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ORDER

LARRY BOWOTO VS. CHEVRONTEXACO CORPORATION

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FILED
San Francisco County Superior Court

JAN 31 2008

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

LARRY BOWOTO, et al.

Plaintiffs,

v.

CHEVRONTEXACO CORPORATION, et
al.,

Defendants.

CASE NO. CGC-03-417580

~~REDACTED~~ ORDER DENYING
DEFENDANTS' MOTION FOR SUMMARY
ADJUDICATION OF FIRST CAUSE OF
ACTION FIRST CAUSE OF ACTION
BASED ON UNAVAILABILITY OF ANY
REMEDY (Motion No. 4)

This matter came on for a final day of hearing on November 14, 2007. Plaintiffs were represented by Robert D. Newman, Lauren Teukolsky and Marco Simons. Defendants were represented by Robert A. Mittelstaedt, Lara Kollios and David E. Wallach. At the end of the hearing, the Court directed each side to submit a proposed order no later than November 21, 2007.

Overview

With Motion No. 4, Defendants Chevron Corporation, Chevron Investments, Inc. and Chevron U.S.A., Inc. (hereafter collectively referred to as "Defendants" or "Chevron") have moved for summary adjudication as to the First Cause of Action in Plaintiffs' First Amended Complaint ("FAC"). The First Cause of Action not only arises out of the incident involving the

1 Nigerian villagers at Chevron's offshore oil platform in Parabe in May 1998 and at the villages of
2 Opia and Ikenyan in the Niger Delta in January 1999, but also arises out of Defendants' continued
3 use of the Nigerian military and police to provide security for their oil and gas production
4 facilities. FAC, ¶¶ 97, 101, 116-121. The five Nigerian Plaintiffs – Larry Bowoto, Anthony
5 Lawuru, Benson Edekou, Henry Pabulogba and John Ikenyan – have brought the First Cause of
6 Action on behalf of themselves and a class of others similarly situated in the Niger Delta. FAC,
7 ¶ 101.

8 Motion No. 4 is not a typical summary adjudication motion in that Chevron does not
9 dispute most of the allegations of illegality in the FAC.¹ Instead, Defendants contend that, even if
10 the alleged acts of wrongdoing did occur in 1998 and 1999, the undisputed evidence establishes
11 that the five Nigerian Plaintiffs are not entitled to any relief (injunctive, declaratory or restitution)
12 for the violations of the Unfair Competition Law ("UCL"), Business & Professions Code § 17200
13 *et seq.*, alleged in the First Cause of Action.

14 For the reasons discussed below, the Court denies Defendants' motion for summary
15 adjudication as to the First Cause of Action.

16 Plaintiffs Have Produced Some Evidence of a Likelihood of Ongoing Harm

17 Chevron contends that the Nigerian Plaintiffs are not entitled to any injunctive relief under
18 the UCL because "they make no allegation that they or the persons they represent face any real
19 and immediate threat of a recurrence" and "[t]hus, plaintiffs have no standing to obtain injunctive
20 relief." Memorandum in Support of Defendants' Motion at 1. The question of threatened
21 irreparable harm to Plaintiffs raises two issues: whether Chevron's allegedly injurious conduct is
22 likely to continue, and whether the Plaintiffs *themselves* are likely to be subject to harm in the
23 future. The parties dispute whether each of these must be shown for an injunction to issue under
24 the UCL and, if required, whether Plaintiffs have made the requisite showing.

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27 ¹ In the related federal court action, the court recently concluded that Plaintiffs' evidence,
28 if credited, is sufficient to hold Chevron legally liable for the injuries arising from the Parabe and
the Opia and Ikenyan incidents. *Bowoto v. Chevron Corp.*, 2007 WL 2349336 (Slip. Op.) (N.D.
Cal. Aug. 14, 2007).

1 Plaintiffs Can Show That They Are Likely to Be Injured.

2 Plaintiffs have presented sufficient evidence to create a triable issue of material fact as to
3 whether they are personally likely to be injured in the future.

4 There appears to be no dispute that Plaintiffs continue to reside in the Niger Delta, in
5 proximity to Chevron facilities.

