



**FILE**  
San Francisco County Superior Court

AUG 14 2015

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Deputy Clerk

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 SUSTAINING IN PART WITH LEAVE  
AND OVERRULING IN PART DEFENDANTS'  
DEMURRERS TO QUI TAM PLAINTIFF'S  
FIRST AMENDED COMPLAINT  
AND  
OVERRULING DEMURRERS TO THE  
PEOPLE'S FIRST AMENDED COMPLAINT

I heard argument today on defendants' demurrers to (1) the People's first amended complaint and (2) qui tam plaintiff's third and fourth causes of action in his first amended complaint. I provided an oral tentative determination at the commencement of the hearing and adopt it now, as supplemented by this discussion.

**Introduction**

Christopher Schroen filed a qui tam action against five different British Petroleum companies (BP). Schroen, a former employee of BP, alleged 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 FAC has eleven causes of action. The first five are on behalf of the state, and the rest are on Schroen's behalf.

1 In January 2015, the Attorney General filed a First Amended Complaint in Intervention  
2 (FACI) alleging four causes of action. The FACI did not include two of Schroen's qui tam  
3 claims, specifically those under Govt. C. § 12651(a)(3)<sup>1</sup> (conspiracy to violate the False Claims  
4 Act) and § 12651(a)(7) (retention of proceeds), which were Schroen's third and fourth causes of  
5 action.  
6

7 In a June 10, 2015 Order, I overruled BP's demurrer to Schroen's third and fourth causes  
8 of action, among other things. June 10, 2015 Order, 6, 11. Now before the Court are (1) a new  
9 demurrer to Schroen's third and fourth causes of action; and (2) a demurrer to all of the causes of  
10 action in the FACI.

#### 11 **Requests for Judicial Notice**

12 I deny BP's request for judicial notice in connection with the Schroen FAC. BP asks for  
13 judicial notice of the fact that four of the BP entities are wholly-owned subsidiaries of BP p.l.c.  
14 pursuant to Evidence Code § 452(h). BP did not explain how those relationships are capable of  
15 immediate and accurate determination by resort to sources of reasonably indisputable accuracy.  
16

17 I deny BP's two requests for judicial notice of contracts to which Nancy Moon is a party,  
18 made in connection with the demurrer to the Attorney General's FACI, as irrelevant. *People v.*  
19 *Rowland*, 4 Cal.4th 238, 268 n.6 (1992). Even if the existence and terms of the various contracts  
20 identified in the requests are judicially noticed, the pertinent inferences BP seeks to extract from  
21 them – that the California Department of General Services (DGS) was knew or could reasonably  
22 know the market price for natural gas – cannot be judicially noticed.  
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<sup>1</sup> Further references are to the Government Code unless otherwise indicated.

1 **Demurrer to Schroen's FAC<sup>2</sup>**

2 BP demurs to the third cause of action in FAC on the ground that it fails to state facts  
3 sufficient to constitute a cause of action because the claim is barred by the intracorporate  
4 conspiracy doctrine and the agent-immunity rule. BP demurs to the fourth cause of action on the  
5 ground that it fails to state facts sufficient to constitute a "reverse" false claim.  
6

7 **1. Third Cause of Action**

8 The third cause of action is based on an alleged conspiracy.

9 BP first asserts that the allegation of an agency relationship defeats the conspiracy cause  
10 of action because a corporation cannot conspire with its agents. *Cf. Wise v. Southern Pacific Co.*,  
11 223 Cal.App.2d 50, 72 (1963). But even if allegations of conspiracy and agency are inconsistent  
12 these can be pled in the alternative—whether or not the complaint *literally* tells us these are pled  
13 in the alternative (an issue BP emphasized at argument). *Mendoza v. Rast Produce Co., Inc.*, 140  
14 Cal.App.4th 1395, 1402 (2006) (alternative inconsistent legal theories allowed). See generally,  
15 Weil & Brown, et al., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:248,  
16 7:48.11 (2015).  
17

18 Second, BP argues that a corporate parent and its wholly-owned subsidiaries cannot be  
19 sued for conspiracy, citing *Copperweld Corp. v. Independence Tube Corp.*, 467-U.S. 752, 769-74  
20 (1984). See *Black v. Bank of America*, 30 Cal.App.4th 1, 6 (1994); *Kerr v. Rose*, 216 Cal.App.3d  
21 1551, 1564 (1990). Apparently there is no appellate authority on whether *Copperweld* applies in  
22 state false claims act cases. In any event, the factual premise of BP's argument – that four of the  
23 BP entities are all wholly-owned subsidiaries of the fifth BP entity – is based on BP's request for  
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27 <sup>2</sup> Schroen objects that BP has already demurred to these causes of action and the present motion is an impermissible second bite at the apple. But I allowed BP separately to address (1) whether Schroen could pursue California False Claims Act claims not adopted by the Attorney General and (2) the sufficiency of Schroen's allegations.

1 judicial notice. RJN, 1.<sup>3</sup> I have rejected BP's request for judicial notice. The facts must be  
2 capable of immediate and accurate determination by resort to sources of reasonably indisputable  
3 accuracy. Evid. Code § 452(h). BP has made no such showing.

