SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

STATE OF CALIFORNIA ex rel. CHRISTOPHER J. SCHROEN, ET AL., Plaintiffs, vs. BP AMERICA PRODUCTION CO. ET AL., Defendants.	Case No. CGC –12-522063 ORDER OVERRULING DEMURRERS AND DENYING MOTIONS TO STRIKE AND TO DISMISS (*FORUM NON CONVENIENS*)

Introduction

Christopher Schroen filed a *qui tam* action against five different British Petroleum companies (BP). Schroen, a former employee of BP, alleges BP contracted with some California state entities for the sale of natural gas. First Amended Complaint (FAC) ¶¶ 1, 5. Schroen claimed that BP overcharged the state, concealing the facts which would have alerted the state to this. The current First Amended Complaint alleged eleven causes of action. The first five are on behalf of the state, and the rest are on his own behalf for e.g. retaliation, wrongful termination, breach of contract, and so on. In January 2015, the California Attorney General filed a First Amended Complaint in Intervention alleging four causes of action. The AG's complaint did not include two of Schroen's qui tam claims, specifically those under Govt. C. § 12651(a)(3)[1] (conspiracy to violate the False Claims Act) and § 12651(a)(7) (retention of proceeds) which were Schroen's third and fourth causes

[1] Further references are to the Government Code unless otherwise indicated.

of action. Nor did the AG name BP Products North America, Inc., or BP PLC as defendants, even though those entities are named in Schroen's complaint.

BP now brings a demurrer, a motion to strike and a motion to dismiss for *forum non conveniens.* I heard argument June 8, 2015.

Request for Judicial Notice

Defendants have not submitted a separate request for judicial notice,[2] but in their Notice of Demurrer and Demurrer to Complaint they ask that I take judicial notice of Exhibit A to the Declaration of Richie Malone. This is not opposed and accordingly is granted.

The Motions Generally

Under § 12652(c)(1)-(2) a complaint under the False Claims Act may be filed by a private person, i.e., a qui tam plaintiff, known also as a relator. If the AG intervenes, the AG assumes control of the action, but the qui tam plaintiff remains a party.

According to the Notice of Demurrer and Demurrer to Complaint, it appears BP demurred to each of Schroen's claims on the grounds that all are superseded by the AG's intervention, and thus the "qui tam plaintiff lacks capacity to assert the claims under the False Claims Act" and "fails to allege facts sufficient to state a cause of action." Notice 2 *et passim.* At argument however BP counsel suggested that the motion was directed only to qui tam claims (not the personal ones), and the Notice in its introductory section ambiguously suggests it is directed both to the qui tam claims only or to all the claims of the qui tam plaintiff (which might be all claims). *Id.* at 1:2-10.

The Notice suggests that a related motion to strike is also directed to the whole of Schroen's complaint, *id.* at 1: 2-22 and in the alternative is addressed to the third and fourth causes of action and the two BP defendants not included in the AG's complaint. The accompanying motion to dismiss targets both all of Schroen's complaint (Notice of Motion and Motion to Strike at 1:6), and

[2] The separate document is generally required. Compare CRC 3.1112(l).

alternatively targets the "excess causes of action" which are it appears Schroen's personal claims (sixth through eleventh) (to have them sent to Texas) and the additional BP defendants. *Id.* at 1:10 *et seq.* Then there is also a separate motion to dismiss Schroen's sixth through eleventh causes of action on *forum non conveniens* grounds.

In an effort to sort this mélange, BP tells me in its Memorandum in support of demurrer, motion to strike, and motion to dismiss, etc. (BP Memorandum) that "this motion" is directed only to Schroen's claims which (1) were brought as a qui tam plaintiff but not adopted by the AG and (2) are personal to him. *Id.* 2:18-19. The ambiguous reference to "this motion" is elaborated at *id.* at 5 n.4.

Without belaboring the issue further, it is apparent at least from argument that (1) BP does not contend that every claim in Schroen's complaint should be dismissed because of the superseding AG complaint; (2) BP doesn't care what happens to those Schroen claims which are perfectly congruent with those made by the AG, as long as it is understood the AG will be primarily responsible for their prosecution; (3) two of Schroen's claims (the third and fourth causes of action), as well as references to the additional BP defendants, should be stricken because the AG has brought closely related[3] claims; (4) Schroen's personal claims should be dismissed under *forum non conveniens* to be litigated in Texas.

