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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

**PLAINTIFF'S REPLY IN SUPPORT OF 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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## I. INTRODUCTION

Defendants' Opposition, Dkt. 234 ("Opp."), to PCFFA's Motion to Remand, Dkt. 224 ("Mot."), does not lack for inventiveness. At the case management conference on May 26, 2023, this Court suggested that Defendants' jurisdictional theories are "almost like . . . we're sitting in a room and we're trying to think of any conceivable argument we can make in support of a removal, no matter how funny it may be," and Defendants' Opposition supports that view. *See* Ex. B to Decl. of K. Diehl, Dkt. 234-3, May 26 CMC Tr. at 14:1–3. This case must be remanded to the California Superior Court where it was filed, and the Court should grant PCFFA its reasonable costs and attorneys' fees incurred as a consequence of removal, pursuant to 28 U.S.C. § 1447(c).

Of the eight grounds for removal Defendants raise or "preserve" in opposition to remand, *none* have case support and all are plainly meritless. Defendants first say this case is removable under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2) ("CAFA"), because as an association "PCFFA claims to 'represent' a large class of hundreds of absent parties—its 'members'" and "'[r]epresentative' actions are authorized by Section 382 of the California Code of Civil Procedure," which defines the requirements for representative actions under California law, including class actions. Opp. at 5. But Defendants' theory misconstrues PCFFA's Complaint, which does not "see[k] damages for alleged injuries to hundreds of crab businesses." *Id.* at 7. The Complaint makes clear PCFFA seeks relief for injuries it suffered directly and for claims assigned from certain of its members. PCFFA does not seek damages on behalf of any absent class. Defendants cite no case from any court where federal subject-matter jurisdiction has been upheld on the basis that a plaintiff *could have* sought class relief under state law but chose not to. All applicable authority is to the contrary: "Even assuming Defendant's argument is correct, the fact that a plaintiff's complaint seeks damages only technically available in a class action does not somehow transform the complaint into a class action complaint." *Belton v. Hertz Loc. Edition Transporting, Inc.*, No. 19-CV-854-WHO, 2019 WL 2085825, at *4 (N.D. Cal. May 13, 2019) (quoting *Hoffman v. Sterling Jewelers, Inc.*, No. 18-cv-696-BEN-WVG, 2018 WL 6830610, at *3 (S.D. Cal. Dec. 21, 2018)). A plaintiff's "[f]ailure to request class status or its equivalent is fatal to CAFA jurisdiction," and there is no such request here. *Hawaii ex rel. Louie v. HSBC Bank Nev., N.A.*, 761 F.3d 1027, 1040 (9th Cir. 2014).

Defendants' argument for jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b) ("OCSLA"), fares no better. Defendants contend OCSLA confers jurisdiction because (1) "the injuries alleged by PCFFA occurred in large part on the OCS [outer Continental Shelf] to 'natural resources' (Dungeness crabs) over which the United States exercises 'jurisdiction and control,'" and (2) "those injuries occurred because of Defendants' activities on the OCS, rather than because of Defendants' supposed misrepresentations." Opp. at 16. As to the first theory, Defendants again cite no case from any court upholding federal-question jurisdiction on that basis. The theory is irreconcilable with OCSLA's plain language granting original jurisdiction to district courts over cases "arising out of, or in connection with . . . any operation conducted on the outer Continental Shelf which involves *exploration, development, or production of the minerals*, of the subsoil and seabed of the outer Continental Shelf, or which involves *rights to such minerals*." 43 U.S.C. § 1349(b)(1) (emphasis added). OCSLA says nothing about federal jurisdiction over cases involving fisheries, and to the contrary "shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation *and fishing therein* shall not be affected." 43 U.S.C. § 1332(2) (emphasis added).

Defendants' second OCSLA theory, that this case is distinguishable from *County of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022) ("*San Mateo IV*"), *cert. denied*, 143 S. Ct. 1797 (2023), because the Complaint alleges "causal links between Defendants' fossil fuel extraction (which substantially occurred on the OCS)" and PCFFA's injuries, Opp. at 21, misrepresents both the Complaint and *San Mateo IV*. The Complaint explicitly rests on "Defendants' production, *promotion, marketing*, and use of fossil fuel products, *simultaneous concealment of the known hazards of those products*, and their *championing of anti-regulation and anti-science campaigns*, [which] actually and proximately caused Plaintiff's injuries." Complaint, Dkt. 1-2 ("Compl."), ¶ 15 (emphasis added). Defendants in fact separately argue that there is jurisdiction "[b]ecause PCFFA's claims involve alleged misrepresentations about the effects of Defendants' fossil fuel products," and thus "target constitutionally protected speech." Opp. at 22–23. Just as in *San Mateo IV*, the Complaint "focus[es] on the defective nature of [Defendants'] fossil fuel products, [their] knowledge and awareness of the harmful effects of those products, and their 'concerted campaign' to prevent

