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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, INC.;

Plaintiff,

vs.

CHEVRON CORP.; et al.,

Defendants.

Case No. 3:18-cv-07477

OPPOSITION TO MOTION FOR REMAND

Date: September 14, 2023
Time: 10:00 a.m.
Courtroom: 4, 17th Floor
Judge: Hon. Vince G. Chhabria

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Defendants respectfully oppose Plaintiff's Motion for Remand, Dkt. 224.[1]

INTRODUCTION

This climate-change lawsuit is different. The Pacific Coast Federation of Fishermen's Associations ("PCFFA") is not a municipal government—it is an umbrella trade association of local fishermen's trade associations. And its alleged damages are different, too: PCFFA claims that climate change caused the government to shut down crab fisheries located on the Outer Continental Shelf ("OCS"), which closures, in turn, economically injured PCFFA's "members." These differences mean this case belongs in federal court under both the Class Action Fairness Act ("CAFA") and the Outer Continental Shelf Lands Act ("OCSLA").

CAFA jurisdiction exists because this is a "representative" action in which PCFFA seeks monetary damages on behalf of a large class of its "members." CAFA's broad definition of "class action" includes lawsuits brought under rules "similar" to Federal Rule 23, and federal courts interpret that definition to include lawsuits that are "in substance" class actions. California case law makes clear that a "representative" action, like this one, is very similar to a traditional *class* action brought by a member of the class. *E.g.*, *Salton City Area Prop. Owners Ass'n v. M. Penn Phillips Co.*, 75 Cal. App. 3d 184, 188 (1977) ("Notwithstanding the Association's disclaimer of interest in class action status, we look to the essential nature of the within action and find it to be a class action on behalf of a self-defined class."). Removal was therefore proper under CAFA.

Removal also was proper under OCSLA because PCFFA's claims arise from alleged injuries to the crab fisheries (federal resources) on the OCS (a federal enclave). No other climate-change complaint has alleged injuries occurring directly on the OCS.

Defendants also restate the federal-officer and *Grable* grounds for removal that are presently before the Ninth Circuit in *City of Oakland v. BP p.l.c.*, No. 22-16810 (9th Cir.). Respectfully, this Court should defer decision on these two grounds until after the Ninth Circuit renders its judgment in the *City of Oakland* appeal.

[1] A number of Defendants contend that personal jurisdiction is lacking over them and that process and service of process were insufficient. These Defendants do not waive these objections, and will move to dismiss on these grounds at the appropriate time.

FACTUAL AND PROCEDURAL BACKGROUND

PCFFA is a non-profit corporation. It describes itself on its website as "an 'umbrella' group made up of diverse commercial fishing associations all along the West Coast. PCFFA is, in fact, a federation of many different port and fishermen's marketing associations with members spanning San Diego to Alaska."[2]

In its Complaint, PCFFA states that it is suing "in a representative capacity on behalf of its members and the west coast fishing community." Compl. ¶ 16. As a "representative of its members," PCFFA brings claims for damages allegedly suffered by crab-fishing businesses when the crab fisheries were closed as a result of domoic acid outbreaks:

> PCFFA brings these claims in its own name [and] as a representative of its members that are and will continue to be injured financially and otherwise by Defendants' conduct and consequent domoic acid incidents and domoic acid-induced crab fishery closures . . . .

Id. ¶ 19.

The word "Plaintiff," as used in the Complaint, does *not* refer solely to PCFFA. The Complaint defines "Plaintiff" to mean both PCFFA and its "members." *Id.* ¶ 19 ("[a]s used hereinafter, the term 'Plaintiff' refers to PCFFA [and] its members"). Indeed, PCFFA states that it represents, in this lawsuit, "commercial Dungeness crab harvesters and onshore crab processors and wholesalers that have suffered, and continue to suffer, substantial economic losses due to . . . lost fishing opportunities." *Id.* ¶ 11.

PCFFA filed this action in California Superior Court on November 14, 2018. Defendants timely removed it to this Court on December 12, 2018. Dkt. 1. Three weeks later, the Court granted a joint stipulation to "stay further proceedings in this action until" two appeals to the Ninth Circuit, arising from removals of other climate-change lawsuits, were "finally resolved." Dkt. 91.

The first of those two appeals—*County of San Mateo*—was "finally resolved" on April 24, 2023, when the Supreme Court of the United States denied *certiorari*. *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022) ("*San Mateo IV*"), *cert. denied*, 143 S. Ct. 1797 (Mem.) (2023). The second—*City of Oakland*—is again pending before the Ninth Circuit after

[2] Decl. of Kemper Diehl ("Diehl Decl."), Ex. A (screenshot of "About PCFFA" webpage of the PCFFA website (https://pcffa.org/about-pcffa/)).

intervening district court proceedings. *City of Oakland v. BP p.l.c.*, No. 22-16810 (9th Cir.). Briefing in the *City of Oakland* appeal was completed on June 26, 2023, and oral argument is expected to be scheduled for November or December 2023. *Id.*, Dkt. 56.

On May 17, 2023, this Court indicated its intent to remand this case to state court, "[a]bsent objection." Dkt. 196. Defendants promptly objected. Dkt. 197 at 3.

The Court held a status conference on May 26, 2023. At that conference, Defendants informed the Court that they intended to oppose remand on four grounds: CAFA and OCSLA (both of which feature arguments unique to this case) and federal-officer removal and *Grable* (both of which will be resolved by the forthcoming Ninth Circuit decision in the *Oakland* case). *See* Diehl Decl., Ex. B, Transcript of Proceedings Held on May 26, 2023, Dkt. 215 ("CMC Tr."), at 16:3–19:22.

Soon after that status conference, the Court lifted the stay. Dkt. 203. PCFFA filed its Motion for Remand on July 18, 2023, Dkt. 224, which Defendants now oppose.

LEGAL STANDARD

Removal is proper if the federal court would have had original jurisdiction over the action. 28 U.S.C. § 1441(a). The removing party need show only that there is federal jurisdiction over a single claim. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559, 563 (2005).

There is no "antiremoval presumption" under CAFA. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 89 (2014) ("[N]o antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court."). Similarly, the federal-officer removal statute, 28 U.S.C. § 1442, is construed "broadly in favor of removal." *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006).

ARGUMENT

I. CAFA confers subject-matter jurisdiction because this lawsuit is, in substance, a "class action" as CAFA defines that term.

This Court has subject-matter jurisdiction under CAFA because this case is, in substance, a class action seeking more than $5 million in damages on behalf of a large class of "crab harvesters and onshore crab processors and wholesalers." Compl. ¶ 11.

A. CAFA defines the term "class action" broadly.

CAFA confers subject-matter jurisdiction "over [1] 'a class action' if [2] the class has more than 100 members, [3] the amount in controversy is greater than $5,000,000, and [4] the parties are minimally diverse." *Hawaii ex rel. Louie v. HSBC Bank Nev., N.A.*, 761 F.3d 1027, 1039 (9th Cir. 2014) ("*Louie*") (citing 28 U.S.C. § 1332(d)(2) & (d)(5)(B)). Only the first of these four elements is in dispute. PCFFA *does not* dispute that [2] it claims to represent "more than 100" crab businesses,[3] [3] the parties are "minimally diverse,"[4] or [4] "the amount in controversy is greater than $5,000,000."[5] The *only* dispute is [1] whether PCFFA's lawsuit qualifies as a "class action."

