

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

SHELL GULF OF MEXICO, INC.,  
and SHELL OFFSHORE, INC.,

Plaintiffs,

vs.

CENTER FOR BIOLOGICAL  
DIVERSITY, INC., et al.,

Defendants.

Case No. 3:12-cv-0096-RRB

**ORDER DENYING MOTION  
TO DISMISS AT 28**

**I. INTRODUCTION**

Before the Court are Defendants Center For Biological Diversity, Inc.; Redoil, Inc.; Alaska Wilderness League; Natural Resources Defense Council, Inc.; Northern Alaska Environmental Center; Pacific Environment and Resources Center; Sierra Club; The Wilderness Society; Ocean Conservancy, Inc.; Oceana, Inc.; Defenders of Wildlife; Greenpeace, Inc.; National Audubon Society, Inc.; and World Wildlife Fund, Inc. (collectively the "Organizations") with a Motion to Dismiss at Docket 28. The Organizations contend that this Court lacks jurisdiction and that the Amended Complaint fails to state a valid claim because: (1) the Amended Complaint does not present a case or controversy; (2) no

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cause of action exists that permits a private party to sue another private party to affirm agency action; (3) the Noerr-Pennington doctrine prohibits bringing suit based on a party's exercise of its First Amendment right to petition the government; and (4) the Court should decline to exercise its discretionary authority under the Declaratory Judgment Act ("DJA").<sup>1</sup> Based on the lack of jurisdiction and of a valid claim, the Organizations request that the Court dismiss the present litigation.

Plaintiffs Shell Gulf of Mexico, Inc. and Shell Offshore, Inc. (collectively "Shell") oppose at Docket 30 and argue that: (1) Shell possesses a protectable legal interest in the Department of Commerce's and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service ("NMFS") approvals of the Chukchi and Beaufort Seas Incidental Harassment Authorizations ("IHA"), such interest is adverse to that of the Organizations, and there exists between Shell and the Organizations an immediate and concrete dispute; (2) Shell can proceed under the DJA instead of the Administrative Procedure Act ("APA"); (3) the Noerr-Pennington doctrine is inapplicable; and (4) the Court should

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<sup>1</sup> Docket 29 at 8-9.

exercise its discretionary authority under the DJA in the interest of judicial economy.<sup>2</sup>

Inasmuch as the Court concludes that: (1) it possesses subject-matter jurisdiction over the present litigation; (2) a justiciable dispute exists between the parties; (3) it is appropriate for Shell to proceed under the DJA, as opposed to the APA; and (4) the Noerr-Pennington doctrine is not applicable in the instant matter, Shell's request for declaratory judgment will not be summarily dismissed.<sup>3</sup>

## II. STANDARD OF REVIEW

Under Federal Rules of Civil Procedure ("FRCP"), Rule 12(b)(1), a defendant may raise a facial or factual challenge to the court's subject-matter jurisdiction.<sup>4</sup> If the challenge to jurisdiction is a facial attack, i.e., the defendant contends that the allegations of jurisdiction contained in the complaint are insufficient on their face to demonstrate the existence of jurisdiction, the plaintiff is entitled to safeguards applicable

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<sup>2</sup> Docket 30 at 6 n. 2.

<sup>3</sup> For the factual background underlying this Order, the Court adopts the related case Shell Gull of Mexico, Inc. v. Ctr. For Biological Diversity, Inc., 3:12-cv-0048, at 3-5 (D. Alaska June 27, 2012) (Docket 59, Order Denying Motion to Dismiss).

<sup>4</sup> 2 James W. Moore, Moore's Federal Practice, § 12.30(4) at 12-38 (3d ed. 1977).

when a Rule 12(b)(6) motion is made.<sup>5</sup> "A complaint will be dismissed for lack of subject matter jurisdiction . . . if the cause does not 'arise under' any federal law or the United States Constitution"<sup>6</sup> or if there does not exist complete diversity between the parties.<sup>7</sup>

A motion under Rule 12(b)(6) may be granted "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations."<sup>8</sup> In deciding a motion, not only must a court accept all material allegations in the complaint as true, but the complaint must be construed, and all doubts resolved, in the light most favorable to the plaintiff.<sup>9</sup> Yet, such tenet does not apply to legal conclusions.<sup>10</sup> "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."<sup>11</sup> "Threadbare recitals of the

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<sup>5</sup> See 2A J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice, 12.07(2.-1)], at 12-46 to 12-47 (2d ed. 1987).

