TENTATIVE ORDER: NOT TO BE FILED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL HOLLIFIELD et al., Plaintiffs, v. RESOLUTE CAPITAL PARTNERS LTD., LLC et al., Defendants.	Case No. 2:22-cv-07885-SB-RAO TENTATIVE ORDER[1] DENYING DEFENDANT PETROROCK MINERAL HOLDINGS, LLC'S MOTION TO DISMISS THIRD AMENDED COMPLAINT [DKT. NO. 383]

Defendant PetroRock Mineral Holdings, LLC (PetroRock), moves to dismiss Count 6 of Plaintiffs' Third Amended Complaint (TAC), which alleges breach of contract against PetroRock, Legacy Energy, LLC, and seven now-defunct entities affiliated with PetroRock: PRMH Lenders Fund I; PRMH Lenders Fund II; PRMH Lenders Fund III; PRMH Lenders Fund IV; Choice Energy Holdings I, LLC; Choice Energy Holdings III, LLC; and Strategic Energy Assets VII, LLC (collectively, the funds). Dkt. No. 227 ¶¶ 246–254.[2] PetroRock's motion asserts two separate grounds for dismissal: first, that the funds were not properly served; and second, that a state court in Texas has exclusive jurisdiction over the breach of contract claims based on a class action settlement. Because PetroRock fails to demonstrate that dismissal is warranted on either ground, the Court DENIES the motion.

[1] The purpose of the tentative ruling is to focus the discussion at the hearing. *No party shall submit any written response to the tentative ruling—or submit the tentative ruling as an exhibit in any filing—without prior leave of court*.

[2] Count 6 also names Warren Taryle as a defendant, but he has been dismissed. Dkt. No. 359. All other causes of action in the TAC have been dismissed or resolved. *See* Dkt. Nos. 351, 360–63.

I.

As a preliminary matter, the motion to dismiss is procedurally defective. The motion's meet and confer certification (Dkt. No. 383 at 8) does not comply with the Court's standing order (Dkt. No. 8 ¶ 6(a)), which requires parties to certify that they "met in person or by videoconference, thoroughly discussed each and every issue raised in the motion, and attempted in good faith to resolve the motion in whole or in part." The parties should be prepared to address whether they complied with this requirement at the motion hearing. Additionally, on April 18, 2024, only eight days before the hearing date, PetroRock filed a reply. Dkt. No. 438. The reply is untimely. L.R. 7-10 (replies may be filed "not later than fourteen (14) days before the date designated for the hearing"). It also contains several new arguments raised for the first time on reply and attaches no less than 165 pages of unlabeled exhibits. The Court declines to consider the reply.[3] L.R. 7-12 ("The Court may decline to consider any memorandum or other document not filed within the deadline set by order or local rule."); *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief."). As described below, if PetroRock wishes to argue that it is entitled to judgment based on evidence outside the pleadings, it should do so in its motion for summary judgment.

II.

The motion to dismiss for lack of service, which PetroRock brings under Rules 41(b) and 4(m) of the Federal Rules of Civil Procedure, contains other defects. First, it requests dismissal on behalf of the funds, but it purports to be brought by PetroRock alone. *See* Dkt. No. 383 at 1 (caption), 1–8 (footer), 2 (notice of motion), 7–8 (signature block). PetroRock does not address, much less demonstrate, how it has standing to move for dismissal on behalf of other defendants.[4] Additionally, PetroRock's blanket assertion that none of the funds

[3] Although the Court does not consider the reply for purposes of resolving this motion, the reply includes evidence suggesting that Plaintiffs received notice of the Texas settlement agreement and failed to opt out, resulting in the assignment of their claims to the settlement trust. Dkt. Nos. 438-2, 438-3. The parties are ordered to meet and confer, in person or by videoconference, about whether this evidence resolves their dispute and to be prepared to address the issue at the motion hearing.

[4] The answer may be that Farmer Law Group (FLG), which represents PetroRock and Legacy Energy, also represents the funds and was intending to move on their

has been served appears factually incorrect. In opposition, Plaintiffs argue that they in fact served several of the funds in accordance with California Code of Civil Procedure § 415.40 (which would constitute sufficient service under Federal Rule of Civil Procedure 4(e)(1)), and they provided certified mail receipts demonstrating that they did so. Dkt. No. 429 at 178–84. Indeed, at least one of the funds (Strategic Energy Assets VII) filed an answer to the TAC without mentioning improper service, Dkt. No. 261, and thus appears to have waived any defense on that ground, Fed. R. Civ. P. 12(h)(1)(B)(ii).

In any event, PetroRock has not demonstrated that dismissal is warranted under either Rule 4(m) or Rule 41(b). Before a district court dismisses a case under Rule 41—a "harsh" penalty to be imposed only in "extreme" circumstances—it must consider five factors:

> (1) the public's interest in expeditious resolution of litigation;
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> (2) the court's need to manage its docket;
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> (3) the risk of prejudice to the defendants;
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> (4) the public policy favoring disposition of cases on their merits; and
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> (5) the availability of less drastic sanctions.

Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998). Generally, if at least three factors do not support dismissal, dismissal is improper. *See id.* at 399–400 (finding abuse of discretion where only two factors supported dismissal).

Here, at least three factors weigh against dismissal. First, the public policy favoring disposition of cases on the merits weighs strongly against dismissal. This case was originally filed in state court in September 2022. Dkt. No. 1-2. After multiple rounds of pleadings, motions, and dismissals, the case has now been whittled down to a single cause of action against a subset of defendants and is set for trial in July. At this point, disposition on the merits is imminent. And it appears that the claims at issue may be time-barred if they were dismissed now and

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behalf. FLG has answered discovery responses on behalf of at least six of the funds, and at the February 2, 2024, mandatory scheduling conference, FLG indicated it could answer for the other defendants if the Court directed, despite the service issues. Dkt. No. 429 at 54–109 (discovery responses on behalf of funds signed by FLG). But the motion before the Court states only that it is brought by PetroRock.

refiled, preventing them from ever being decided on the merits. Second, there has been no showing of any risk of prejudice to the seven purportedly unserved defendants, which are defunct funds related to the two served defendants, ostensibly represented by the same counsel, and apparently located at the same addresses as the served defendants. *See* Dkt. No. 429 at 178–84. Thus, even if they were not served (contrary to Plaintiffs' evidence), the funds have been on notice of this lawsuit and have even participated in it, since FLG has submitted discovery responses on behalf of six of them. Third, less drastic sanctions are available in this case, where the Court can order Plaintiffs to file a proof of service within a specified time. *See* Fed. R. Civ. P. 4(m) ("If a defendant is not served within 90 days after the complaint is filed, the court . . . must dismiss the action without prejudice against that defendant or order that service be made within a specified time."). Finally, while the remaining two factors (the public's interest in expeditious resolution and the Court's need to manage its docket) often weigh in favor of dismissal, the Court finds these factors neutral here, as it does not appear that the failure to file proofs of service will cause any meaningful delay.

PetroRock's Rule 4(m) argument, which seeks dismissal based on failure to timely serve, also fails. As noted above, the text of Rule 4(m) allows a court to "order that service be made within a specified time" when a party fails to serve, giving the court discretion whether to dismiss a case.[5] Fed. R. Civ. P. 4(m). The standard is "flexible," and is to be "liberally construed so long as a party receives sufficient notice." *United Food & Com. Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984). While there is no comprehensive list of factors governing whether to dismiss under Rule 4(m), the Ninth Circuit has identified at least four factors that courts may consider: prejudice to the defendant, actual notice of the lawsuit, eventual service, and the effect of the statute of limitations. *Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007). All four factors weigh against dismissal here. As articulated above, there is no prejudice to these defendants, who appear to have received actual notice of the lawsuit and are represented by PetroRock's counsel. Also, Plaintiffs appear to have served defendants while this motion was pending. *See* Dkt. Nos 440–446 (proofs of service filed for each of the seven fund defendants). Finally, the statute of

[5] As the text of Rule 4(m) makes clear, this discretion applies even when a plaintiff has not shown good cause for failure to serve. Fed. R. Civ. P. 4(m). When a plaintiff has shown good cause, by contrast, the court "*must* extend the time for service." *Id.* (emphasis added).

limitations would likely bar the assertion of the claims in this lawsuit if they were dismissed.

Accordingly, the Court denies PetroRock's motion to dismiss for failure to serve under Rules 41(b) and 4(m).

III.

PetroRock's motion to dismiss based on the exclusive jurisdiction of a Texas state court fares no better. This section of the motion, which totals just over one page and does not cite any law at all, purports to be made under "Rule 12(b)," without identifying which of 12(b)'s seven subsections it is moving under. Dkt. No. 383 at 6. Regardless, PetroRock cannot bring a 12(b) motion because it has already answered. Fed. R. Civ. P. 12(b) ("A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed."); Dkt. No. 238 (PetroRock's answer).

If the Court instead were to construe the motion as one for judgment on the pleadings under Rule 12(c), it would have to convert the motion into one for summary judgment, because PetroRock's motion relies on matters outside the pleadings—namely, the settlement agreement. Fed. R. Civ. P. 12(d) ("If, on a motion under . . . 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."). Such a conversion requires all parties to be given "a reasonable opportunity to present all the material that is pertinent to the motion," *id.*, which has not occurred here. If PetroRock wishes to raise a factual argument about the impact of the Texas class settlement, it may do so in a motion for summary judgment. *See* Dkt. No. 418 (allowing parties leave to file summary judgment motion).

In short, the Court declines to construe the improperly filed Rule 12(b) motion as a Rule 12(c) motion for judgment on the pleadings, which would then have to be treated as a Rule 56 motion because PetroRock relies on facts outside the pleading. Transforming this Rule 12(b) motion into a Rule 56 motion, moreover, would deprive Plaintiffs of a full and fair opportunity to respond. Thus, PetroRock has not shown that Count 6 should be dismissed.

IV.

The Court DENIES the motion to dismiss.

Date: April 22, 2024

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Stanley Blumenfeld, Jr.
United States District Judge