the public from recognizing those dangers." 32 F.4th at 754–55. "These allegations do not refer to actions taken on the outer Continental Shelf," *id.* at 755, and OCSLA jurisdiction is absent.

Defendants' remaining theories merit no more than the scant attention Defendants pay them. This case is not removable under the federal officer removal statute, 28 U.S.C. § 1442, and the Ninth Circuit has already held that Defendants' alleged "production of large volumes of specialized fuels for the U.S. military and extensive activities during World War II," *see* Opp. at 22, do not support removal. *See City & Cnty. of Honolulu v. Sunoco LP*, No. 20-cv-163-DKW-RT, 2021 WL 531237, at *5 (D. Haw. Feb. 12, 2021) (granting remand and finding defendants' alleged "supply of specialized fuels during World War II, the Korean War, the Cold War, and between 1983 and 2011 to the Department of Defense" did not support removal), *aff'd*, 39 F.4th 1101 (9th Cir. 2022) ("*Honolulu II*"), *cert. denied*, 143 S. Ct. 1795 (2023). Defendants' theory that jurisdiction exists under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), because they intend to raise First Amendment defenses to PCFFA's claims, *see* Mot. at 22–23, has been rejected out of hand by every court to consider it because federal defenses plainly do not support federal-question jurisdiction. *See* Mot. at 13–14 (citing *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 709 (3d Cir. 2022) ("*Hoboken II*"), *cert. denied*, 143 S. Ct. 2483 (2023)), and other decisions). And Defendants acknowledge that their five other removal arguments concerning federal common law, complete preemption by the Clean Air Act, admiralty jurisdiction, federal-enclave jurisdiction, and bankruptcy jurisdiction all are foreclosed by the Ninth Circuit's decisions in *San Mateo IV*, *Honolulu II*, and *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020) ("*Oakland II*"), *cert. denied*, 141 S. Ct. 2776 (2021). *See* Opp. at 23. The case must be remanded.

The removal procedure statute provides for fee-shifting where the removing defendant "lacked an objectively reasonable basis for" pursuing federal jurisdiction, "to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 140, 141 (2005). No purpose has been served by removal in this case other than nearly five years of delay, and Defendants' jurisdictional theories are frivolous. An award of fees and costs is warranted.

## II. ARGUMENT

### A. PCFFA's Claims Are Not Removable Under CAFA.

Defendants' Opposition does not seriously engage with controlling Ninth Circuit case law or on-point authority considering the removability of non-class state law claims under CAFA. Uniform precedent is clear that where a plaintiff expressly disclaims recovery on behalf of a class, courts cannot "ignore those disclaimers and transmogrify [such] suits into class actions." *Louie*, 761 F.3d at 1039. That is the case here—this is not a class action in disguise. And notwithstanding Defendants' argument that PCFFA could only recover damages under California law if this case proceeds as a class action, "a motion to remand is not the appropriate means by which to resolve" whether "the damages sought by [a] [p]laintiff may only be available in a class action," because "such a dispute is best reserved for a motion to dismiss or strike in state court." *Hoffman*, 2018 WL 6830610, at *3.

Defendants are correct that "no antiremoval presumption" applies to cases removed under CAFA. *See Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 89 (2014); *Jauregui v. Roadrunner Transp. Servs., Inc.*, 28 F.4th 989, 992 (9th Cir. 2022) (courts should not "pu[t] a thumb on the scale against removal" in cases removed under CAFA); *see* Opp. at 3. Nonetheless, "under CAFA the burden of establishing removal jurisdiction remains, as before, on the proponent of federal jurisdiction." *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006); *accord Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (Easterbrook, J.) (noting that "[t]he rule that the proponent of federal jurisdiction bears the risk of non-persuasion has been around for a long time" and rejecting contention that "the Class Action Fairness Act reassigns that burden to the proponent of remand"). A defendant removing under CAFA therefore must still "show by a preponderance of the evidence that the jurisdictional requirements are satisfied." *Arias v. Residence Inn by Marriott*, 936 F.3d 920, 924 (9th Cir. 2019).