Discussion

A. Demurrer & Motion to Strike

Section 12652(e)(1) reads, "[i]f the state or political subdivision proceeds with the action, it shall have the primary responsibility for prosecuting the action. The qui tam plaintiff shall have the right to continue as a full party to the action." Obviously, and as the parties agree, the qui tam

[3] I use this vague phase here so as not to beg the question, discussed below, of what test to use to compare the qui tam and state claims.

plaintiff remains in the case after intervention.[4] The parties disagree whether, if the qui tam and subsequent state claims are sufficiently related,[5] whether the court should dismiss the qui tam claims (as BP urges) or in effect simply hold the qui tam claims are superseded.

The Attorney General did not include in her complaint Schroen's third and fourth claims. While the failure of the AG to intervene typically means that a relator *can* purse the claims on his or her own, BP argues the opposite: that these claims are superseded as well.

BP makes two distinct arguments, although the first seems to have been discarded by the time of the hearing.

BP's first approach is to note that under § 12652(e)(1) when the AG intervenes she has primary responsibility for prosecuting the "the action" which BP thinks means the whole case. BP Memorandum at 3 ("there can only be one false claim action"), *id.* at 5, etc. There is some support for this broad reading, because 'action' can refer to the lawsuit as such filed in court. C.C.P §§ 22, 30; see generally *Roberts v. Packard, Packard & Johnson*, 217 Cal. App. 4th 822, 832 (2013) (civil action is equivalent to civil suit). But BP's discussion rapidly devolves to the second position, BP Memorandum at 7, which is that this sort of preemptive effect kicks in when the relator and the state present claims that are "nearly identical factual allegations of wrongdoing," quoting *U.S. ex rel. Feldman v. City of New York*, 808 F. Supp. 2d 641, 649 (S.D.N.Y. 2011).[6] In contradiction to BP's first approach, federal cases plainly endorse this approach of 'partial intervention' by which some causes of action may be prosecuted by the relator:

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[4] For example, qui tam plaintiffs may secure a bounty on successful conclusion of the state's claims, and state law allows the government to dismiss over the *qi tam* plaintiff's objections only if the state has good cause and the court gives the qui tam plaintiff an opportunity to oppose the dismissal and present evidence at a hearing. Section 12652(e)(2)(A).

[5] See note 3.

[6] The complete quote, not provided by BP in its quotations in either its opening or reply papers, is "the *same causes of action* under the FCA as Feldman (as well as two additional causes of action under New York common law), and that the two Amended Complaints are predicated on nearly identical factual allegations of wrongdoing," 808 F. Supp. 2d at 649 (emphasis supplied; I refer to this extra language below in the text). The parties agree that I should look to federal law as I construe the analogous state statute. See, e.g., *State ex rel. McCann v. Bank of Am., N.A.*, 191 Cal. App. 4th 897, 903(2011); *San Francisco Unified Sch. Dist. ex rel. Contreras v. Laidlaw Transit, Inc.*, 182 Cal. App. 4th 438, 446 (2010).

> "However, if the Government only partially intervenes in an action, a relator may retain standing to prosecute those aspects of his or her complaint as to which the Government has not intervened." Id.; see also O'Keefe, 918 F.Supp. at 1346–47 (permitting the relator to pursue FCA claims not adopted by the government).

U.S. ex rel. Allen v. Guidant Corp., No. CIV. 11-22 DWF/AJB, 2012 WL 878023, at *6 (D. Minn. Mar. 14, 2012), quoting *Feldman*, above. *See also U.S., ex rel. Becker v. Tools & Metals, Inc.*, No. 3:05-CV-0627-L, 2009 WL 855651 (N.D. Tex. Mar. 31, 2009).

That is, there is an analysis to be done under (analogous) federal law, which is to determine the extent of congruence between the state and qui tam claims. The question then is: to what extent is congruence required?

