claims. In so doing, defendants have  
6 apparently conceded with respect to *all* of plaintiffs' claims that adding in CTOP would not  
7 cause undue prejudice nor is sought in bad faith. This is so because the only reason proffered by  
8 CTOP for refusing to stipulate to the addition of CTOP with respect to plaintiffs' California  
9 common law claims is its assertion that plaintiffs are time-barred from raising those claims  
10 against CTOP. That is an argument that leave to amend would be futile, not that it would cause  
11 undue prejudice or is sought in bad faith.

12 ChevronTexaco erroneously suggests that it would somehow be prejudiced by the  
13 proposed amendment of a *Kasky* theory of liability because, in ChevronTexaco's view, it should  
14 have been raised "three years ago." (Herz Decl., Exh. 4 at 2). As a threshold matter, this  
15 argument is inapplicable to the *Kasky* claims against CTOP, since plaintiffs only recently learned  
16 of CTOP's involvement. Moreover, ChevronTexaco's unsubstantiated assertion of prejudice is  
17 not a legal basis for denying plaintiffs' motion. "[D]elay, by itself, is insufficient to justify denial  
18 of leave to amend." *DCD Programs, Ltd.*, 833 F.2d at 186. That any delay is not prejudicial is  
19 especially clear since this case is still in discovery, with no trial date pending. *Id.* at 188.<sup>7</sup> In  
20 addition, §17200 is an equitable provision, and ChevronTexaco and/or CTOP persist to this day

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21 <sup>7</sup>Amendments are often allowed after lengthy periods of time. *See e.g., State Teachers*  
22 *Retirement Bd. v. Fluor Corp.*, 654 F.2d 843, 845-6 (2d Cir. 1981) (three year interval);  
23 *Howey v. United States*, 481 F.2d 1187, 1190-91 (9th Cir. 1973) (denial of leave to amend  
24 reversed for abuse of discretion where no showing of prejudice or bad faith, even though  
25 amendment sought five years after original pleading filed, on day two of trial, and moving  
26 party provided no reason for the delay); *Middle Atlantic Utilities Co. v. S.M.W. Development*  
27 *Corp.*, 392 F.2d 380, 383 (2d Cir. 1986) (amendment allowed after 3-year interval and notice  
of trial readiness); *Zeigan v. Blue Cross and Blue Shield*, 607 F.Supp. 1434, 1438 (S.D.N.Y.  
1985) (three year interval); *Green v. Wolf Corp.*, 50 F.R.D. 220, 223 (S.D.N.Y. 1970) (four  
year interval).

1 in making the kind of public assertions *Kasky* found actionable.<sup>8</sup> Neither ChevronTexaco nor  
2 CTOP can be prejudiced by an amendment that challenges ongoing behavior.<sup>9</sup>

3 For similar reasons, ChevronTexaco and CTOP cannot be heard to argue prejudice  
4 with respect to the addition of a RICO claim. Indeed, the existing complaint already contains a  
5 claim for civil conspiracy. Thus, plaintiffs have already alleged that defendants conspired with  
6 the military to commit the abuses in question. (Exh. A at ¶153). Defendants will not be  
7 prejudiced by the addition of the comparable conspiracy allegations in the proposed RICO claim.

8 In sum, ChevronTexaco and CTOP cannot meet their burden to show that they would  
9 be prejudiced by any of the amendments in the Fourth Amended Complaint. In the following  
0 sections, plaintiffs demonstrate that amendments adding CTOP for purposes of plaintiffs'  
1 California common law claims and a *Kasky* theory would not be futile.

## 2 **V. PLAINTIFFS' CALIFORNIA COMMON LAW CLAIMS AGAINST CTOP ARE** 3 **TIMELY**

4  
5 CTOP objects to the addition of plaintiffs' California common law claims based on its  
6 assertion that those claims are time-barred because CTOP was not added as a Moe defendant  
7 within 3 years of the filing of the original complaint on May 27, 1998. (Herz Decl. Exhs. 4, 6).  
8 This assertion is contrary to the procedural history, however. After several months of