4  
5 **2. Fourth Cause of Action**

6 The parties agree that there must be a specific legal obligation going beyond potential  
7 liability at the time that the alleged false record or statement was made to give rise to liability for  
8 a reverse false claim. Memorandum in Support of Demurrer, 4; Opposition, 11-12. Schroen  
9 argues that reverse false claim liability is appropriate here because (1) there was a disparity in  
10 knowledge and the government relied on BP's price quotes; and (2) BP restructured some  
11 transactions, giving it the opportunity and obligation to undo the original overcharges.  
12 Opposition, 12-13; FAC ¶ 72. Schroen does not explain how these facts created in BP a present  
13 obligation to pay money to the state.  
14

15 Obligations must be liquidated and certain to create liability for a reverse false claim.  
16 *State ex rel. Bowen v. Bank of America Corp.*, 126 Cal.App.4th 225, 242 (2005). For example,  
17 where a plaintiff sought disgorgement of reconveyance fees allegedly owed to the state under  
18 either contract or statute without alleging that such disgorgement was required by contract, the  
19 allegation was insufficient. *Id.* Money is not owed for a breach of contract without a specific  
20 contract remedy, a judgment, or an acknowledgement of indebtedness. *Id.*  
21

22 Schroen has no written response to BP's argument. At argument he told me he can amend  
23 to fix this problem. I grant leave to do so.  
24  
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26 <sup>3</sup> Schroen did allege that BP p.l.c. is the parent entity. FAC ¶ 69. Schroen did not allege that the remaining entities  
27 are *wholly-owned* subsidiaries of BP p.l.c. Rather, Schroen alleged that BP is a massive international entity made up  
of a complicated corporate structure. *Id.* at ¶ 73. Schroen does not concede that the remaining entities are or have  
been wholly-owned subsidiaries of BP p.l.c. during the relevant period. Opposition, 1 n.1.

1 **Demurrer to the Attorney General's FACI**

2 BP demurs to all four causes of action on the grounds that (1) the FACI fails to state facts  
3 sufficient to constitute a cause of action; (2) the causes of action are fatally uncertain; and (3) the  
4 actions are founded upon contract but it cannot be ascertained from the pleading whether the  
5 contract at issue is written, oral, or implied by conduct.  
6

7 **1. Failure to State a Claim**

8 **a. Issues Pertaining to Violations of the Contracts**

9 First, BP contends that allegations concerning “price caps” are misleading because the  
10 contracts limit the prices BP is permitted to quote, not the prices the parties are permitted to  
11 agree to. But the Attorney General has fully explained the pertinent terms.  
12

13 Second, BP argues that the Attorney General must plead the market price at the time of  
14 each transaction and each specific quote in excess of the market price to plead that BP failed to  
15 comply with its contractual obligations. There are sufficient allegations to make it clear that a  
16 cause of action is stated. E.g., FACI ¶¶ 54-59. The Attorney General need not specifically  
17 identify each transaction to identify sufficient facts to state a claim.  
18

19 Third, BP argues that DGS could not have reasonably relied on BP’s quotes because the  
20 contracts contemplated that DGS would independently monitor the market and because the  
21 Attorney General only alleged that DGS was unaware of the market price “at least in most  
22 cases.” Corrected Memorandum in Support of Demurrer, 9-10. Relatedly, BP contends that the  
23 Attorney General failed to allege who at DGS relied on excessive price quotes or that such  
24 reliance was reasonable. *Id.* at 10-12; FACI ¶ 60. But even if the contracts gave DGS discretion  
25 to raise noncompliance with the cap on price quotes to BP, this does not as a matter of law  
26 preclude DGS from relying on BP’s price quotes. *See* FACI, Ex. A at § 7; Ex. B at § 7.2; Ex. C  
27

1 at § 7.5.3. Second, BP's failed attempts to establish, by way of judicial notice, that Moon had  
2 requisite knowledge of the market prices to preclude reasonable reliance cannot provide a basis  
3 for sustaining the demurrer. Third, ¶ 60 of the FACI concedes at most (and this is a stretch) that  
4 perhaps in some cases DGS was aware of the true market price. This isn't enough to sustain the  
5 demurrer to the cause of action.  
6

7 **b. Whether Claim is to be Viewed as a Breach of Contract**

8 To the extent BP can be said to have breached the quote terms of the contracts, BP  
9 contends that the contracts lack the precision necessary to render any breach of the terms an  
10 "objective falsehood" that would be actionable under the CFCA. Corrected Memorandum in  
11 Support of Demurrer, 12-13. The Attorney General has alleged that BP objectively  
12 misrepresented the fact that the prices it was quoting did not exceed the market price by more  
13 than \$.15 MMBtu, and with respect to at least the 2003 contract and some instances under the  
14 2006 contract, that the market was defined. This is enough to overrule the demurrer.  
15

16 **c. Waiver**

17 The Attorney General alleged that, at least in most cases, DGS did not know, and could  
18 not reasonably know, what the market price was. FACI ¶ 60. BP seizes on this allegation as an  
19 admission that DGS *did* know the market price at the time of the alleged false claim transactions  
20 (in *some* cases, I suppose) but entered into contracts and transaction confirmations anyway.  
21 Corrected Memorandum in Support of Demurrer, 13. Remarkably, BP then argues that DGS  
22 thereby waived *any* claim for damages arising from fraud in the inducement. *Id.* This is an  
23 exaggerated reading of the complaint and does not conform to the ordinary rules construing its  
24 allegations, and all reasonable inferences based on those, in favor of the plaintiff.  
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1 **Conclusion**

2           The demurrer to Schroen's third cause of action is overruled. The demurrer to Schroen's  
3 fourth cause of action is sustained with leave to amend. The amended complaint must be filed  
4 and served by August 28, 2015. Reponses are due within **ten court days** of service and filing of  
5 the new complaint.  
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7           The demurrer to the Attorney General's FACI is overruled. A response must be filed not  
8 later than August 28, 2015.  
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11 Dated: August 14, 2015

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14 Curtis E.A. Karnow  
15 Judge of The Superior Court  
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**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 **AUG 14 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:

**AUG 14 2015**

T. Michael Yuen, Clerk

By:

  
\_\_\_\_\_  
DANIAL LEMIRE, Deputy Clerk