Some courts dismiss relator claims that are "duplicative" of the government's claim, or contain "no material difference." *United States of America v. Guidant Corp.*, 2012 UL 878023 (D. Minn.); *Feldman*, 808 F.Supp.2d at 649. While the notion of a 'material difference' of course begs the question, Judge Rakoff in *Feldman* appears to have concluded that the causes of action were the *same*, and for that reason dismissed them. See above, note 6. *Tools & Metals* does not help at all, because the parties *agreed* the claim at issue was superseded and only disagreed that the relator's claims had to be dismissed, *id.* at *6; and the court provided no analysis of the congruence issue. *Guidant* allowed the relator to proceed with claims pertaining to devices manufactured during a different time period from those at issue in the government's claims. *Guidant*, 2012 WL 878023, at *7.

BP refers me to *U.S. ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905 (9th Cir. 1998). This discussed the res judicata impact of a government settlement on a relator's claims, and found the requirements satisfied. But the scope of claims precluded by res judicata is likely broader than those precluded by the congruence test at issue now, "because the doctrine of res judicata will not only bar the claims litigated therein, but will also bar relitigating of claims that *could have been asserted* in the previous action between the parties." *Stone v. Baum*, 409 F. Supp. 2d 1164, 1178 (D. Ariz. 2005)

(emphasis supplied), citing *Barajas*.[7] BP does not provide other case which suggest anything other than identical claims are precluded by state intervention. *E.g., U.S. ex rel. Raggio v. Jacintoport Int'l LLC*, No. CIV.A. 10-01908 BJR, 2013 WL 2462109, at *2 (D.D.C. June 7, 2013) (identical claims).[8]

As Schroen's counsel noted at argument, his third and fourth causes of action are not the same as those pled by the AG: our Legislature has gone to the bother of distinguishing them. These claims are not superseded or precluded. The same reasoning resolves the issue of the two additional defendants: Schroen may pursue them here.[9]

Conspiracy

BP adds in an attack on Schroen's conspiracy claim, on the basis that it is too vague to meet pleading standards. BP Memorandum at 7-8. Confusingly (i) this is done in the middle of BP's argument that Schroen's claims are preempted by the AG's complaint and (ii) the demurrer itself does *not* challenge the claim for the reason that it fails pleading standards. The latter point is enough to dispose of this challenge.

But still, I note that BP has confused the standards for pleading fraud with those that relate to conspiracies. Compare, e.g., *United States ex rel. Conteh v. IKON Office Solutions, Inc.*, 27 F. Supp. 3d 80, 89 (D.D.C. 2014) (fraud to be pleaded with specificity); *Knox v. Dean*, 205 Cal. App. 4th 417, 434 (2012) (same), with e.g., *California Auto Court Ass'n v. Cohn*, 98 Cal. App. 2d 145, 149 (1950) (elements of civil conspiracy are formation and operation of the conspiracy and damage); *Arei II Cases*, 216 Cal. App. 4th 1004, 1022 (2013).

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[7] See also *U.S. ex rel. Pratt v. Alliant Techsystems, Inc.*, 50 F. Supp. 2d 942, 948 (C.D. Cal. 1999) (government must be able to provide broad releases of claims based on underlying conduct—which might preclude subsequent relator claims).

[8] I also note § 12652(c)(10)'s bar on related actions, and the opinion of the court of appeal that this does not indicate "the Legislature was … concerned with protecting False Claims Act defendants from the possibility of separate actions based on *other legal theories*…" *Rothschild v. Tyco Internat. (US), Inc.*, 83 Cal. App. 4th 488, 498 (2000) (emphasis supplied).

[9] See e.g., *U.S. ex rel. Mallavarapu v. Acadiana Cardiology, LLC*, No. CIV.A. 04-732, 2010 WL 3896425, at *8 (W.D. La. Aug. 16, 2010) *report and recommendation adopted as modified sub nom. United States v. Mallavarapu*, No. CIV.A. 04-732, 2010 WL 3896422 (W.D. La. Sept. 30, 2010) ("government can partially intervene, and when it does so, the relator is left to proceed *against the defendants against whom the government has not intervened* or to proceed with claims the government has chosen not to pursue") (emphasis supplied).