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9  
10 <sup>8</sup>For example, Chevron's website currently contains the following false or misleading  
11 statements about the Parabe incident: "On May 25, 1998, about 200 armed youths boarded  
12 and seized Chevron's Parabe platform . . ." "The group was armed with machetes, knives and  
13 clubs and demanded ransom and other payments from Chevron management." "During the  
14 siege, some employees fell ill and were denied access to medical treatment." "A protester  
15 attempted to seize a weapon of one of the officers, leading to a scuffle, during which two of  
16 the kidnappers died of gunshot wounds and another was injured." (Herz Decl. Exh. 15)

17  
18 <sup>9</sup>Amending the complaint to include actions taken since the filing of plaintiffs' original  
19 complaint is proper under F.R.C.P. 15(d). As the Ninth Circuit held in *Keith v. Volpe*, 858  
20 F.2d 467, 473-74, 476 (9<sup>th</sup> Cir. 1988), amendment under Rule 15(d) is "favored" where as  
21 here "some relationship [] exist[s] between the newly alleged matters and the subject of the  
22 original action," even if the new complaint adds a new defendant.

1 discussions between the parties' counsel, this Court addressed the amendment issue during the  
2 May 17 case management conference. At that time, the Court indicated that CTOP would be  
3 added as a defendant, since there appeared to be no opposition to that aspect of the proposal.  
4 While authorizing the naming of CTOP as a defendant, the Court recognized that the parties  
5 were not in agreement on the question of what claims could be added to the complaint, especially  
6 since defense counsel had only recently received the allegations plaintiffs sought to add to assert  
7 a theory under *Kasky v. Nike, Inc.* As a result, the Court ordered the parties to meet and confer  
8 about the allegations to be added and determine whether there were any issues to be resolved by  
9 the Court. (Declaration of Theresa M. Traber, ¶ 5).

10 As a result of this case management conference, the time for adding CTOP was tolled  
11 on May 17, 2002 – 10 days before the May 27, 2002 deadline on which defendants rely. The  
12 amendment period was tolled by the Court's indication that CTOP would be added as a  
13 defendant, by CTOP's apparent assent to this amendment, and by the Court's order – not to file  
14 an immediate motion to effectuate the amendment – but to “meet and confer” in an attempt to  
15 narrow the issues to be resolved by the Court. In effect, plaintiffs were ordered to wait for  
16 defendant's response to their proposed allegations – a response that was provided one day after  
17 the May 27, 2002 deadline on which CTOP relies.

18 The amendment sought is proper because CTOP is mistaken in arguing the claims are  
19 time-barred. As explained below, plaintiffs have met the requirements for serving a Doe  
20 defendant under sections 474 and 583.210 of the California Code of Civil Procedure. Moreover,  
21 plaintiffs' claims relate back to the filing of the original complaint under Federal Rule of Civil  
22 Procedure 15(c).

23 **A. Plaintiffs' state common law claims against CTOP are timely under sections**  
24 **474 and 583.210 of the California Code of Civil Procedure.**

1 California Code of Civil Procedure Sections 474 and 583.210 allow plaintiffs to amend  
2 in state common law claims against CTOP. Section 474 allows a plaintiff who is ignorant of the  
3 identity of a defendant to designate the defendant by a fictitious name in the complaint. Section  
4 583.210 allows the complaint to be served upon the defendant within three years of the filing of  
5 the complaint. California courts are very liberal in permitting the amending of complaints to  
6 bring in defendants previously sued under a fictitious name. *See Kreines v. U.S.*, 959F.2d 834,  
7 837 (9<sup>th</sup> Cir. 1992); *Brennan v. Lerner Corp.*, 626 F.Supp. 926, 929 (N.D.Cal. 1986). In  
8 construing §583.210, “the policy favoring trial or other disposition of an action on the merits [is]  
9 generally to be preferred over the policy that requires dismissal for failure to proceed with  
0 reasonable diligence in the prosecution of an action.” CCCP §583.130.

1 Here, five of the plaintiffs filed the original complaint on May 27, 1999. Therein,  
2 those plaintiffs specifically asserted that they are ignorant of the true names of certain  
3 responsible parties and sued those parties as Moe 1-500. CTOP asserts Sections 474 and  
4 583.210, time-bar the plaintiffs from adding CTOP as a defendant for purposes of plaintiffs’  
5 state common law claims, (Herz Decl. Exh. 4) apparently assuming that the time limit for  
6 naming CTOP as a Moe defendant ran on May 27, 2002. They are mistaken, for a number of  
7 reasons. First, the three-year period was tolled because plaintiffs could not practicably have  
8 served the complaint during a court-ordered “meet and confer” process. Second, CTOP is  
9 estopped because its own conduct induced plaintiffs to continue the “meet and confer” past the  
0 three-year period. Third, CTOP entered a general appearance at the May 17<sup>th</sup> hearing. Lastly,  
1 the three-year period has not run with respect to the state common law claims of those plaintiffs  
2 who were not named in the original complaint.