6 According to the evidence put forth by Plaintiffs, at least one of these incidents involved
7 an attack on persons and villages that, for lack of a better term, were minding their own business.
8 As District Judge Illston has noted, Plaintiffs' evidence shows that the villages of Opia and
9 Ikenyan were attacked by Nigerian soldiers, who killed several unarmed people and "burned the
10 villages of Opia and Ikenyan to the ground." 2007 WL 2349336 at *12. A Chevron installation
11 was "location in the general vicinity of Opia and Ikenyan." *Id.* at *10. While several villagers
12 from Opia had visited that facility "to demand compensation for pollution caused by CNL in the
13 community[,] none of the plaintiffs were among this group." *Id.* According to Plaintiffs'
14 evidence, no one from Ikenyan had any contact with Chevron at all.

15 Plaintiffs' evidence thus shows that simply residing in the vicinity of Chevron
16 installations in the Niger Delta can subject residents, even those who do not initiate contact with
17 Chevron, to losses of property and other abuses.

18 Under similar circumstances, the court in *Doe v. Unocal Corp.*, 67 F. Supp.2d 1140 (C.D.
19 Cal. 1999), found that the plaintiffs had shown a credible threat of future harm. In *Unocal*,
20 plaintiffs were residents of the Tenasserim region of Burma, where they had allegedly suffered
21 abuses related to a gas pipeline project. The court held that, "because plaintiffs' allegations and
22 evidence suggest that human rights abuses are ongoing in the Tenasserim region, plaintiffs have
23 demonstrated the existence of a credible threat that they will once again be subjected to human
24 rights violations allegedly committed in furtherance of the pipeline project." *Id.* at 1144. By the
25 same logic, because this Court must assume that attacks such as those alleged at Opia and
26 Ikenyan are ongoing in the Niger Delta, the Nigerian Plaintiffs have demonstrated the existence
27 of a credible threat that they will once again be subject to similar attacks related to Chevron's
28 operations.

1 The Plaintiffs' Claims for Injunctive Relief Are Not Moot

2 In their moving papers, Defendants emphasize how the Nigerian Plaintiffs have not been
3 personally subjected in the last eight years to a recurrence of the same incidents that occurred at
4 Parabe in 1998 or Opia and Ikenyan in 1999. But the “mere fact that a defendant refrains from
5 unlawful conduct during the pendency of a lawsuit does not necessarily preclude the trial court
6 from issuing injunctive relief to prevent a posttrial continuation of the unlawful conduct.”
7 *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal.4th 121, 133 (1999).

8 At times, Chevron appears to be arguing that the Plaintiffs' claims for injunctive relief
9 have been rendered moot by subsequent events. The Supreme Court long ago declared that the
10 “burden is a heavy one” for defendant to prove mootness, that “there is no reasonable expectation
11 that the wrong will be repeated.” *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

12 Chevron has not proven, much less alleged, any change in circumstances that would
13 unquestionably moot out Plaintiffs' claims, such as the discontinuance of its oil and gas
14 operations in the Niger Delta. *Compare Madrid v. Perot Systems Corp.*, 130 Cal.App.4th 440,
15 462-67 (2005)(injunctive relief does not lie against defendants for conduct during California's
16 2001 declared electricity emergency when Governor declared official end to state of emergency
17 in 2003); *Donald v. Café Royale, Inc.*, 138 Cal.App.3d 168, 184 (1990)(trial court properly
18 denied injunctive relief since defendant had subsequently ceased operating restaurant that was the
19 subject of the lawsuit and a different corporation had opened up another restaurant at that same
20 location). Nor have Defendants presented any evidence that the challenged conduct in this case is
21 the subject of an existing court order. *Compare Feitelberg v. Credit Suisse First Boston, LLC*,
22 134 Cal.App.4th 997, 1022 (2005)(plaintiffs are not entitled to injunctive relief as ‘the business
23 practice challenged here is the subject of a federal consent judgment that compels defendants to
24 stop the offending conduct”).

25 Throughout all the years of litigation in this court and federal court, Defendants have
26 consistently denied any wrongdoing on their part as to what occurred at the offshore oil platform
27 in Parabe or at the villages of Opia and Ikenyan. The Court is not taking any position on which
28 side is right , but the ongoing disagreement between the parties is itself further indication that the

1 controversy is not moot. *Compare Feminist Women's Health Center v. Blythe*, 32 Cal.Ap.4th
2 1641, 1658-59 (1995)("it was reasonable for the trial court to conclude that the prohibited
3 conduct would resume unless permanently enjoined" since the "subject of this dispute is so
4 intensely divisive, and the antagonists so passionately committed to their respective positions").