As discussed in PCFFA's Motion, *see* Mot. at 7, the Ninth Circuit has repeatedly held that "[t]here is no ambiguity in CAFA's definition of class action." *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 848 (9th Cir. 2011). A case is a "class action" under CAFA when it is filed under Fed. R. Civ. P. 23, or under a state statute or rule that "closely resembles Rule 23 or is like Rule 23 in substance or in essentials." *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1121 (9th Cir. 2014)

(quoting *W. Va. ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 174 (4th Cir. 2011)). In turn, "[t]o be removable under CAFA, a 'class action' must be '*filed under*' Rule 23 or a state law equivalent." *Louie*, 761 F.3d at 1040 (emphasis added). "Although suits that lack the defining attributes of true class actions may be 'representative actions,' they are not 'class actions' under CAFA." *Canela v. Costco Wholesale Corp.*, 971 F.3d 845, 851 (9th Cir. 2020) (cleaned up). "The appropriate inquiry is therefore whether a complaint seeks class status," and "[f]ailure to request class status or its equivalent is fatal to CAFA jurisdiction." *Louie*, 761 F.3d at 1040.

**1. PCFFA Does Not and Will Not Seek Class Relief, and Will Not Be Required to Prove the Elements of Rule 23 to Recover on Its Claims.**

PCFFA is not, as Defendants insist, "seek[ing] to recover the alleged 'economic losses' that *all* 'commercial Dungeness crab harvesters and onshore crab processors and wholesalers . . . have suffered, and continue to suffer'" as a result of climate-change-induced fishery closures. *See* Opp. at 6 (quoting Compl. ¶ 11). This is not what the Complaint says. Defendants added "*all*" in italics to the language they put in quotes but the word does not appear there, or in any other relevant context, because that is not the relief PCFFA is seeking. Rather, PCFFA seeks relief for claims that accrued to PCFFA in the first instance, and claims assigned to it by certain of its members. It does not, and will not, seek relief for claims belonging to absent parties. Because the Complaint does not seek class treatment or class relief, it is not a class action under CAFA.

Defendants' assertions characterizing the Complaint as a class action "in substance," *e.g.*, Opp. at 3, all flow from strained inferences Defendants draw from cherry-picked words and phrases. The Complaint says that "Plaintiff represents commercial Dungeness crab harvesters and onshore crab processors and wholesalers," and at the status conference before the Court, counsel stated that PCFFA "represent[s] commercial of [sic] [D]ungeness crab fishermen." *See* Opp. at 6 (quoting Compl. ¶ 11 & Diehl Decl., Ex. B at 10:7–10). Defendants insist those are fatal admissions that the Complaint seeks class relief. *See id.* In context, however, both are factual statements about what PCFFA is and does. PCFFA is a "not-for-profit trade organization" that "fights for the long-term survival of commercial fishing—including commercial Dungeness crab fishing—as a productive livelihood and way of life." Compl. ¶ 18. Defendants further note that "[t]he Complaint defines

'Plaintiff' to include PCFFA's 'members.'" Opp. at 6 (quoting Compl. ¶ 19). That is true so far as it goes, but does not mean this is a class action within the meaning of CAFA. The Complaint alleges, for example, that a stigma associated with Dungeness crabs following the fishery closures "adversely affects Plaintiff *and its members*," and "caused Plaintiff *and its members* a substantial loss of income," allegations which would make no sense if "Plaintiff" necessarily meant a class including PCFFA and its members. *See* Compl. ¶ 175 (emphasis added). A fair construction of the Complaint does not show that PCFFA seeks class relief, because PCFFA does not seek that relief.