- 3 **1. The statute of limitations was tolled because it would have been**  
4 **impracticable for plaintiffs to serve the amended complaint during**  
5 **the pendency of the Court ordered meet and confer process.**



1 be permitted to plead the very delay caused by his course of conduct as a defense to the action  
2 when brought.” *Id.* at 442. The application of estoppel is a question that must be decided on the  
3 particular facts of the case, “with a view of subserving, rather than defeating, the ends of  
4 substantial justice.” *Id.* at 440.

5 Estoppel is warranted in the case at bar, because plaintiffs reasonably relied on  
6 defendant’s actions in waiting until after May 27, 2002 to serve CTOP with the amended  
7 complaint. Plaintiffs informed defense counsel of our intent to add CTOP on March 8<sup>th</sup>, and  
8 asked defense counsel if they would stipulate to such amendment. (Herz Decl., Exh. 1). In  
9 response, defense counsel asked to see the proposed amendment, and inquired as to whether  
0 plaintiffs would agree in a stipulation adding CTOP not to rely on CTOP’s joinder as a basis for  
1 seeking additional discovery or extending the discovery deadlines. (Herz Decl., Exh. 2). CTOP’s  
2 counsel concluded by stating “After receiving that information, we will consider your request  
3 and let you know our position.” *Id.*

4 Accordingly, in response to defendant’s request, and after a careful review of all of the  
5 evidence recently obtained in discovery relating to CTOP’s liability, plaintiffs provided CTOP’s  
6 counsel with a copy of the proposed amendment by letter sent May 13<sup>th</sup> and apparently received  
7 by May 17<sup>th</sup>. At the Court’s May 17<sup>th</sup> case management conference, the parties agreed to  
8 further meet and confer regarding the scope of the amendment of CTOP. (Traber Decl. ¶ 5).

9 Defendant’s letter seeking information about the proposed amendment, and the  
0 discussion at the May 17<sup>th</sup> conference, reasonably induced plaintiffs to delay service until after it  
1 received a response from CTOP regarding plaintiffs’ May 13<sup>th</sup> letter. Only by waiting for  
2 CTOP’s reply could plaintiffs know which proposed amendments CTOP would stipulate to and  
3 which plaintiffs needed to brief in the instant motion. CTOP waited to respond to plaintiffs’  
4 letter until May 28<sup>th</sup>, the day after it now apparently asserts the statute ran. In these  
5 circumstances, “an estoppel is essential to prevent the defendant from profiting from his

1 deception.” *Tresway Aero, Inc.*, 5 Cal.3d at 440. That tolling is warranted here is further  
2 confirmed by CCCP 583.130, which states: “It is the policy of the state that a plaintiff shall  
3 proceed with reasonable diligence in the prosecution of an action *but that all parties shall*  
4 *cooperate in bringing the action to trial or other disposition.*”

5 **3. Plaintiffs’ state law claims are not time-barred because CTOP**  
6 **entered a general appearance at the May 17<sup>th</sup> conference.**

7 Under CCCP §583.220, the time within which service must be made pursuant to  
8 §583.210 does not apply if the defendant does an act that constitutes a general appearance in the  
9 case. “A general appearance occurs where a party, either directly or through counsel,  
10 participates in an action in some manner which recognizes the authority of the court to proceed.  
11 It does not require any formal or technical act.” *Mansour v. Sup.Ct. (Eidem)*, 38 Cal.App.4th  
12 1750, 1756 (1995); *accord Hamilton v. Asbestos Corp., Ltd.*, 22 Cal.4th 1127, 1147 (2000). An  
13 attorney's appearance for a party at a case management hearing can result in a general  
14 appearance. *Mansour*, 38 Cal.App.4th at 1757. This is so even if the attorney also represents  
15 another defendant in the litigation who does not object to the court’s jurisdiction, if the attorney  
16 does not limit his or her appearance to the other client. *Id.* Counsel for CTOP participated fully  
17 in the May 17<sup>th</sup> hearing without indicating that their appearance was limited to their  
18 representation of ChevronTexaco. Moreover, CTOP’s counsel indicated that CTOP accepted the  
19 Court’s apparent conclusion that amending in CTOP was proper for at least some of plaintiffs’  
20 claims. (Traber Decl. ¶ 5). In so doing, CTOP recognized the authority of the Court to proceed  
21 in the suit against it within the statutory period for service. This recognition constitutes a general  
22 appearance that renders plaintiffs’ claims timely under CCCP §583.220.