CAFA defines "class action" to mean "any civil action filed under rule 23 of the Federal Rules of Civil Procedure *or similar State statute or rule of judicial procedure* authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B) (emphasis added). Congress intended for this definition "to be interpreted liberally" in order to "strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications." S. Rep. No. 109-14, at 35 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 34. Thus, CAFA's "application should not be confined solely to lawsuits that are labeled 'class actions' by the named plaintiff or the state rulemaking authority." *Id.*

In applying CAFA's broad definition of "class action," the Ninth Circuit "evaluate[s] the 'substance and essentials'" of the case that the plaintiff has pled, rather than the labels that the plaintiff has used to describe its case. *Canela v. Costco Wholesale Corp.*, 971 F.3d 845, 853–54

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[3] According to the National Oceanic and Atmospheric Administration, there are currently 998 "participants" in the California, Oregon, and Washington Dungeness Crab Pot Fisheries. *See* Diehl Decl., Ex. C (471 participants in California); Ex. D (323 in Oregon); Ex. E (204 in Washington). These numbers do not include the "onshore crab processors and wholesalers" that PCFFA also claims to represent. Compl. ¶ 11. As of 2005, PCFFA claimed to represent "approximately 3,000 small commercial fishermen." *Klamath Irrigation Dist. v. United States*, 64 Fed. Cl. 328, 331 (2005).

[4] PCFFA claims to represent citizens of California, Oregon, and Washington, and most of the Defendants are not citizens of these states. *See* Compl. ¶¶ 24–38.

[5] *See* Notice of Removal, Dkt. 1, ¶ 89 (noting that "the U.S. Secretary of Commerce has devoted $25.6 million to compensate those affected only in California and only for the 2015-16 [crab] fishery closures" due to domoic acid outbreaks, and quoting PCFFA's website as claiming that Dungeness crab fishing accounts for "$95 million" of annual revenue in California alone).

(9th Cir. 2020). Removal is proper, under CAFA, regardless of whether the state court would actually allow the case to proceed as a class action. *See Louie*, 761 F.3d at 1040 ("a plaintiff files a class action for CAFA purposes by invoking a state class action rule, regardless of whether the putative class ultimately will be certified").

In keeping with CAFA's broad definition of "class action," two other federal Circuits have held that CAFA confers subject-matter jurisdiction over any lawsuit that is "in substance a class action." *Addison Automatics, Inc. v. Hartford Cas. Ins. Co*., 731 F.3d 740, 742 (7th Cir. 2013) (affirming CAFA removal of insurance-coverage litigation filed by class representative as assignee of prior defendant's claims against its insurers); *Williams v. Emp'rs Mut. Cas. Co.*, 845 F.3d 891, 901 (8th Cir. 2017) (same).

B. This case is a "representative" action seeking damages on behalf of hundreds of crab businesses.

Like a named plaintiff in a traditional class action, PCFFA claims to "represent" a large class of hundreds of absent parties—its "members"—and seeks money damages for their claims.

1. Section 382 of the California Code of Civil Procedure authorizes an association, like PCFFA, to bring a "representative" lawsuit on behalf of its "members."

"Representative" actions are authorized by Section 382 of the California Code of Civil Procedure, which states: "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." In addition to authorizing traditional class actions, Section 382 also "authorizes another type of action, namely, a *representative action*" brought by an association on behalf of its members. *River's Side at Washington Square Homeowners Ass'n v. Superior Ct. of Yolo Cnty.*, 88 Cal. App. 5th 1209, 1230 (2023), *review denied* (June 14, 2023).

As discussed in further detail below, "representative" actions by associations are "creatures of [California] case law." *Id.* That case law demonstrates that "representative" actions are class actions in their "substance and essentials." *Canela*, 971 F.3d at 853.

2. The Complaint expressly alleges a "representative" action.

The Complaint repeatedly makes clear that this is a "representative" action. *See* Compl. ¶ 16 (stating that PCFFA sues "in a representative capacity on behalf of its members and the west coast fishing community"); *see also id.* ¶ 11 ("Plaintiff represents commercial Dungeness crab harvesters and onshore crab processors and wholesalers"). The Complaint even defines the term "Plaintiff" to include PCFFA's "members." Compl. ¶ 19 ("[a]s used hereinafter, the term 'Plaintiff' refers to PCFFA [and] its members"). PCFFA seeks to recover the alleged "economic losses" that *all* "commercial Dungeness crab harvesters and onshore crab processors and wholesalers . . . have suffered, and continue to suffer." *Id.* ¶ 11.

If the Complaint left any doubt that PCFFA were acting as a "representative" seeking damages on behalf of absent parties, PCFFA's counsel dispelled that doubt at the May 26 status conference by stating to the Court that PCFFA "represent[s] commercial [D]ungeness crab fishermen." Ex. B, CMC Tr., at 10:7–10; *see also id.* at 10:15–16 ("the Plaintiff here represents the [D]ungeness crab fishermen").

3. PCFFA is not allowed to disclaim, in its Motion for Remand, the Complaint's claims for relief "on behalf of" PCFFA's "members."

PCFFA's Motion insists that "the Complaint does not seek to 'recover on behalf of' Plaintiff's members." Mot., at 9 lines 14–21. That is not what the Complaint alleges. The Complaint defines "Plaintiff" to include PCFFA's "members." Compl. ¶ 19. All the injuries the Complaint describes were allegedly suffered by PCFFA's "members," not by PCFFA. PCFFA cannot amend the Complaint in its Motion to Remand.

Even if PCFFA were to amend its Complaint to remove all assertions that PCFFA represents its "members," that amendment would not affect this Court's subject-matter jurisdiction because removal is assessed based on the "damages that are claimed at the time the case is removed." *Chavez v. JPMorgan Chase & Co.*, 888 F.3d 413, 417 (9th Cir. 2018). A "subsequent amendment to the complaint" that deletes the allegations giving rise to federal jurisdiction does not "oust the federal court of jurisdiction." *Id.* Here, the Complaint makes clear, every time it uses the term "Plaintiff" (defined to include PCFFA's "members") that this is a representative action

seeking damages for alleged injuries to hundreds of crab businesses.

4. This action must be construed as a representative action under Section 382 because otherwise PCFFA would not have authority to bring the claims that it has pled.

PCFFA's eleventh-hour attempt to restyle its Complaint as a single-plaintiff lawsuit should also be disregarded for an additional reason: If this case were anything other than a representative action under Section 382, then PCFFA would not have authority to bring it.

The Complaint's "public nuisance" claim requires a plaintiff to allege a "special injury."[6] But PCFFA has not alleged any "special injury" to *itself*. PCFFA is a non-profit association and does not, itself, harvest crabs, process crabs, or sell crabs. The Complaint instead alleges "special injuries" to the *crab businesses*. Compl. ¶ 184 (alleging that "Plaintiff"—broadly defined to include PCFFA's "members"—"suffered . . . special injuries" such as "economic losses due to the prohibition on harvesting and transacting in Dungeness crabs, which constitute a substantial and significant portion of Plaintiff's revenue"). Similarly, the Complaint's products-liability claims require a plaintiff to allege an "injury to person or property."[7] Here again, PCFFA has not alleged any injury to *its own* "person or property." Instead, the Complaint alleges injuries to the *crab businesses*—such as "deprivation of the right to use fishing privileges," Compl. ¶ 201, and "commercial fishery closures," *id.* ¶ 213. The allegation in Paragraph 20, that PCFFA has "diverted resources" like "staff time and energy" to "address[] domoic acid impacts," comes nowhere close to the kind of injury that would permit PCFFA to bring tort claims for public nuisance or products liability.[8]

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[6] *See* Cal. Civ. Code § 3493 ("A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise."); *Kelley v. AW Distrib., Inc.*, No. 20-CV-06942-JSW, 2023 WL 2167391, at *6 (N.D. Cal. Feb. 21, 2023) (relatives of victims killed in car accident caused by the defendant's product had not suffered "special injury" and thus could not sue for nuisance).

