

1 Robert A. Mittelstaedt #60359
Thomas A. Rector #199175
2 JONES DAY
555 California Street, 26th Floor
3 San Francisco, CA 94104
Telephone: (415) 626-3939
4 Facsimile: (415) 875-5700
email: ramittelstaedt@jonesday.com
5 email: tarector@jonesday.com

6 Deborah Scott
6001 Bollinger Canyon Rd., Room C2192
7 San Ramon, CA 94583
deborah.scott@chevron.com
8 Telephone: (925) 842-3413
Facsimile: (925) 842-4562

9 Attorneys for Defendants Texaco Inc., Texaco
10 Petroleum Company and Chevron Corporation

11 **UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

13
14 LUISA GONZALES, et al.,

15 Plaintiffs,

16 v.

17 TEXACO INC., et al.,

18 Defendants.

CASE NO. C 06-02820 WHA

**DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT AGAINST PLAINTIFFS
CADENA AND ZAMBRANO ON THE
STATUTE OF LIMITATIONS**

Date: November 15, 2007
Time: 8:00 a.m.
Dept: Courtroom 9, 19th Floor
Judge: Hon. William H. Alsup

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on November 15, 2007, at 8:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 9 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, 19th Floor, San Francisco, California, defendants will and hereby do move the Court for an order, pursuant to FRCP 56, granting summary judgment against plaintiffs Luz Armas Cadena and Maria Cano Zambrano on the basis of the California and Ecuador statute of limitations.

This Motion is based on this Notice of Motion and Motion, the following Memorandum, the Declaration of Thomas A. Rector, the pleadings and papers filed in this case, and any oral arguments this Court permits.

NOTICE OF INTENT TO RELY ON FOREIGN LAW

Pursuant to Federal Rule of Civil Procedure 44.1, defendants hereby provide notice that they intend to rely on the statute of limitations set forth in Ecuador’s Civil Code.

I. INTRODUCTION

The claims of the remaining two plaintiffs would have been dismissed over a year ago on statute of limitations grounds but for a misrepresentation by their counsel, Mr. Bonifaz. Defendants filed a FRCP 12(b)(6) motion because the face of the complaint showed Cadena and Zambrano were both diagnosed with cancer well outside California’s two-year statute of limitations period. Plaintiffs’ counsel, however, claimed that these plaintiffs, then known as “Jane Doe III” and “Jane Doe IV,” were “entitled to equitable tolling until the date that they met American counsel” because until then they had “absolutely no basis” to blame Texaco and no “general awareness of the possibility to bring legal claims.” Bonifaz submitted a declaration attesting that they were only “now discovering” that Texaco was supposedly to blame and that they could sue.

That was all false. After Bonifaz’s representation, plaintiffs testified that they both knew that they had cancer **and** blamed defendants more than two years before they sued. And Cadena had much more than a “general awareness of the possibility to bring legal claims” – her now-dismissed husband had already sued TexPet in 1997 in Ecuador for her health problems and lost.

1 Worse, Bonifaz had a copy of that suit at the time he was making false assertions to the Court.
2 For her part, Zambrano first knew of suits against Texaco “about 10 years ago.” In short, there
3 never was any basis for equitable tolling, and plaintiffs’ claims are squarely time-barred under
4 California law.

5 Under California law, the shorter of the California and Ecuador limitations period
6 governs. But their claims are barred even if Ecuador law applies. Plaintiffs opposed the motion
7 to dismiss under the Ecuador statute of limitations with live testimony from a purported Ecuador
8 law expert (Pena). Later it was revealed that Pena is the lawyer whom Bonifaz paid \$2,000 to
9 round up these plaintiffs so that, in Bonifaz’s words, they could “stick it to Chevron.” Based in
10 part on Pena’s less-than-disinterested testimony (undisclosed to the Court at that time), the Court
11 held that the Ecuador limitations period had run if the “onset of plaintiffs’ cancer predated April
12 25, 2002.” Plaintiffs have now submitted a two-sentence, wholly unsupported medical expert
13 “opinion” on that issue that fails to comply with either FRCP 26 or FRE 702. *See* Defendants’
14 Motion to Exclude Dr. Damjanov, filed herewith. Because defendants’ evidence shows that the
15 onset of cancer was more than four years before they sued and because with Damjanov’s opinion
16 excluded plaintiffs have no contrary evidence, summary judgment should be granted on the
17 Ecuador statute of limitations as well.