1 15(c)(2). Here, plaintiffs seek to hold CTOP liable for the same conduct and  
2 occurrences described in the original complaint—the human rights abuses inflicted upon  
3 the plaintiffs at Parabe, Opia and Ikenyan.

4 Second, the party to be added must have received such notice of the action  
5 within the [120 day] period provided by Rule 4(m) for service of process that it will not  
6 be prejudiced in its defense. F.R.C.P. 15(c)(3)(A). This requirement is met if “the  
7 parties are so closely related in their business operations or other activities that the  
8 institution of an action against one serves to provide notice of the litigation to the other.”

9 *G.F. Co.*, 23 F.3d at 1503 (9<sup>th</sup> Cir. 1994). Such notice was provided here because  
10 CTOP is a wholly-owned subsidiary of ChevronTexaco. *See Johannsen v. Brown*, 797 F.Supp.  
11 835, 839 (D.Or. 1992)(suit against company’s sole shareholder provided notice to company).

12 Moreover, as noted above, ChevronTexaco is an integrated energy company. CTOP is the entity  
13 within the Chevron “family” responsible for overseeing the operations of ChevronTexaco’s  
14 foreign subsidiaries, including CNL. A sufficient community of interest exists between CTOP  
15 and ChevronTexaco. Notice was further provided because CTOP and ChevronTexaco have  
16 overlapping management. They also share the same counsel. *G.F. Co.*, 23 F.3d at 1503.

17 Third, the party to be added should have known that, but for a mistake concerning the  
18 identity of the proper party, he or she would have been named in the original pleading. F.R.C.P.  
19 15(c)(3)(B). The nature of the allegations make clear that CTOP should have known it was  
20 omitted from the original complaint by mistake. Plaintiffs clearly intended by their complaint to  
21 sue the U.S.-based Chevron entities responsible for the abuses at issue, but had no way of  
22 knowing, until it was revealed in discovery, that CTOP was one of those entities. Accordingly,  
23 plaintiffs have met all of the requirements of Rule 15(c).

24 Nonetheless, CTOP contends in its June 7 letter, without citing any authority, that  
25 “F.R.C.P. 15(c)(3)(B) does not apply where the plaintiff intended to sue the defendant named in

1 the original complaint.” (Herz Decl. Exh. 6). CTOP is mistaken. Rule 15(c)(3) applies not only  
2 where a new party is *substituted* for an erroneously named party, but also where a new party is  
3 *added* by the amended complaint. *E.g. Precise Exercise Equipment v. Kmart, Corp.*, 2000 U.S.  
4 Dist. LEXIS 21499 (C.D.Cal. 2000) at \*\*2-6; *Johannsen*, 797 F.Supp. at 838-39; *Meredith v.*  
5 *United Air Lines*, 41 F.R.D. 34, 39 (S.D. Cal. 1966). Indeed, in *Meredith*, the court specifically  
6 held that where, as presumably is the case here, the new defendant denies its involvement in the  
7 torts at bar, it would be unfair to deny the amendment simply because the plaintiff sought to add  
8 the new defendant rather than substituting the new defendant for an existing one. 41 F.R.D. at  
9 39.

0 In sum, the requisite notice and mistake exists to allow the Fourth Amended Complaint  
1 adding CTOP to relate back to the original complaint for statute of limitation purposes.

2 **VI. THE FALSE OR MISLEADING STATEMENTS CHEVRONTEXACO AND/OR**  
3 **CTOP ALLEGEDLY MADE ARE ACTIONABLE UNDER KASKY.**

4 The California Supreme Court held in *Kasky* that a cause of action lies under Business  
5 and Professions Code § 17200, *et. seq.*, where a business, to defend its sales and profits, makes  
6 false or misleading statements “about its own products or its own operations.” *Kasky v. Nike,*  
7 *Inc.*, 119 Cal.Rptr.2d 296, 300-301, 303-304 (2002). The Supreme Court concluded that a §  
8 17200 claim could proceed against a shoe company that allegedly made false statements  
9 defending labor practices and working conditions at factories producing its products. *Id.* at 319.