[7] Only plaintiffs who suffer "injury to person or property" may recover for tort claims like these; "purely economic losses" cannot be recovered. *S. California Gas Leak Cases*, 7 Cal. 5th 391, 412, 414 (2019); *see also Union Oil Co. v. Oppen*, 501 F.2d 558, 570 (9th Cir. 1974) ("commercial fishermen" could recover in negligence for the "diminution of aquatic life" caused by an oil spill, but not anyone else "whose economic or personal affairs were discommoded by the oil spill").

[8] Paragraph 20's "diverting resources" allegation is cut-and-pasted from Ninth Circuit case law

Each crab business is the "owner of [its] cause[s] of action" and is thus the "real party in interest" as to its own claims against Defendants. *Vaughn v. Dame Construction Co.*, 223 Cal. App. 3d 144, 148 (1990); *see also Killian v. Millard*, 228 Cal. App. 3d 1601 (1991) ("A real party in interest ordinarily is defined as the person possessing the right sued upon by reason of the substantive law."). If PCFFA were an ordinary plaintiff, it could not bring a lawsuit to recover for someone else's damages claim without a formal claim assignment from that other person.[9] California law states that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." Cal. Code Civ. Proc. § 367.

The only California statute that could "otherwise provide" PCFFA with authority to "prosecute" these tort claims on behalf of hundreds of crab businesses is Section 382. Thus, if this were *not* a representative action under Section 382, then PCFFA would lack authority to bring any of the claims pled in the Complaint, since PCFFA is not the real party in interest.

C. A representative action, under California law, is a "class action" under CAFA's broad definition of that term.

Representative actions like this one are "creatures of [California] case law." *River's Side*, 88 Cal. App. 5th at 1230. That case law requires the association to meet almost all the requirements of a traditional class action.[10] A leading treatise summarizes the case law as follows: "Suits in a

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concerning a non-profit's standing to seek to enjoin a defendant's violation of a remedial statute. *See, e.g.*, *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) (non-profit fair-housing organization had standing to seek injunction, barring Roommate.com from allowing its users to discriminate, because non-profit had allegedly "divert[ed] resources" to address Roommate.com's conduct). But PCFFA seeks money damages for its members—crab businesses that are not parties here—for alleged injuries that those crab businesses supposedly suffered from the torts pled in the Complaint. Only a representative action, under Section 382, could give PCFFA authority to bring *those* claims.

[9] PCFFA has stated that 23 crab businesses have formally "assigned" their claims to PCFFA. Diehl Decl., Ex. F (letter from PCFFA's counsel). But the Complaint is not limited to those 23 assignors. The Complaint asserts claims on behalf of *hundreds* of crab businesses. *See supra* note 3 (there are 998 "participants" in the West Coast crab fisheries).

[10] There is one minor difference: Unlike a lead plaintiff in a traditional class action, the association bringing a representative action is not required to have claims of its own against the defendant that are "typical" of its members' claims—a sensible distinction, since the association sues not as a member of the class but rather as the members' representative.

representative capacity are *similar* to class actions in many ways (i.e., an ascertainable class and a community of interest are required)." Weil & Brown, Cal. Prac. Guide Civ. Pro. Before Trial Ch. 14-D, *Representative Suits* ¶ 14:201 (Rutter Group 2023).[11] Therefore, a representative action is, in its "substance and essentials," a class action under CAFA. *Canela*, 971 F.3d at 854.

A leading case on the requirements of a representative action is *Salton City*, 75 Cal. App. 3d 184. The plaintiff in that case was a property owners' association that sued the property developer, on behalf of the association's members, for defrauding the members into buying the properties. The defendant moved to dismiss on the ground that the plaintiff association was not a proper plaintiff, since the association itself had not been defrauded. The trial court agreed with the defendant and dismissed the case, but the Court of Appeal reversed.

The Court of Appeal's opinion in *Salton City* described the lawsuit as "a class action." *Id.* at 188. The opinion took great pains to explain that the association was required to satisfy all the essential requirements of a traditional class action. First, the Court of Appeal analyzed the association's complaint and determined that there were common issues of law and fact that predominated over individual issues. *Id.* at 190 (finding a "commonality of the critical questions of law and fact involved in the action"); *id.* at 188 (finding that "[o]nly the extent of injury to each member would require individualized proof"); *compare* Fed. R. Civ. P. 23(a)(2) (authorizing class certification only if "there are questions of law or fact common to the class"); *id.* 23(b)(3) (authorizing class certification where the common questions "predominate" over individualized inquiries). Second, the Court of Appeal cautioned that, on remand, the association would have to demonstrate to the trial court that it would "adequately and fairly represent" the "interests" of the absent parties (i.e., its members). *Salton City*, 75 Cal. App. at 190–91; *compare* Fed. R. Civ. P. 23(a)(4) (authorizing class certification only if "the representative parties will fairly and adequately protect the interests of the class"). Third, the Court of Appeal directed the association to "give notice" to the absent parties (its members), or else show that its members had given it "authorization to sue" on their behalf. *Id.* at 191; *compare* Fed. R. Civ. P. 23(c)(2) (requiring

[11] This treatise is available on the WestLaw database, and the cited document may be accessed there by typing "fi: CACIVP CH 14-D" into the search bar.

"notice" to class members).

Another instructive California case is *National Solar Equipment Owners' Association v. Grumman Corp.*, 235 Cal. App. 3d 1273 (1991). That case was a representative action filed by a non-profit association of 2,070 members who had bought solar equipment from the defendant. The association alleged that the defendant's material misrepresentations about the solar equipment had defrauded its members. The trial court "determined the matter was a class action and should proceed on that basis." *Id.* at 1278. On appeal, the association claimed (like PCFFA here) that its lawsuit was not "a class action." *Id.* at 1280. The Court of Appeal, citing *Salton City* and Section 382, agreed with the trial court that the case *was* a "class action" and that the association would be treated as the "class representative":

> The rule of *Salton City* is simple: An association which has not itself been injured has standing to sue on behalf of its members only if it acts as a class representative. This seems a logical accommodation between two competing interests. The first is that courts should fashion some collective remedy where individual losses may not be great enough to warrant separate actions. (See Code Civ. Proc., § 382.) The second is the basic notion that a party must be aggrieved in order to sue. The Association therefore has standing to sue, but *must do so as a class representative.*

Id. at 1280–81 (emphasis added, some citations omitted). Relying on traditional class-action precedents, the Court of Appeal then determined that the trial court erred by requiring "full discovery of every unnamed class member." *Id.* at 1283. The court also held that the association was an "adequate class representative." *Id.* at 1284–86. Thus, *National Solar* makes clear that there is little daylight between a representative action, in which an association seeks damages on behalf of its members, and a traditional class action filed by a member of the class.