18 **II. FACTS**

19 **A. Defendants’ Motion to Dismiss on the Statute of Limitations**

20 The original complaint was filed on April 25, 2006. Cadena (then “Jane Doe IV”) alleged
21 that she was diagnosed with cancer in January 2003. Complaint, ¶ 11. Zambrano (then “Jane
22 Doe III”) alleged that she was diagnosed with cancer in July 2002. *Id.* ¶ 10.

23 Accordingly, defendants moved under FRCP 12(b)(6) to dismiss their claims as time-
24 barred under both Ecuador and California law. Dkt. # 60.¹ Defendants argued that (1) Ecuador’s
25 four-year limitations period ran from the last injury-causing act which came, at the latest, in 1992
26 when TexPet left Ecuador and, in any event, and (2) California’s two-year limitations period

27 ¹ The Court had dismissed the first two complaints on different grounds. Defendants’
28 motion to dismiss on the statute of limitations was against the Second Amended Complaint.

1 barred Cadena's and Zambrano's claims because the complaint showed they were diagnosed with
2 cancer more than two years before filing suit and the Ninth Circuit applies the California statute
3 of limitations over foreign law if California law bars plaintiffs' claims. *Id.* 4-8

4 In opposition, plaintiffs argued that Ecuador's limitations period ran from the date of
5 diagnosis, not from the last injury-causing act. They submitted a declaration from attorney Pena
6 to that effect. Dkt. # 67-1. Discovery later revealed that Pena was not a disinterested expert here.
7 Instead, he had been paid \$2,000 by Bonifaz to secure any "3 or 4 people" with "some form of
8 cancer" so they could "stick it to Chevron." Ex. 1.²

9 As to California's limitations period, plaintiffs conceded (albeit cryptically) that Cadena's
10 and Zambrano's claims were time-barred on the face of the complaint. Dkt. # 65-1, n.14.
11 However, counsel argued that plaintiffs were "entitled to equitable tolling until the date that they
12 met American counsel." *Id.* Specifically, counsel claimed "[t]here was absolutely no basis from
13 which Plaintiffs could have made the concrete link between their cancers" and defendants "until it
14 was specifically explained to them by those working [sic] attorney Cristobal Bonifaz." *Id.* at 16.
15 Counsel cited to a Bonifaz declaration in support. *Id.* Bonifaz declared that in 2006 he had
16 "commissioned a paralegal" (now known to be "Ms. Teresa") to contact these plaintiffs who were
17 only "now discovering" that they had allegedly been injured by defendants. Ex. 2, ¶ 9. Counsel
18 continued that while American plaintiffs have "general awareness of the possibility to bring legal
19 claims, Plaintiffs here are indigenous peoples living in remote areas with no knowledge of such
20 matters" and again cited to Bonifaz's declaration Dkt. # 65-1 at 17.

21 **B. The Court's Orders on the Motion to Dismiss**

22 The Court issued two orders on the motion to dismiss. Exs. 3 & 4. In the first (Ex. 3), the
23 Court deferred ruling on Ecuador law pending an evidentiary hearing. *Id.* 3-4. As to California
24 law, the Court held that California "provides a two-year statute of limitations for cases such as
25 this one. This period is shorter than Ecuador's four-year statute of limitations. [Thus], even if
26 after evidentiary hearing Ecuador's statute of limitations is found to permit the instant action, the
27 action would be barred if it is untimely under the California statute of limitations." *Id.* 5-6. "The

28 ² All exhibit (Ex.) cites are to the Rector Declaration unless otherwise noted.

1 initial complaint in this suit was filed in April 2006. The case is barred if the California statute of
2 limitations expired before April 2004. Alternatively, under the four-year Ecuador statute of
3 limitations, the suit is barred if the statute of limitations expired before April 2002.” *Id.* n.4.