Defendants contend that "[a]ll the injuries the Complaint describes were allegedly suffered by PCFFA's 'members,' not by PCFFA," Opp. at 6, but that is simply wrong. First, PCFFA alleges that it was directly injured by being required to expend "staff time and energy to address [domoic acid] outbreaks in the media, working with state agencies to determine crab fishery closure and reopening procedures, sharing information on domoic acid and closures with its members, and appealing to state and federal entities for fishery disaster relief, among other activities." Compl. ¶ 20. Defendants' argument that those allegations "com[e] nowhere close to the kind of injury that would permit PCFFA to bring tort claims for public nuisance or products liability," Opp. at 7, is a merits issue for the Superior Court to resolve on remand. Regardless, PCFFA also brings claims "as [the] assignee of claims assigned to it by individuals and businesses that derive income from the California and Oregon Dungeness crab fisheries," Compl. ¶ 19, and alleges that the organization was "deprived of a substantial portion of [its] annual revenue from the Dungeness crab fishery" based on those assigned interests, *id.* ¶ 172. *See also, e.g., id.* ¶ 174 ("Onshore crab wholesalers and processors, including Plaintiff, were deprived of a substantial portion of their annual revenue during the 2015–16, 2016–17, and 2017–18 crab seasons, and will continue to suffer such injuries during future domoic acid-induced fishery closures."). Defendants acknowledge that a plaintiff may "bring a lawsuit to recover for someone else's damages claim with[] a formal claim assignment from that other person," and acknowledge that such assignments were made here. Opp. at 8 & n.9. They do not, however, try to square those acknowledgments with their false assertion that "PCFFA is not the real party in interest" and has not alleged any compensable harm. *See id.* at 8.

To dispel any doubt: PCFFA is not "seeking damages for alleged injuries to hundreds of crab businesses." *See* Opp. at 7. This action seeks to vindicate injuries PCFFA suffered directly and injuries subject to claims assigned to PCFFA by some of its members. This is not a class action.

**2. Irrespective of Whether This Is a Non-Class Representative Action Under California Law, It Is Not a Class Action for Purposes of CAFA.**

Defendants' central contention that this must be a class action because "[i]f this case were anything other than a representative action under Section 382, then PCFFA would not have authority to bring it," Opp. at 7, and their related contention that "PCFFA is not the real party in interest," *id.* at 8, are both wrong. Courts in this Circuit have rejected that same line of reasoning repeatedly.

In addition to the cases cited in PCFFA's Motion, *see* Mot. at 8–9, *Hoffman v. Sterling Jewelers, Inc.*, is highly instructive. *See* 2018 WL 6830610 (S.D. Cal. Dec. 21, 2018). The plaintiff there brought claims against her employer under California's Private Attorneys General Act ("PAGA"). *Id.* at *1. The employer removed on CAFA grounds, arguing that some of the plaintiff's requested penalties "are not available under PAGA and are only available if she brings a class action." *Id.* at *2. The court granted remand, observing it was "not tasked with evaluating the merits of the plaintiff's claims—whether plaintiff's claims are 'authorized, as plead, under PAGA,'" which was "best reserved for a motion to dismiss or strike in state court." *Id.* at *3; *see also Louie*, 761 F.3d at 1039 (no CAFA jurisdiction even though "Attorney General's attempt to bring these actions while disclaiming class status may fail under state law"); *Belton*, 2019 WL 2085825, at *3–4; *Kidner v. P.F. Chang's China Bistro, Inc.*, No. EDCV 15-287 JGB (KKx), 2015 WL 2453523, at *4 (C.D. Cal. May 21, 2015) (granting remand where "it d[id] not appear that Plaintiffs are attempting to sneak a disguised class action past Defendant, but rather that Plaintiffs are merely confused as to what damages are proper under PAGA"); *Peña v. Sea World, LLC*, No. 14-cv-391-GPC-BLM, 2014 WL 12508597, at *4 (S.D. Cal. Aug. 26, 2014) (granting remand because PAGA action was not a class action for CAFA purposes: "Nowhere does the Complaint seek class status, plead the existence of a class, cite California's class action statute, . . . or define the limits of a class; in fact, the word 'class' fails to appear in the Complaint"). Defendants' argument that PCFFA is not "authorized to

bring tort claims for money damages allegedly suffered by absent 'real parties in interest,'" *see* Opp. at 12, is indistinguishable from the position rejected in *Hoffman* and fails for the same reasons.[1]

Authority from other circuits is in accord. In *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 211 (2d Cir. 2013), for example, the Commonwealth of Kentucky brought *parens patriae* claims alleging that the defendants made false and misleading statements to promote the opioid drug OxyContin, "which resulted in widespread addiction and other adverse consequences" within and to Kentucky. The Second Circuit affirmed remand to state court, holding that the *parens patriae* claims were not class claims under CAFA. *Id.* at 215–17. The court rejected the defendants' argument that while the complaint did not reference any Kentucky class action statute or rule, "a careful review of the claims raised therein [would] reveal[] that the Attorney General [wa]s actually relying, albeit surreptitiously, on those provisions to assert representative claims for restitution." *Id.* at 216 n.7. "[B]ecause none of the statutes cited in the complaint specify the procedural mechanisms through which such representative claims are brought," the defendants argued, rules concerning class treatment would "automatically apply to fill the gap." *Id.* The Second Circuit "disagree[d]," emphasizing that a CAFA class action is "a civil action '*filed under*' a state-law equivalent to Rule 23," and stating that it was "hard pressed to understand how a suit may be 'filed under' a statute or rule that does not even appear on the face of the complaint." *Id.* The court continued that "the mere fact that the Attorney General *could have* utilized some other statutory or procedural mechanism to recover restitution is beside the point," because "[p]laintiffs, as masters of their complaint, are always free to choose the statutory provisions under which they will bring their claims." *Id.* The