Relief

While all parties agree that Schroen's first, second, and fifth claims are superseded by the AG's complaint in intervention, they do not agree on the nature of the order I should issue. To be sure, Judge Rakoff and others have found that dismissal is the right remedy, because in his view this is a standing problem. E.g., *Feldman*, 808 F. Supp. 2d at 649. But neither the state nor federal statutes literally go this far; federal law only says that "the government takes 'primary responsibility for prosecuting' this claim. 31 U.S.C. § 3730(c)," *Tools & Metals, Inc.*, No. 3:05-CV-0627-L, 2009 WL 855651, at *6 (N.D. Tex. Mar. 31, 2009). And our state statute makes it plain that the relator continues as a "full party". Section 12652(e)(1). This suggests it would be awkward to dismiss relators in the absence of, e.g., an amended complaint that recognizes the relator's role; which absence now obtains.

BP notes the split of federal authority in its Reply, at 3 n.2. Recent cases suggests there is no need to dismiss, indeed that it is error to do so, *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 638 (4th Cir. 2015)[10] and concomitantly that requests to do so are moot. *U.S. ex rel. Bilotta v. Novartis Pharm. Corp.*, 50 F. Supp. 3d 497, 512 (S.D.N.Y. 2014).

Dismissal is not appropriate because dismissal appears (as in *Feldman*) to assume a standing problem, and we know relators do have standing to participate in the action.

And there is no reason to dismiss. The Attorney General took no position at argument on the merits of any of the issues discussed in this Order, and indicated she was content to work with the relator's counsel. While many courts do dismiss claims, "dismissal is by no means required especially where, as here, defendants have made no showing that the Relators' participation during the course of the litigation will cause [defendants] undue burden or expense that would justify

[10] Petition for Certiorari docketed June 8, 2015.

limiting their participation." *United States ex rel. Sansbury v. LB & B Associates, Inc.*, 58 F. Supp. 3d 37, 47 (D.D.C. 2014).[11]

B. Forum Non Conveniens

BP's motion to dismiss claims on the basis of *forum non conveniens* may be based on the assumption that I would dismiss all relator's claims but for his personal ones set out in causes of action 6-11; BP is not clear on this. BP Memorandum at 8; Reply at 6. I have not dismissed or stricken them. It is, obviously, entirely inefficient to have Schroen's personal claims tried in Texas while he also acts as a party here on the qui tam claims—a position he would have, as I have noted, *whether or not* I dismissed his unique qui tam claims. Given this, there is little more I must I say in connection with the *forum non conveniens* motion, but a few observations may help the record on appeal.

1. Forum Selection Clause

Exhibit A to the Declaration of Richie Malone contains a copy of a document that purportedly governs the distribution of bonuses to employee traders at BP (I refer to this as the Bonus Document).[12] BP claims that the forum selection clause in the Bonus Document precludes Schroen from pursuing his personal claims in California. At argument, BP's counsel was unclear whether this would apply to all six of Schroen's personal claims. At best it only seems to apply to one of them: the breach of contract claim (ninth cause of action). BP Memorandum at 9:13 *et seq.* But that claim does not tell us which contract is at stake; BP has not established the Bonus

[11] BP does not care much, one way or the other, on this issue. BP Reply at 3 n.2. In the end, this is probably no more than a potential case management problem. This case has been assigned to me for all purposes, and any problems encountered by any party stemming from the relator's role in the prosecution of the Attorney General's claims can be brought to my attention for swift resolution.

[12] Rule 4.6 of the document (Ex. A, p. 7) as changed by Schedule 9.1 (Ex. A, p. 14) states that "[a]ny dispute that hereinafter arises with respect to the terms of this agreement shall be governed by and construed in accordance with the laws of the state of Texas. . . . Further unless waived by both the company and employee, any such dispute must be brought and resolved in a court of competent jurisdiction located in the state of Texas and such courts are the exclusive courts for the resolution of such a dispute."

Document is the contract at issue[13] or that it otherwise applies. Even if it is the pertinent contract, it would affect a single claim; and BP has not suggested I dismiss one claim to be tried in Texas. Nor would I. I need not reach Schroen's argument that the forum selection clause is not enforceable.