The examples do not stop there. Earlier this year, the Third District Court of Appeal held that a homeowner's association could bring a "representative action," under Section 382, on behalf of its members against the developer who built the members' homes. *River's Side*, 88 Cal. App. 5th at 1233. The Court of Appeal re-affirmed that such an action requires the association to demonstrate "(1) an ascertainable class; and (2) a well-defined community of interest in the questions of law and fact." *Id.* (citing *Mkt. Lofts Cmty. Assn. v. 9th St. Mkt. Lofts, LLC*, 222 Cal. App. 4th 924, 933 (2014)). The term "community of interest" is a term of art in California case

law; it typically "embodies three separate factors: predominant common questions of law or fact; class representatives whose claims or defenses are typical of the class; and class representatives and class counsel who can adequately represent the class."[12] Therefore, when the courts require a "well-defined community of interest" in a representative action like *River's Side*, 88 Cal. App. 5th at 1233, the courts are saying that the plaintiff association must show that its lawsuit meets the essential elements of a class action.

The following chart summarizes the key similarities between a representative action, as elaborated by California case law, and a federal class action under Rule 23:

Requirement	**California Case Law on Representative Actions**	**Federal Class-Action Rule**
There must be an "ascertainable class" of real parties in interest.	*River's Side*, 88 Cal. App. 5th at 1233; *Mkt. Lofts Cmty. Assn.*, 222 Cal. App. 4th at 933.	*Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124 nn. 3 & 4 (9th Cir. 2017) ("an administratively feasible way to identify class members")
The class must be so numerous that it would be impractical to join all class members as parties.	*Ass'n for Los Angeles Deputy Sheriffs v. Cnty. of Los Angeles*, 60 Cal. App. 5th 327, 337 (2021), *review denied* (Apr. 21, 2021).	Fed. R. Civ. P. 23(a)(1).
The named plaintiff must demonstrate that it can "adequately and fairly" represent the interests of the class members.	*Nat'l Solar*, 235 Cal. App. 3d at 1280-81; *Salton City*, 75 Cal. App. at 190; *Residents of Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal. App. 3d 117, 129 (1973).	Fed. R. Civ. P. 23(a)(4).
The class members' claims must share common questions of law and fact.	*River's Side*, 88 Cal. App. 5th at 1233 ("well-defined community of interest"); *Salton City*, 75 Cal. App. 3d at 190.	Fed. R. Civ. P. 23(a)(4); *id.* 23(b)(3).
Discovery requests to absent class members are disfavored.	*Nat'l Solar*, 235 Cal. App. 3d at 1282–83.	3 Newberg and Rubenstein on Class Actions § 9:11, *Discovery from absent class members—Generally* (West 6th ed.)

[12] Weil & Brown, Cal. Prac. Guide Civ. Pro. Before Trial Ch. 14-B, *Class Action Requirements—In General* ¶ 14:11.5 (Rutter Group 2023). This treatise is available on the WestLaw database, and the cited document may be accessed there by typing "fi: CACIVP CH 14-B" into the search bar.

Requirement	California Case Law on Representative Actions	Federal Class-Action Rule
The named plaintiff must either give notice to the absent class members or else demonstrate that the members authorized the named plaintiff to represent them.	*Nat'l Solar*, 235 Cal. App. 3d at 1280–81; *Salton City*, 75 Cal. App. at 190.	Fed. R. Civ. P. 23(c)(2).
Any award of damages must be fairly distributed to the absent class members.	*Ass'n for Los Angeles Deputy Sheriffs v. Macias*, 63 Cal. App. 5th 1007, 1022 (2021) (union would be required to "ensure that the remedy 'will inure to the benefit of those members . . . actually injured'"), *review denied* (July 28, 2021).	4 Newberg and Rubenstein on Class Actions § 12:16, *Claim processing—Generally* (West 6th ed.) ("there must be a formal process for distributing the funds to the class").
The absent class members are bound by the judgment under principles of *res judicata*.	"[A] judgment in a representative action operates as *res judicata* against all represented persons," absent special circumstances. Weil & Brown, *Representative Suits*, ¶ 14:222, *supra* note 11.	"Basic principles of *res judicata* . . . apply" to judgments in federal class actions. *Cooper v. Fed. Rsrv. Bank of Richmond*, 467 U.S. 867, 874 (1984).

CAFA defines "class action" as "any civil action" that is "filed under" a "State statute or rule of judicial procedure" that is "similar" to Federal Rule 23. 28 U.S.C. § 1332(d)(1)(B). That broad definition requires the court to "evaluate the 'substance and essentials'" of the lawsuit. *Canela*, 971 F.3d at 854. As the above discussion demonstrates, the "rule[s] of judicial procedure" that apply to California representative actions are "similar" to Federal Rule 23.

The above discussion also demonstrates that this case is a class action "in substance." *Addison*, 731 F.3d at 742; *Williams*, 845 F.3d at 901. The essential feature of both *Addison* and *Williams*, which rendered them class actions "in substance," was that the named plaintiff's authority to bring its claims was based on that plaintiff's status as the authorized representative of other, absent parties. *Addison*, 731 F.3d at 742 ("Addison has standing to pursue relief from Hartford [the insurer] only in its capacity as class representative"); *Williams*, 845 F.3d at 900 ("Williams can bring this case only because of her status as the representative of the class"). The same is true here: The only reason PCFFA may be authorized to bring tort claims for money damages allegedly suffered by absent "real parties in interest" (the crab businesses) is PCFFA's claim to be acting as its members' representative. *Supra*, at 7-8.

D. PCFFA's labels for this lawsuit are not relevant.

Much of PCFFA's Motion relies on how PCFFA has chosen to label this lawsuit. Mot., at 7-9. But labels are irrelevant under both California law and CAFA. It is irrelevant that PCFFA's Complaint does not use the words "class action" and that PCFFA checked the box on the cover sheet stating "this is not a class action." *See id.* In the *Salton City* and *National Solar* cases, the California courts rejected the associations' similar arguments and looked to the substantive features of the cases in holding that they *were* class actions: "Notwithstanding the Association's disclaimer of interest in class action status, we look to the essential nature of the within action and find it to be a class action on behalf of a self-defined class." *Salton City*, 75 Cal. App. 3d at 188; *Nat'l Solar*, 235 Cal. App. 3d at 1278 (trial court correctly determined, over association's objection, that association's lawsuit "was a class action and should proceed on that basis").

PCFFA's disclaimer of class action status is also irrelevant under CAFA. "[W]hat matters," under CAFA, is *not* "whether a plaintiff formally makes class allegations." *Canela*, 971 F.3d at 854 (rejecting a "formalistic test" that "considers only the formal labels and allegations in a complaint"). What matters is whether the "rule of judicial procedure" that would apply in state court is "similar to Rule 23." *Id.* at 852–53 (quoting statutory text). Any interpretation of "class action" that looked solely to the plaintiff's labels would defeat Congress's intent,[13] which was to permit removal of "lawsuits that *resemble* a purported class action," and not "solely" those "lawsuits that are labeled 'class actions' by the named plaintiff or the state rulemaking authority." S. Rep. No. 109-14, at 35 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 34 (emphasis added); *see also Williams*, 845 F.3d at 901 ("[A]llowing class-action plaintiffs to avoid federal jurisdiction simply by omitting explicit reference to the class-action rule they intend to proceed under would promote the kind of procedural gaming CAFA was enacted to prevent.").