<sup>6</sup> Baker v. Carr, 369 U.S. 186, 198 (1962).

<sup>7</sup> 28 U.S.C. § 1332 (2011).

<sup>8</sup> Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

<sup>9</sup> Holden v. Haqopian, 978 F.2d 1115, 1118 (9th Cir. 1992) (citing Usher v. City of L.A. 828 F.2d 556, 561 (9th Cir. 1987)).

<sup>10</sup> Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

<sup>11</sup> Id. at 663 (internal citations omitted).

elements of a cause of action, supported by mere conclusory statements, do not suffice.”<sup>12</sup>

Specifically, a complaint must “contain sufficient factual matter . . . to ‘state a claim to relief that is plausible on its face.’”<sup>13</sup> Plausibility is required so “that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation: The complaint should give fair notice and enable the opposing party to defend itself effectively.”<sup>14</sup> “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>15</sup> “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>16</sup> “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a

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<sup>12</sup> Id. at 679 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

<sup>13</sup> Id. at 678 (quoting 550 U.S. at 570).

<sup>14</sup> Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

<sup>15</sup> 556 U.S. 662, 679 (internal citations omitted).

<sup>16</sup> Id. at 663 (citing 550 U.S. at 556).

defendant has acted unlawfully.”<sup>17</sup> “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’”<sup>18</sup>

In short, “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’– ‘that the pleader is entitled to relief.’”<sup>19</sup> In other words, the “dismissal for failure to state a claim is ‘proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory.’”<sup>20</sup> A court should not look to “whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.”<sup>21</sup>

### **III. DISCUSSION**

In their Motion to Dismiss, the Organizations raise arguments identical to those the Organizations raised in the separate but

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<sup>17</sup> Id. at 678 (quoting 550 U.S. at 557).

<sup>18</sup> Id.

<sup>19</sup> Id. at 679 (quoting Fed. R. Civ. P. 8(a)(2) (2009)).

<sup>20</sup> Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1041 (9th Cir. 2010).

<sup>21</sup> Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997).

related case, Shell Gull of Mexico, Inc. v. Center For Biological Diversity, Inc., 3:12-cv-0048, (D. Alaska June 27, 2012) (Docket 59, Order Denying Motion to Dismiss). The only differences that exist between the current litigation and Shell, 3:12-cv-0048, is the addition, as a Defendant, of World Wildlife Fund, Inc. and the NMFS approval of the Chukchi and Beaufort Seas IHAs as the subject matter instead of the Department of Interior's Bureau of Safety and Environmental Enforcement approvals of the Chukchi and Beaufort Oil Spill Response Plans ("OSRP") as in Shell, 3:12-cv-0048. Other than those two differences, the parties and the legal questions sought to be answered in this suit are identical to those found in Shell, 3:12-cv-0048.

Because the legal issues to be resolved in this case are indistinguishable from the issues already resolved by this Court in its Order at Docket 59 of Shell, 3:12-cv-0048, save the intrinsic differences that exist between IHAs and OSRPs, and because it promotes judicial economy, the Court adopts and includes, herein by reference, its reasoning at Docket 59, pages 9 through 31 of Shell, 3:12-cv-0048.

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**IV. CONCLUSION**

For the foregoing reasons, Defendants' Motion To Dismiss for lack of subject matter jurisdiction and for failure to state a claim at **Docket 28** is hereby **DENIED**.

**ORDERED** this 30<sup>th</sup> day of July, 2012.

S/RALPH R. BEISTLINE  
UNITED STATES DISTRICT JUDGE

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