0 Plaintiffs allege in part that ChevronTexaco and/or CTOP, in describing the events at  
1 Parabe, Opia and Ikenyan and in order to maintain sales in California and the United States, have  
2 made false or misleading statements to the general public in California and the United States.

3 With respect to Parabe, these statements include representations that Chevron had no role in and  
4 provided no material support for the attack on Parabe, that Chevron did not pay the soldiers  
5 involved in the attack, that the occupants of the platform were armed with guns or machetes, that

1 they refused to provide medical access, that their purpose was to demand ransom, and that they  
2 provoked the violence by attacking the soldiers and attempting to seize their weapons. With  
3 respect to Opia and Ikenyan, ChevronTexaco and/or CTOP falsely represented to the public that  
4 no Chevron personnel or equipment were involved in the attacks on these villages, and that the  
5 villagers at Opia and Ikenyan intended to demand ransom. *See* Statement of Facts, *supra*.<sup>10</sup>

6 These statements are actionable under *Kasky*. First, they are representations about  
7 ChevronTexaco and CTOP's own operations, since plaintiffs allege that CNL is defendants'  
8 alter-ego. (Exh. A at ¶¶ 37-38). Second, even if CNL were not the alter-ego of the U.S. entities,  
9 these statements would be actionable because they are representations about ChevronTexaco and  
10 CTOP's own product. The existing complaint alleges that CNL participated with the military in  
11 abuses "for the purpose and with the effect of suppressing Plaintiffs' and others' peaceful  
12 protests about Chevron's environmental practices on and near Plaintiffs' properties." (Exh. A at  
13 ¶ 3). CNL's efforts to crush potential opposition to the harmful effects of its operations are  
14 certainly an aspect of the manner in which CNL produces ChevronTexaco and CTOP's product.  
15 Statements about those actions are legally indistinguishable from Nike's statements defending  
16 the working conditions at its subcontractors' factories.

17 The statements were also directed to potential purchasers of ChevronTexaco and/or  
18 CTOP's product in California and designed to protect sales. For example, Chevron's website,  
19 (and thus the website statements at issue), is clearly intended to reach customers, since it  
20

21  
22 <sup>10</sup> Plaintiffs obviously do not have to prove the falsity of these statements at the pleading  
23 stage. Plaintiffs note, however, to take just one example, that the statement that the  
24 protestors at Parabe were armed is belied by Schull's report to Stephen Chalvsky of the U.S.  
25 embassy, which Schull provided to COPI public affairs staff. That report states that "The  
villagers [who boarded the Parabe platform] were unarmed and the situation has remained  
calm since their arrival." C17523-17526 (Herz Decl. Exh. 14).

1 prominently provides visitors the ability to find the nearest Chevron gas station and with an  
2 online application to apply for a Chevron credit card. [www.chevron.com](http://www.chevron.com).

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6 **VII. THE THEORY OF §17200 LIABILITY RECOGNIZED IN KASKY IS FULLY**  
7 **CONSISTENT WITH THE FIRST AMENDMENT.**

8 Defendants suggest that *Kasky* is wrongly decided. (Herz Decl. Exh. 4). They are  
9 mistaken. The California Supreme Court's opinion is well grounded in First Amendment  
0 precedent. As *Kasky* noted, commercial speech that is false or misleading is not entitled to *any*  
1 First Amendment protection. 119 Cal.Rptr. 2d at 306; *quoting inter alia In re R.M.J.*, 455 U.S.  
2 191, 203 (1982). Accordingly, if *Kasky* was correct in holding that statements at issue were  
3 commercial speech, there is no question that the § 17200 cause of action *Kasky* recognized is  
4 constitutionally permissible.