E. PCFFA's authorities are inapposite.

The CAFA cases that PCFFA cites in support of remand are inapposite. None considered

[13] "CAFA was designed primarily to curb perceived abuses of the class action device which, in the view of CAFA's proponents, had often been used to litigate multi-state or even national class actions in state courts." *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952 (9th Cir. 2009). It would defeat that purpose if CAFA's definition of "class action" could be circumvented by a plaintiff's choice of labels.

a lawsuit even remotely similar to the representative action before this Court.

The *Louie* case was a *parens patriae* lawsuit brought by Hawaii's Attorney General to enforce that state's consumer protection statute. *Louie*, 761 F.3d 1027. Civil enforcement actions by a state's Attorney General are generally "not class actions." *Id.* at 1039. Similarly, "a common law *parens patriae* suit is not a procedural device similar to Rule 23." *Id.* The defendant in that case could not point to *any* similarities between the Attorney General's action and Rule 23. *See id.* 1040–42. Here, there are many such similarities. *Supra*, at 8-12. Moreover, in *Canela* the Ninth Circuit clarified *Louie*, and held that CAFA's definition of "class action" does not depend on the plaintiff's use of the "class action" label. *Canela*, 971 F.3d at 854 (rejecting the argument that, under *Louie*, "what matters is whether a plaintiff formally makes class allegations").

The *Baumann* case was a lawsuit filed by a single plaintiff under the California Labor Code Private Attorneys General Act of 2004 ("PAGA"). *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1119 (9th Cir. 2014). As its name indicates, PAGA authorizes employees to bring suit as "private attorneys general" against their employers. *Id.* at 1123. A PAGA plaintiff "step[s] into the shoes of the LWDA [the Labor and Workforce Development Agency]," and brings claims "on behalf of [that] state agency." *Id.* "Because an identical suit brought by the state agency itself would plainly not qualify as a CAFA class action, no different result should obtain when a private attorney general is the nominal plaintiff." *Id.* Moreover, in a PAGA case, the "bulk of any recovery goes to the LWDA" rather than to class members, and the judgment is not binding on any other employees besides the named plaintiff. *Id.*

The *Belton* case is inapposite because it concerned the peculiar procedural rules that apply to claims brought under California's Unfair Competition Law ("UCL")—a cause of action not asserted by PCFFA in this case. *Belton v. Hertz Local Edition Transporting, Inc.*, No. 19-CV-00854-WHO, 2019 WL 2085825 (N.D. Cal. May 13, 2019). Unlike the common-law claims pled here, a UCL claim *cannot* be brought as a representative action. *Arias v. Superior Ct.*, 46 Cal. 4th 969, 980 (2009). A UCL plaintiff must choose between either (1) bringing the UCL claim solely in his individual capacity, to recover for injuries to himself alone; or (2) bringing the claim as a traditional class action. *Id.* Belton chose option (1), and disclaimed any intent to bring a traditional

class action. Here, by contrast, PCFFA has not pled a UCL claim, and has instead chosen a third option—which was unavailable to Belton—of pleading a representative action. A representative action is similar enough to a traditional class action to confer CAFA jurisdiction. *See supra*, at 8-12. Because no such representative action was before the court in *Belton*, that decision is inapposite.

* * *

The Complaint makes clear that this case is a representative action on behalf of an "ascertainable class" of PCFFA's "members"—hundreds of West Coast crab fishermen. *River's Side*, 88 Cal. App. 5th at 1231. Representative actions like this one are "creatures of case law," *id.* at 1230, and that case law imposes "rules of judicial procedure" that are "similar" to federal Rule 23—which means that this case meets CAFA's definition of a "class action." CAFA's definition controls, notwithstanding PCFFA's efforts to re-label this lawsuit as something else. This Court therefore has subject-matter jurisdiction under CAFA.

II. This Court has subject-matter jurisdiction because both the relevant conduct and the alleged injuries occurred on the OCS.

OCSLA confers subject-matter jurisdiction in actions "arising out of, or in connection with . . . any operation conducted on the [OCS] which involves exploration, development, or production of the minerals, [or] of the subsoil and seabed of the [OCS]." 43 U.S.C. § 1349(b)(1). The OCS comprises the submerged lands beginning three nautical miles offshore and ending approximately 200 miles beyond that, at the edge of the United States' "exclusive economic zone."[14] Ample evidence, submitted together with this brief and summarized below,[15] demonstrates that most of

[14] *See* 43 U.S.C. § 1331(a)(1); 43 U.S.C. § 1301.

[15] The "court may properly consider evidence the removing party submits in its opposition to remand, even if this evidence was not submitted with the original removal petition." *Garza v. Brinderson Constructors, Inc.*, 178 F. Supp. 3d 906, 910 (N.D. Cal. 2016) (quoting *Altamirano v. Shaw Indus., Inc.*, No. C–13–0939 EMC, 2013 WL 2950600, at *3 (N.D. Cal. June 14, 2013)); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 n. 1 (9th Cir. 2002) ("The district court did not err in construing Petsmart's opposition as an amendment to its notice of removal."). After all, a notice of removal need only "contain[] a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). In OCSLA cases in particular, the case law makes clear that the Court may look beyond the facts alleged in the Complaint to determine that OCSLA jurisdiction exists. *See, e.g.*, *Plains*

the Dungeness crab fishery is located on exclusively federal submerged lands.

Many Defendants "conduct[]" substantial "operation[s]" on the OCS that "involve[] exploration, development, [and] production" of fossil fuels. *Id.* Certain Defendants and their affiliates operate a large share of the "more than 5,000 active oil and gas leases on nearly 27 million OCS acres" administered by the Department of the Interior under OCSLA. Dkt. 1 ¶ 80.[16] "For example, from 1947 to 1995, Chevron U.S.A. Inc. produced 1.9 billion barrels of crude oil and 11 billion barrels of natural gas" from the OCS. *Id.* In 2016 alone, "Chevron U.S.A. produced over 49 million barrels of crude oil and 50 million barrels of natural gas" from the OCS. *Id.* Other Defendants have likewise conducted substantial oil and gas operations on the OCS for decades. Indeed, those "Defendants and their affiliates presently hold approximately 32.95% of all OCS leases." *Id.* Evidence of certain Defendants' substantial operations on the OCS is set forth in the declarations of William E. Thomson and J. Keith Couvillion that those Defendants submitted in opposition to remand in *City of Oakland v. BP P.L.C.*, Case No. 3:17-cv-6011-WHA, Dkt. 90, 91 (Dec. 18, 2017), which are attached hereto. Diehl Decl., Exs. G & H.

The only dispute here is whether PCFFA's claims "aris[e] out of, or in connection with" Defendants' substantial operations on the OCS. 43 U.S.C. § 1349(b)(1). They do, for two reasons. *First*, the injuries alleged by PCFFA occurred in large part on the OCS to "natural resources" (Dungeness crabs) over which the United States exercises "jurisdiction and control," *id.* § 1302, which independently gives rise to federal jurisdiction under 28 U.S.C. § 1331. *Second*, PCFFA alleges that those injuries occurred because of Defendants' activities on the OCS, rather than because of Defendants' supposed misrepresentations. Both of those reasons distinguish this case

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Gas Solutions, LLC v. Tenn. Gas Pipeline Co., LLC, 46 F. Supp. 3d 701, 703 (S.D. Tex. 2014); *St. Joe Co. v. Transocean Offshore Deepwater Drilling Inc.*, 2011 A.M.C. 2624, 2640 (D. Del. 2011).