4 As to Cadena (“Jane Doe IV”) and Zambrano (“Jane Doe III”) individually, the Court held
5 that “[f]or those plaintiffs, California’s statute of limitations expired before April 2006, when this
6 suit was brought.” *Id.* 7. However, the Court denied defendants’ motion to dismiss on the limited
7 basis that “the amended complaint does not allege sufficient facts that, at this juncture, would
8 indicate *when* plaintiffs suspected either (1) the physical cause of the injury or (2) that the injury
9 was caused by defendants’ decades-old conduct. Facts supporting defendants’ claim do not
10 ‘clearly and affirmatively appear on the face of’ the amended complaint.” *Id.* 8. “[I]t is not
11 possible at this juncture to determine when plaintiffs should have known their claims accrued.
12 The discovery rule that applies here ‘tolls the statute of limitations until the date the plaintiff
13 knew or should have known the factual basis of the cause of action.’” *Id.* n.5 (citation omitted).

14 The second order (Ex. 4) followed an evidentiary hearing on Ecuador law, at which Pena
15 testified on plaintiffs’ behalf. As to Ecuador law, the Court held that “the limitations period did
16 not begin to run, as to any individual plaintiff, until the pollution actually produced cancer in that
17 individual. As soon as it did produce cancer in any individual, **whether detected or not**, then the
18 four-year period began to run. Although plaintiffs have the burden of proving they have cancer
19 and why, defendants have the burden ... to prove the onset of cancer was before April 25, 2002,
20 i.e., more than four years prior to commencement of this action.” *Id.* 4 (emphasis added).

21 C. Plaintiffs’ Admissions on the Statute of Limitations

22 Cadena testified that her throat problems began around 1975. Ex. 5, 138:18-139:23. In
23 1988, she developed a “ball” on her throat in 1988. 141:9-14. By 1997, at the latest, she blamed
24 her health problems on Texaco. Specifically, her husband sued TexPet in 1997 in Ecuador
25 claiming, in part, damages for his wife’s unspecified “incurable illness.” Ex. 6. Although
26 Cadena claimed not to know the result of that suit (Ex. 5, 352:14-353:2), TexPet prevailed after 5
27 years of litigation with the court conducting a “Judicial Inspection” at which “the Judge did not
28

1 observe the presence of petroleum on the ground floor of the farm, nor the existence of damage to
2 any material caused by the defendant company” Ex. 7.

3 In 2001, Cadena went to see a local doctor for the “ball” in her throat. Ex. 5, 193:17-22.
4 At that time, she still blamed “contamination” and Texaco due to “[t]he knowledge that I have
5 learned through the press.” 194:22-195:8. The doctor referred her to a hospital in Quito. 268:1-
6 4. In April 2003, she saw an oncologist and two endocrinologists, was operated on, her surgeon
7 told her she had thyroid cancer and gave her a medical report.. 231:22-232:4 & 268:22-269:14.
8 By December 2003 (156:8-13), she claimed that she had been told by another doctor and by
9 “people from Frente” that her cancer was caused by petroleum. 152:2-153:19. She admitted that
10 she thought her cancer was caused by petroleum well before that as well. 155:8-13.

11 As to Zambrano, in the summer of 2002, she had a pap smear, doctors told her “they had
12 found something abnormal” and they performed a biopsy. Ex. 8, 313:18-314:25. In December
13 2002, she was diagnosed with cancer in situ. Ex. 9. In July 2003, she was operated on. Ex. 10.
14 As of June 2003, she already blamed Texaco for her cancer. Ex. 8, 271:6-272:3. She claimed
15 that her surgeon told her both before and after her surgery that the cancer was due to petroleum.
16 277:1-277:14. Nor did Zambrano lack “general awareness of the possibility to bring legal
17 claims,” as counsel claimed. She testified that she first knew of cases against Texaco by
18 Ecuadorian residents “about 10 years ago.” 81:20-82:7.

19 **III. PLAINTIFFS’ CLAIMS ARE TIME-BARRED BY CALIFORNIA LAW**

20 As the Court already held, “[California Code of Civil Procedure] Section 340.8 restricts
21 claims that are brought more than two years after a plaintiff knows or reasonably should know of
22 (1) an injury, (2) the physical cause of the injury and (3) sufficient facts to put a reasonable
23 person on inquiry notice that the injury was caused or contributed to by the wrongful act of
24 another.” Ex. 3 at 7-8. Also, “even if ... Ecuador’s statute of limitations is found to permit the
25 instant action, the action would be barred if it is untimely under the California statute of
26 limitations.” *Id.* 5-6 (citing *Deutsch v. Turner*, 324 F.3d 692, 717 (9th Cir. 2002)).