5 The California Supreme Court was, in fact, correct in concluding such statements are  
6 commercial speech. The U.S. Supreme Court has repeatedly accepted that statements about a  
7 product or service are commercial speech, even if they do not propose a commercial transaction.  
8 *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995)(statement of alcohol content on beer  
9 label); *Ibanez v. Florida Dept. of Bus. and Prof. Reg.*, 512 U.S. 136, 142 (1994)(lawyer  
0 identifying herself as a certified public accountant in communications with the public); *Bolger v.*  
1 *Youngs Drug Products Corp.*, 463 U.S. 60, 63 and n.4, 67-68 (1983)(informational pamphlets  
2 discussing the desirability of prophylactics). This is so even if the statements contain discussions  
3 of important public issues. *Bolger*, 463 U.S. at 67-68.

4 In *Bolger* the court analyzed three factors to determine whether speech was  
5 commercial: economic motivation of the speaker, product references, and whether the statement

1 was an advertisement. *Id.* at 66-68. The Court found that although each of these factors alone  
2 was insufficient, none was necessary. *Id.* at 66-68 and n. 14. In particular, *Ibanez*'s holding that  
3 an attorney's self identification as a CPA in her stationary was commercial speech demonstrates  
4 that a statement need not be in the form of an advertisement. 512 U.S. at 142. Here,  
5 ChevronTexaco and CTOP clearly had an economic motivation for the statements. Certainly, a  
6 consumer might be less inclined to buy Chevron products if he or she knew ChevronTexaco,  
7 CTOP and/or CNL participated in serious human rights violations against people who objected  
8 to the manner in which such products were produced and against people who lived near where  
9 they were produced. The statements also contain product references, in that they specifically  
10 refer to Chevron by name, (*e.g.* Herz Decl. Exh. 15) rather than simply referring to petroleum  
11 products generically. *Bolger*, 463 U.S. at 66, n.13. These factors together qualify the statements  
12 at issue as commercial speech.

13           Even if, however, this Court were to conclude that the statements at bar are not  
14 commercial speech, §17200 liability is constitutionally permissible here. As *Kasky* noted,  
15 “[t]here is no constitutional value in false statements of fact. . . .’ *Gertz v. Robert Welch, Inc.*,  
16 418 U.S. 323, 340 (1974). For this reason, ‘untruthful speech, commercial or otherwise, has  
17 never been protected for its own sake.’ *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S.  
18 748, 771 (1976).” *Kasky*, 119 Cal.Rptr.2d at 306. Given this, states may prohibit false speech,  
19 even in such a highly protected sphere as the criticism of a public official. To avoid  
20 inadvertently deterring valuable speech, however, liability may only attach in that circumstance  
21 if the statement was made “with knowledge that it was false or with reckless disregard of  
22 whether it was false or not.” *New York Times, Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).  
23 Plaintiffs allege that ChevronTexaco and CTOP knew or were reckless as to whether the

24

25

1 statements at issue were false. (Exh. A at ¶ 160). Thus, liability is permissible here even if the  
2 Court were to apply the strictest constitutional standards applicable to false speech.<sup>11</sup>

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6 **VIII. CHEVRONTEXACO AND CTOP HAVE STIPULATED TO THE OTHER**  
7 **AMENDMENTS REFLECTED IN THE FOURTH AMENDED COMPLAINT.**

8 CTOP has stipulated, and the Court accepted at the May 17<sup>th</sup> hearing that CTOP can be  
9 added as a defendant for purposes of plaintiffs' Alien Tort Claims Act and §17200 claims. (Herz  
0 Decl. Exh. 4, 6)(Traber Decl. ¶¶ 4-5). Defendants have also stipulated to the proposed  
1 amendments correcting the errors in the names of certain plaintiffs in the Third Amended  
2 Complaint. Accordingly, leave to file these amendments should be granted.

3  
4 **IX. CONCLUSION**

5 For the foregoing reasons, plaintiffs respectfully request that the Court grant plaintiffs  
6 motion for leave to file the Fourth Amended Complaint.

7 Dated: June 28, 2002

Respectfully Submitted

8 \_\_\_\_\_  
9 /s/ Richard Herz  
10 Attorney for Plaintiffs

11  
12 \_\_\_\_\_  
13 <sup>11</sup>In fact, however, since the speech does not concern public figures, it is doubtful that the  
14 strictest standard is the one applicable to the false statements at bar. *See Gertz*, 418 U.S. at  
15 347 (“so long as they do not impose liability without fault, the States may define for  
16 themselves the appropriate standard of liability for . . .defamatory falsehood injurious to a  
17 private individual.”)