[16] Defendants do not concede that, as a substantive matter, Plaintiff has adequately pleaded that each Defendant is liable for the actions of its separate subsidiaries and affiliates. For purposes of assessing this Court's *jurisdiction*, however, the substantive adequacy of the Complaint is irrelevant. *See Parra v. PacifiCare of Ariz., Inc.*, 715 F.3d 1146, 1151 (9th Cir. 2013). Accordingly, for purposes of this motion only, Defendants assume *arguendo* Plaintiff's theory and, in describing the actions of "Defendants" herein, Defendants include the actions of their subsidiaries and affiliates.

from the claims asserted by San Mateo and other California municipalities, which the Ninth Circuit held did not give rise to OCSLA jurisdiction in *San Mateo IV*, 32 F.4th at 754.

A. *San Mateo IV* holds that "injuries occurring on" the OCS are sufficient to confer OCSLA jurisdiction.

In *San Mateo IV*, the Ninth Circuit held that Section 1349(b) "accord[s] federal courts the same jurisdiction over actions and injuries on the outer Continental Shelf as they would have in other federal enclaves." *Id.* at 753. Consistent with that holding, the Ninth Circuit concluded that "the phrase 'aris[e] out of, or in connection with' in [OCSLA] § 1349(b)(1) . . . grant[s] federal courts jurisdiction" over tort claims that "arise from actions ***or injuries occurring on the outer Continental Shelf.***" *Id.* at 753 (emphasis added); *see also id.* at 749–50 (holding that federal enclave jurisdiction is appropriate when an injury occurs on a federal enclave); *accord Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1891 ("the OCS should be treated as an exclusive federal enclave"). The Ninth Circuit rejected the requirement of a "but-for" causal connection between the plaintiff's alleged injuries and the defendant's activities on the OCS: "the language of § 1349(b), 'aris[e] out of, or in connection with,' does not necessarily require but-for causation." *San Mateo IV*, 32 F.4th at 754.

After construing the statute, the Ninth Circuit held that "the connection between [defendants'] conduct [on the OCS] and the injuries alleged by the plaintiffs" in *San Mateo IV* was "too attenuated to give rise to jurisdiction." *Id.* The Ninth Circuit cited two reasons for this holding, neither of which applies here:

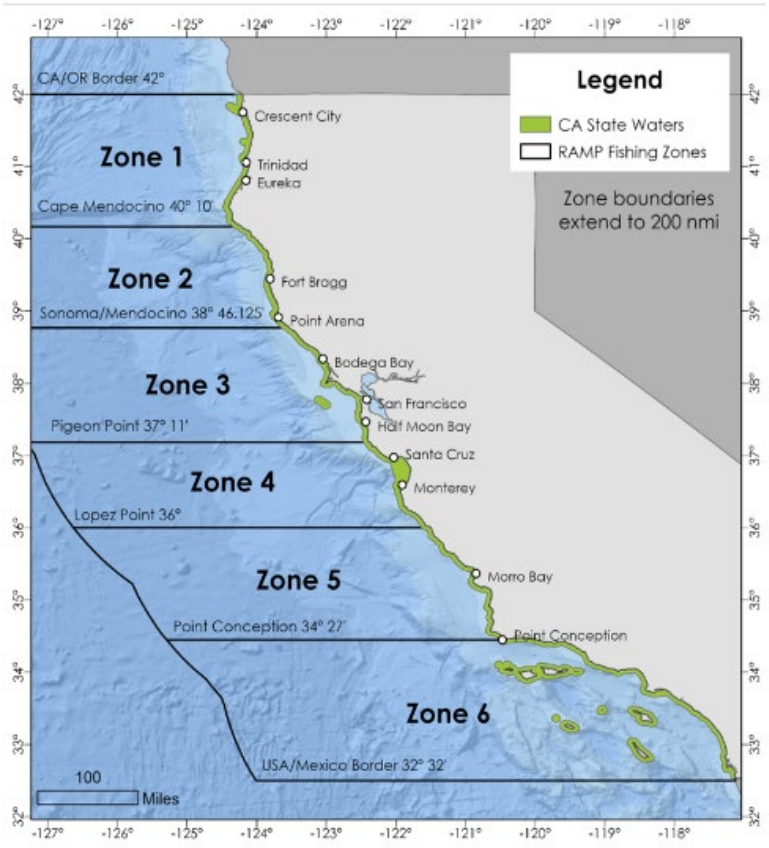
> First, the Counties' complaints ***allege injuries occurring exclusively within their local jurisdictions, not on the outer Continental Shelf***.
>
> Second, instead of alleging wrongful actions on the outer Continental Shelf, the Counties' claims focus on the defective nature of the Energy Companies' fossil fuel products, the Energy Companies' knowledge and awareness of the harmful effects of those products, and their 'concerted campaign' to prevent the public from recognizing those dangers. ***These allegations do not refer to actions taken on the outer Continental Shelf***.

Id. at 754–55 (emphases added). This case is different. The core injury alleged in PCFFA's Complaint—the contamination of Dungeness crabs by domoic acid—occurred on the OCS. And PCFFA's Complaint repeatedly alleges a causal chain between that alleged injury and Defendants' extraction of fossil fuel products—which also occurred on the OCS.

B. Unlike the plaintiffs in *San Mateo IV*, PCFFA alleges injuries occurring on the OCS to federal resources (crabs) located on the OCS.

PCFFA's claims are based on "acute changes to the ocean off of California and Oregon that resulted, over the last three years, in prolonged regulatory closures of the Dungeness crab fisheries." Compl. ¶ 1; *see also id.* ¶¶ 8–10 & 16. Those alleged injuries give rise to federal jurisdiction under OCSLA because the injuries "occurr[ed] on the [OCS]." *San Mateo IV*, 32 F.4th at 753. Those alleged injuries also give rise to federal jurisdiction under 28 U.S.C. § 1331 because the OCS is a federal enclave, and the Dungeness crabs are federal resources subject to the United States' "jurisdiction and control." 43 U.S.C. § 1302.

The Oregon Department of Fish and Wildlife states in its "Dungeness Crab Fishery Management Plan" that "Dungeness crab are distributed throughout a variety of coastal habitats including the continental shelf." Diehl Decl., Ex. I, at 2. Indeed, "*the majority* of crab settle on the continental shelf." *Id.* at 51 (emphasis added). Likewise, a map prepared by the California Department of Fish and Wildlife shows that the Commercial Dungeness Crab Fishery is mostly located on federal lands (shaded blue) as opposed to state lands (shaded green):



Diehl Decl., Ex. J (Cal. Dep't Fish and Wildlife, *CDFW Announces Depth Restriction For The Commercial Dungeness Crab Fishery* (May 2, 2023)). Another California state body—the California Ocean Protection Council[17]—confirms that "[t]he west coast Dungeness crab fishery is conducted in both state (0-3 nautical miles from shore) and federal (3-200 nautical miles) waters of Oregon, Washington and California." Diehl Decl., Ex. K, at 6.