27
28

1 This case was filed in April 2006. By December 2003, at the **absolute latest**, Cadena
2 both knew she had thyroid cancer and blamed TexPet's operations for it. Therefore, under
3 California law, the statute of limitations ran in December 2005. Cadena's claims are time barred.

4 By July 2003, at the **absolute latest**, Zambrano both knew that she had cervical cancer
5 and blamed TexPet's operations for it. Therefore, under California law, the statute of limitations
6 ran in July 2005. Zambrano's claims are also time barred.

7 Nor can counsel claim equitable tolling this time around. Discovery put an end to that
8 charade. If anything, the equities here favor sanctioning Bonifaz for protracting this litigation
9 over a year through his false representations. His sworn statement that plaintiffs were only "now
10 discovering" that they had allegedly been injured by defendants is particularly outrageous in
11 Cadena's case, where Bonifaz had a copy of her husband's 1997 lawsuit in hand. Rector Dec.
12 ¶ 7. His argument that plaintiffs were "entitled to equitable tolling until the date that they met
13 American counsel" is a farce, given that both Cadena and Zambrano testified that they have never
14 met him. Ex. 5, 90:5-7 & Ex. 8, 23:21-24:2. Nor was there any truth to his assertion that
15 plaintiffs were ignorant of their claims "until it was specifically explained to them by those
16 working [sic] attorney Cristobal Bonifaz." Cadena had already sued TexPet once and Zambrano
17 knew for 10 years prior to being contacted by Ms. Teresa about the lawsuits against defendants.
18 These facts require dismissal of these claims. They are time-barred.

19 **IV. ALTERNATIVELY, PLAINTIFFS' CLAIMS ARE TIME-BARRED BY**
20 **ECUADOR LAW**

21 On September 21, 2007, plaintiffs served a report and opinion on the Ecuador statute of
22 limitations issue from their expert, Dr. Damjanov. Damjanov's report and opinion are wholly
23 inadmissible. *See* Motion to Exclude Dr. Damjanov, filed herewith. In sum, his report is one
24 page, its substance is contained in two sentences and it is the product of less than four hours
25 work. He simply expresses an opinion "disagree[ing]" with defendants' experts without any
26 reasoning, basis or support. He also adopted nearly verbatim the opinion "suggested" to him by
27 counsel. Worse, that opinion is contrary to the initial opinion expressed by the witness to
28 counsel.

1 For the Ecuador statute of limitations, the Court held that “[t]he burden of proof shall be
2 on defendants to prove that the onset of cancer predated April 25, 2002.” Ex. 4. Defendants
3 submit herewith the expert opinions of doctors Fee and Chan opining to a reasonable degree of
4 medical certainty that the onset of plaintiffs Cadena’s and Zambrano’s cancer predated April
5 2002. Exs. 11 & 12. Because Damjanov’s expert report and testimony are inadmissible under
6 FRCP 26 and FRE 702, there is no triable issue of fact on the Ecuador statute of limitations and
7 summary judgment should be granted in favor of defendants on this basis as well. *Daubert v.*
8 *Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) (affirming summary judgment
9 upon exclusion of expert under FRE 702); *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1062
10 (9th Cir. 2005) (affirming summary judgment upon exclusion of expert under FRCP 37).

11 Even if Damjanov's “opinion” had been supported with citations and reasoning, it would
12 not suffice to create a triable issue of fact on the Ecuador statute of limitations. At some level of
13 abstraction, it may be true that no one (or “only God”) can know exactly when cancer cells were
14 present or when a tumor began in a particular human being. But that unattainable level of
15 absolute certainty is not the standard in litigation. It is enough that doctors Fee and Chan
16 evaluated the size of the tumors, their well-documented normal growth patterns, and the presence
17 of cancer cells, and on that basis determined to a reasonable degree of medical certainty that
18 plaintiffs’ cancers existed before the limitations period. Damjanov does not refute that analysis.
19 He simply says no one can know for sure.

20 V. CONCLUSION

21 For the reasons stated, summary judgment should be granted in favor of defendants on the
22 statute of limitations.

23 Dated: October 10, 2007

JONES DAY

24 By: /s/ Thomas A. Rector
25 Thomas A. Rector
26 Attorneys for Texaco Inc., Texaco Petroleum
27 Company and Chevron Corporation
28