2. Convenient Forum

BP cites *Stangvik v. Shiley Inc.*, 54 Cal.3d 744 (1991) for the argument that even if the contractual forum selection clause is inapplicable, the case should still be dismissed in favor of Texas because California is an inconvenient forum.[14] Courts are allowed to dismiss or stay an action when it is "more appropriately and justly tried elsewhere." *Id.* 751. To successfully challenge Schroen's selection of the California forum, defendants must first suggest an alternative forum and produce evidence that the alternative forum is appropriate. *Ford Motor Co. v. Insurance Co. of North America*, 35 Cal.App.4th 604, 610 (1995). Defendants must then show that the balance of private and public interests do not favor the plaintiff's forum. *Id.*

a. Adequate Alternative Forum

Courts examine defendants' alternative forum to ensure that "an action may be commenced in the alternative jurisdiction and a valid judgment obtained there against the defendant." *Stangvik*, 54 Cal.3d at 752. This is usually satisfied "when the defendant is 'amendable to process in the other jurisdiction" and the subject matter of the litigation is permitted in the alternative forum. *Boaz v. Boyle*, 40 Cal.App.4th 700, 708 (1995).

Schroen argues that Texas is an inappropriate forum because some of his claims would be barred by the statute of limitations. Defendants counter that they are willing to stipulate that Schroen may bring any claim in Texas that he has raised in this court. Schroen was employed in

[13] Schroen flatly tells us it's *not* the right contract. The contract he meant was his employment agreement, and perhaps it's not really a contract claim at all but one for "conversion." Opposition at 13:5-6. I look forward to having this resolved.

[14] BP exaggerates the holding of this case to suggest plaintiff's choice is entitled to "no deference." BP Motion at 8:22. This is plain misreading. Compare, Weil & Brown, CALIFORNIA PRACTICE GUIDE, CIVIL PROCEDURE BEFORE TRIAL ¶ 3:408.7 (2015).

Texas, Schroen's employers are subject to Texas jurisdiction and Schroen makes no argument that any claims raised in this case are unavailable in Texas (other than the statute of limitations issue.) Texas is an adequate alternative forum.

b. Private Interests

The "private interest factors" are those that "make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses." *Stangvik*, 54 Cal.3d at 751. It's an issue of practicability.

The parties agree that the AG's case and Schroen's personal claims are, to some extent, intertwined. BP tells me many of the witnesses and documents reside in Texas because that is the location at which the actions alleged in the FAC took place. But there is no *evidence* of this; the only evidence BP pointed me to suggests that in the past some unknown number of unnamed witnesses probably lived in Texas. Decl. of Richie Malone signed April 9, 2015 ¶¶ 10, 11.[15] Without evidence of the practical impact of having a trial here or in Texas—accounting for the duplication of lawyers and other expenses associated with perhaps uncoordinated proceedings in two difference states—BP meets *no* burden, at all, regarding these private interests. *Compare*, Weil & Brown, CALIFORNIA PRACTICE GUIDE, CIVIL PROCEDURE BEFORE TRIAL ¶ 3:424.1 (2015).

c. Public Interests

BP suggests California has no interest in conducting litigation of the private claims of a Texas resident. This is not entirely true. Schroen notified California that several of its public institutions had been defrauded, causing the Attorney General to file a lawsuit. It may well be in this

[15] I might infer that many documents and probably at least some witnesses currently reside in Texas, but even so I cannot use those vague inferences to conduct the balancing required. Weil & Brown, CALIFORNIA PRACTICE GUIDE, CIVIL PROCEDURE BEFORE TRIAL ¶ 3:424 (2015) (weighing factors).

state's interests to provide a venue for employees—wherever they reside—to litigate concomitant retaliation claims.

Texas does have a strong interest in these personal claims. But given the claims that will remain in this court, the failure of proof on the private interests (including the applicability of the venue selection clause) and the equivocal impact of public factors, it is clear that on balance the motion to dismiss on inconvenient forum grounds must be denied.

Conclusion

The demurrers are overruled. The motions to strike and motions to dismiss are denied.

Dated: June 9, 2015

Curtis E.A. Karnow
Judge of The Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On JUN 10 2015, I electronically served THE ATTACHED ORDER via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: JUN 10 2015

T. Michael Yuen, Clerk

By: _____
DANIAL LEMIRE, Deputy Clerk