5 In general, the "voluntary discontinuance of alleged illegal practices does not remove the
6 pending charges of illegality from the sphere of judicial power or relieve the court of the duty of
7 determining the validity of such charges where by the mere volition of a party the challenged
8 practices may be resumed." *Marin County Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3rd 920, 929
9 (1976) (citation omitted); *accord, Aguilar*, 21 Cal.4th at 133.

10 Here, Chevron has not even presented any evidence that they have discontinued any of the
11 alleged illegal practices. *Compare Scripps Health*, 72 Cal.App.4th at 333 (no reason to order
12 injunctive relief "where defendant has in good faith discontinued the prescribed conduct");
13 *Cisneros v. U.D. Registry, Inc.*, 39 Cal.App.4th 548, 574 (1995)(trial court did not abuse
14 discretion in denying permanent injunction given that defendant had voluntarily discontinued the
15 wrongful conduct). 28. Viewing the evidence in the light most favorable to the non-moving
16 parties, the Court concludes that Chevron has not met its burden of proof. There are triable issues
17 of material fact as to whether the Nigerian Plaintiffs' claims for injunctive relief are moot.

18 Defendants' Other Arguments Regarding Injunctive Relief Lack Merit

19 Defendants have raised three other arguments regarding the Nigerian Plaintiffs' claims for
20 injunctive relief as to the First Cause of Action. Chevron must, however, establish that Plaintiffs
21 are not entitled to any possible injunctive relief for these violations of the UCL. None of
22 Chevron's arguments qualifies as grounds for granting summary adjudication.

23 Defendants have objected that Plaintiffs are seeking equitable relief against non-parties.
24 However, at the Court's request, Plaintiffs filed a sample proposed order regarding injunctive
25 relief on Plaintiffs' First Cause of Action in December 2006. On its face, nearly all the provisions
26 in the proposed order are directed at the Defendants in this lawsuit. Moreover, as the federal
27 court has found, plaintiffs may be able to prove that CNL is acting as Chevron's agent, such that
28 Chevron has the right to control its security practices. Indeed, the federal court noted that

1 Chevron “had much more than the usual degree of control over CNL’s operations, and
2 particularly in setting security policy” and denied Chevron’s motion for summary judgment
3 which asserted that plaintiffs could not demonstrate agency. *Bowoto v. ChevronTexaco Corp.*,
4 312 F. Supp. 2d 1229, 1244 (N.D. Cal. 2004).

5 Defendants object that the terms of the proposed injunction will not be effective. The
6 appropriate time for determination of which proposed elements of injunctive relief would be best
7 suited to remedy the alleged harms is at trial. Defendants have presented no evidence to prove
8 what is really an argument by their counsel about the efficacy of an injunctive order in this case.
9 In any event, the Court has reviewed Plaintiffs’ proposed order and, viewing the evidence in the
10 light most favorable to the non-moving party, concludes that at least some of the provisions in the
11 proposed order could be effective. In particular, plaintiffs’ proposals regarding increased
12 transparency and investigation of security incidents would be likely to have a positive impact on
13 the conduct of Chevron and its alleged agents.

14 Plaintiffs May Be Entitled to Declaratory Relief

15 While the Court’s conclusion that injunctive relief is available is sufficient to deny
16 Defendants’ motion, much of the preceding analysis also applies to the question as to whether the
17 Nigerian Plaintiffs are entitled to declaratory relief for the First Cause of Action.

18 Chevron is wrong as a matter of law as to whether declaratory relief is generally available
19 for UCL claims. Under Business and Professions Code § 17203, a court is given the discretion to
20 “make such *orders or judgments*, including the appointment of a receiver, as may be necessary to
21 prevent the use or employment by any person of any practice which constitutes unfair
22 competition” (italics added). Apart from § 17203, the accompanying § 17205 provides
23 that “[u]nless otherwise expressly provided, the remedies or penalties provided by this chapter are
24 cumulative to each other and to the remedies or penalties under all other laws of this state.” Code
25 of Civil Procedure § 1060 generally provides that any person may seek declaratory relief in
26 “cases of actual controversy relating to the legal rights and duties of the respective parties.”

27 “A motion for summary adjudication shall be granted only if it completely disposes of a
28 cause of action. . . .” Code of Civ. Proc. § 437c(f)(1). Since triable issues of material fact exist as

1 to the Nigerian Plaintiffs' claims for injunctive and declaratory relief under the First Cause of
2 Action, the Court need not decide whether these Plaintiffs would be entitled to any restitution.
3 Defendants' Motion No. 4 is denied.

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7 Dated:

1/30/08

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9 By: 

The Honorable Kevin McCarthy
San Francisco Superior Court