Thus, it is no surprise that PCFFA's Complaint indicates that the alleged injuries occurred on federal lands. The Complaint asserts that "[t]he severity of the economic loss endured by the crabbing community prompted the ***federal*** government to declare the 2015–16 California crab season a ***federal*** fishery disaster under the Magnuson-Stevens Fishery Management and Conservation Act." Compl. ¶ 11 (emphases added). Under that Act, a "fishery resource disaster" means a "disaster" that occurs on the OCS. 16 U.S.C.A. § 1861a(a)(2); *see also Native Vill. of Eyak v. Trawler Diane Marie, Inc.*, 154 F.3d 1090, 1091 (9th Cir. 1998) ("The Magnuson Act" created "exclusive [federal] fishery management authority over all fish and all Continental Shelf fishery resources, within the exclusive economic zone." (quoting 16 U.S.C. § 1811)).[18] The formal declaration of "disaster," issued by Secretary of Commerce Penny Pritzker, makes clear that she is referring to a "disaster" that occurred on the OCS.[19]

In addition, the OCS-based injuries that PCFFA alleges are injuries to federal resources, which independently gives rise to federal jurisdiction under 28 U.S.C. § 1331. The Submerged

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[17] According to its website, the Ocean Protection Council is "a Cabinet-level state body that works jointly with state and federal agencies, NGOs, tribes and the public to ensure that California maintains healthy, resilient, and productive ocean and coastal ecosystems." Ocean Protection Council, https://opc.ca.gov/ (last visited Aug. 11, 2023).

[18] California, Washington, and Oregon regulate Dungeness crab fisheries in the exclusive economic zone adjacent to the State under delegation from Congress. *See* Pub. L. 105–384, Sec. 203 (Nov. 13, 1998); Pub. L. 115–49, 131 Stat. 1000 (Aug. 18, 2017).

[19] *See* Diehl Decl., Ex. L (letter to California); *id.*, Ex. M (letter to Quileute Tribal Council). Secretary Pritzker was prompted to declare a federal "disaster" by a letter she received from the Tribal Council of the Quileute tribe, a Native American people living in western Washington. The Quileute's letter contained a map showing the location of its Dungeness crab fishery, which is predominantly on the OCS. *See Ex*. N (letter from Quileute Tribal Council showing fishing area extending from the Washington coast out to longitude 125°44'00W, which is approximately 32 nautical miles offshore, far into the OCS).

Lands Act, 43 U.S.C. § 1301 *et seq.*, affirms that all "natural resources" of the OCS "appertain to the United States" and that the United States has exclusive "*jurisdiction* and control" over them. 43 U.S.C. § 1302 (emphasis added).[20] The Submerged Lands Act, moreover, specifically defines those "natural resources" to include the very "crabs" whose fisheries, PCFFA alleges, have been injured. 43 U.S.C. § 1301(e). "[I]n this aspect the case is not greatly different . . . from one involving the Government's paramount power of control over its own property . . . ." *United States v. Standard Oil*, 332 U.S. 301, 306 (1947) (federal law governed tortfeasor's liability to United States for injuring soldier in car accident); *see also Camfield v. United States*, 167 U.S. 518, 524 (1897) ("[T]he government has, with respect to its own lands, the rights of an ordinary proprietor . . . ."). Because federal law governs the crabs as natural resources of the United States, PCFFA's claims necessarily arise under federal law, and this Court has jurisdiction under 28 U.S.C. § 1331.

Because the injuries alleged by PCFFA—harm to and closures of west coast Dungeness crab fisheries—occurred on the OCS to federal resources belonging to the United States, this Court has subject-matter jurisdiction under OCSLA and 28 U.S.C. § 1331.

C. Unlike the complaints at issue in *San Mateo IV*, PCFFA's complaint also alleges that Defendants' operations on the OCS led to the alleged injuries.

Unlike the complaints in *San Mateo IV*, PCFFA's Complaint also alleges that Defendants' extraction of fossil fuels—which substantially occurred on the OCS, *see supra,* at 15-16—produced the alleged injuries to the crab fisheries on the OCS. For example, the Complaint alleges:

> Defendants are directly responsible for a large and substantial portion of total CO_2 emissions between 1965 and 2015. For example, based on Defendants' ***direct extractions*** of fossil fuels, they are responsible for more than two hundred gigatons of emissions representing over 15% of total emissions of that potent greenhouse gas during that period. . . . ***Accordingly***, Defendants are directly responsible for a substantial portion of elevated ocean temperatures that caused the domoic acid contamination on the west coast . . . ."

Compl. ¶ 14 (emphases added); *see also id.* ¶¶ 69, 70 & 74 (alleging that Defendants' "extraction" of fossil fuels "caused more than 15% of global fossil fuel product-related CO_2" and thereby

[20] This ground for removal was raised in the Notice of Removal. Dkt. 1, ¶¶ 24–28.

caused "increases in ocean temperature" and "attendant domoic acid outbreaks").

PCFFA's many allegations of causal links between Defendants' fossil fuel extraction (which substantially occurred on the OCS) and the "attendant domoic acid outbreaks" in the Dungeness crab fishery (which is substantially located on the OCS) make this case different from the complaints that the Ninth Circuit considered in *San Mateo IV*. The plaintiffs' complaints in *San Mateo IV* "focus[ed] on the defective nature of the Energy Companies' fossil fuel products, the Energy Companies' knowledge and awareness of the harmful effects of those products, and their 'concerted campaign' to prevent the public from recognizing those dangers." *San Mateo IV*, 32 F.4th at 754–55. Here, by contrast, PCFFA's Complaint focuses on Defendants' "direct extractions of fossil fuels," not some alleged deception. PCFFA alleges that Defendants' "extractions" of fossil fuels and those fuels' subsequent emissions of CO_2 are "responsible for" the "domoic acid contamination on the west coast." Compl. ¶ 14.

D. Defendants did not concede that the Ninth Circuit has already rejected OCSLA removal.

PCFFA's Motion asserts that Defendants "agreed" at the status conference that the "CAFA removal theory is the only ground asserted here the Ninth Circuit has not yet rejected in an analogous case." Mot., at 6. The transcript belies that assertion. At the status conference, Defendants' counsel made clear that they also have unique OCSLA arguments in this case. Ex. B, CMC Tr., at 17:4–18 (MR. DICK: "Here . . . the focus of the claim is on crab fishing, which . . . occurs on the outer continental shelf. So, we would maintain there's a much closer connection here in that regard, in terms of activities on the outer continental shelf"). This Court acknowledged this point in a clarifying question to Defendants' counsel: "THE COURT: . . . so *other than* the outer continental shelf thing . . . and the CAFA thing, you agree that everything else will be decided by the Ninth Circuit? MR. DICK: I think that's likely fair." *Id.* at 19:10–22.

III. This Court also has jurisdiction under the federal-officer removal statute and the *Grable* doctrine.

This Court also has subject-matter jurisdiction based on the federal-officer removal statute, 28 U.S.C. § 1442(a), and the *Grable* doctrine. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

Defendants' arguments as to these two grounds for removal are pending before the Ninth Circuit in *City of Oakland v. B.P. P.L.C., et al.*, No. 22-16810 (9th Cir.). The Ninth Circuit's rulings in *City of Oakland* will be dispositive here. Therefore, Defendants respectfully submit that the most efficient use of judicial resources would be to wait for the Ninth Circuit's decision on these two grounds, and then apply that decision to the identical arguments made here.

Federal jurisdiction exists under 28 U.S.C. § 1442(a)(1) because a significant portion of Defendants' fossil fuel production and sale activities, including their production of large volumes of specialized fuels for the U.S. military and extensive activities during World War II, were undertaken at the direction of federal officers. These activities necessarily relate to PCFFA's alleged injuries, which PCFFA claims arose from the cumulative impact of Defendants' historical production, promotion, sale, and use of oil and gas. *See* Compl. ¶ 70. The expanded evidentiary record that Defendants submitted in *City of Oakland* (and have re-submitted here) substantiates Defendants' extensive fossil fuel production at the direction of federal officers, including decades of producing specialized fuels for the U.S. military according to the government's specifications. *See* Diehl Decl., Ex. O (Decl. of Joshua Dick and Exhibits); Ex. P (Decl. of Tyler Priest and Exhibits).[21] Likewise, during World War II, the U.S. government controlled when, where, and how Defendants extracted and produced oil and gas, and Defendants operated many oil and gas facilities on the government's behalf. *See id.*; *see also id.* Ex. Q (Decl. of Mark Wilson and Exhibits). Defendants also have raised several colorable federal defenses, including government-contractor immunity. Dkt. 1 ¶ 75. Federal officer removal is thus proper because (1) Defendants "'act[ed] under' federal officers," (2) "Plaintiffs' injuries were for or relating to Defendants' actions," and (3) Defendants "can assert a colorable federal defense." *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101, 1106 (9th Cir. 2022) ("*Honolulu II*").

Federal jurisdiction also exists under *Grable*. Because PCFFA's claims involve alleged

[21] Evidence submitted with an opposition brief is properly considered when deciding a motion to remand. *Supra* note 15. Defendants originally submitted these declarations, and the Declaration of Mark Wilson (Diehl Decl., Ex. Q) in opposition to remand in *City of Oakland v. BP P.L.C.*, Case No. 3:17-cv-6011-WHA, Dkt. 349 (Feb. 25, 2021). These declarations now form part of the record before the Ninth Circuit in that appeal.

misrepresentations about the effects of Defendants' fossil fuel products, those claims arise under federal law for purposes of *Grable* jurisdiction because they target constitutionally protected speech. PCFFA's claims, including its Failure to Warn cause of action, will require the Court to address whether the First Amendment protects Defendants' speech on matters of public concern. When "a court will have to construe the United States Constitution" to decide a plaintiff's claims, they "necessarily raise a stated federal issue" under *Grable*, and federal jurisdiction is proper. *See Ortiz v. Univ. of Med. & Dentistry of N.J.*, 2009 WL 737046, at *3 (D.N.J. Mar. 18, 2009) (denying plaintiff's motion to remand where his state-law claim depended on whether a state entity had impinged on his First Amendment rights). PCFFA's Complaint indisputably implicates matters of significant public concern—responsibility for effects of global climate change—which go to the core of the First Amendment's protections. The substantial First Amendment questions raised by PCFFA's claims thus warrant *Grable* removal. *See* 545 U.S. at 313–14.

IV. Defendants preserve their other grounds for removal that are foreclosed by recent Ninth Circuit precedents.

Defendants respectfully preserve their arguments on the following five removal grounds: (i) PCFFA's claims are governed by federal common law; (ii) PCFFA's claims are completely preempted by the Clean Air Act and/or other federal statutes and the U.S. Constitution; (iii) admiralty jurisdiction, *see* 28 U.S.C. § 1333; (iv) federal-enclave jurisdiction; and (v) bankruptcy jurisdiction, *see* 28 U.S.C. §§ 1334(b) & 1452(a).

However, Defendants concede that this Court is bound to deny removal on these five grounds because of the Ninth Circuit's controlling decisions in *San Mateo IV*, 32 F.4th 733; *Honolulu II*, 39 F.4th 1101; and *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020) ("*Oakland II*"). Those Ninth Circuit decisions rejected these five grounds for removal, and those holdings are controlling in this Court.

V. PCFFA is not entitled to attorneys' fees.

PCFFA's request for attorneys' fees should be denied because Defendants had valid grounds for removal—both when they originally removed this case in 2018 and when they objected to the Court's proposed *sua sponte* remand earlier this year.

"Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). "[R]emoval is not objectively unreasonable solely because the removing party's arguments lack merit" and the removal is ultimately unsuccessful. *Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1065 (9th Cir. 2008) (affirming denial of request for attorneys' fees).

Defendants' removal was objectively reasonable. As for CAFA and OCSLA, Defendants have presented compelling arguments for removal that are unique to this case and that no court has considered in any other climate-change action. As for federal-question removal, at the time Defendants removed this action in December 2018, Judge Alsup had *agreed with Defendants* that removal was proper under 28 U.S.C. § 1441(a) because a climate-change plaintiff's claims necessarily arise under federal law. *See California v. BP p.l.c.*, No. C 17-06011 WHA, 2018 WL 1064293, at *1 (N.D. Cal. Feb. 27, 2018) ("plaintiffs' claims, if any, are governed by federal common law"), *vacated and remanded*, *Oakland II*, 969 F.3d 895. Judge Alsup's ruling, in and of itself, demonstrates that Defendants' removal of this case was not "objectively unreasonable."

Judge Alsup is not alone. The Second Circuit similarly held that claims seeking redress for injuries allegedly caused by global climate change, like those asserted here, are "federal claims" that "must be brought under federal common law." *City of New York v. Chevron Corp.*, 993 F.3d 81, 92, 95 (2d Cir. 2021). The U.S. Department of Justice agreed that such claims are removable in 2021 (before reversing its position in 2023). In 2021, the U.S. Solicitor General told the Supreme Court of the United States that climate-change lawsuits are removable to federal court because "they are inherently and necessarily federal in nature."[22] Given this District's, the Second Circuit's, and the Solicitor General's endorsements of Defendants' removal arguments, Defendants plainly had an "objectively reasonable" basis for seeking removal in 2018. *Lussier*, 518 F.3d at 1065.

PCFFA wrongly asserts that because "Defendants refused to withdraw" any of the removal

[22] Brief for the United States as Amicus Curiae Supporting Petitioners at 26, *BP p.l.c. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021) (No. 19-1189).

grounds asserted in the Notice of Removal, PCFFA had "no choice but to brief each of these removal arguments." Mot., at 25. That assertion is incorrect because Defendants made clear during the status conference that only two removal grounds—CAFA and OCSLA—still required full briefing here. *See* Ex. B, CMC Tr. at 19:10–22. PCFFA's decision to brief five removal grounds that the Ninth Circuit has already rejected in controlling cases is not Defendants' responsibility and does not warrant an extraordinary grant of attorneys' fees. Moreover, it was PCFFA that moved to lift the stipulated stay so that it could move for remand now, rather than waiting for the Ninth Circuit's forthcoming opinion in *City of Oakland*, which will decide whether removal is appropriate under the federal-officer removal statute and the *Grable* doctrine. *See id.* at 11:10–17.

CONCLUSION

This case belongs in federal court under both CAFA and OCSLA. PCFFA is an association bringing a representative action on behalf of hundreds of its "members." California case law makes clear that this kind of representative action is, in its substance and essentials, a class action brought under rules of judicial procedure that are similar to federal Rule 23. Unlike other climate-change cases, this one alleges relevant conduct and injuries that occurred in large part on the OCS to federal resources located on the OCS. PCFFA's motion for remand should be DENIED.

DATED: August 14, 2023

Respectfully submitted,

By: */s/ Neal S. Manne*

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** Pursuant to Civ. L.R. 5-1(i)(3), the electronic signatory has obtained approval from this signatory.

CERTIFICATE OF SERVICE

I certify that on August 14, 2023, I caused the foregoing document to be filed on the Court's CM/ECF system, which will effect electronic service on all counsel of record.

/s/ Steven M. Shepard
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