[1] Defendants say *Belton*, *Louie*, and cases like them (*e.g.*, *Hoffman*) are distinguishable because they involved *parens patriae* claims, claims under PAGA, or claims under California's Unfair Competition Law, *see* Cal. Bus. & Prof. Code § 17200, *et seq.*, not private common law torts. *See* Opp. at 13–15. But Defendants take the wrong lesson from those opinions. They hold that the availability of certain remedies under state law, and whether state law authorizes the claims and relief pleaded, are merits questions for the state court. The only "appropriate inquiry" for the district court, across contexts, remains "whether [the] complaint *seeks class status*." *See Louie*, 761 F.3d at 1040 (emphasis added). Defendants do not try to explain why that reasoning falters here.

Commonwealth chose not to seek class treatment, which defeated CAFA removal. *See id.* at 217.[2] So too here. The Complaint here "does not assert class allegations under California Code of Civil Procedure § 382 or Federal Rule of Civil Procedure 23," and "does not seek class status, plead the existence of a class, define the limits of a class, or even reference the word, 'class.'" *Hoffman*, 2018 WL 6830610, at *3. This case is therefore not a class action under CAFA and is not removable.

Defendants' primary retort seems to be that if PCFFA's case is a representative action, it must be a class action and must satisfy Section 382. First of all, that is not true as a general matter of California law. For example, "[i]t is settled that an unincorporated association can sue in a representative capacity when it has been injured itself or to bring an action for prospective relief such as an injunction or a declaration of rights." *Tenants Ass'n of Park Santa Anita v. Southers*, 222 Cal. App. 3d 1293, 1302 (1990) (citation omitted); *see also Cnty. of San Luis Obispo v. Abalone All.*, 178 Cal. App. 3d 848, 863–64 (1986) (distinguishing between representative actions seeking "declaratory or injunctive relief which would inure to the benefit of the plaintiff organizations' members" and cases brought by "organizational plaintiffs [that] satisfy the requirements for a representative or class action under Code of Civil Procedure section 382"). Regardless, the cases Defendants rely on to argue that PCFFA must satisfy Section 382's class requirements are inapposite. None dealt with federal subject-matter jurisdiction, several pre-date CAFA, and they address whether, under California law, an organizational plaintiff has standing "to sue for *damages on behalf of its members* where *the association itself ha[s] not been injured*." *Salton City Area Prop. Owners Ass'n v. M. Penn Phillips Co.*, 75 Cal. App. 3d 184, 188 (1977) (emphasis added); *see also River's Side at Wash. Square Homeowners Ass'n v. Superior Ct.*, 88 Cal. App. 5th 1209, 1230 (2023)

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[2] *See also Erie Ins. Exch. v. Erie Indem. Co.*, 722 F.3d 154, 159 (3d Cir. 2013) (holding claims by unincorporated association not removable under CAFA because "[i]f the case is procedurally unsound under Pennsylvania's rules, the Commonwealth's courts are best suited to correct the problem," and declining to "rewrite the Complaint to create jurisdiction under the pretense of correcting a state-law error"); *In re Vioxx Prods. Liab. Litig.*, 843 F. Supp. 2d 654, 664 (E.D. La. 2012) ("Congress chose to define 'class action' not in terms of joinder of individual claims or by representative relief in general, but in terms of the statute or rule the case is filed under. . . . This is a statutory requirement; no amount of piercing the pleadings will change the statute or rule under which the case is filed. . . . If this is a formalistic outcome, it is a formalism dictated by Congress.").

(similar), *as modified on denial of reh'g* (Mar. 30, 2023), *review denied* (June 14, 2023); *Nat'l Solar Equip. Owners' Ass'n v. Grumman Corp.*, 235 Cal. App. 3d 1273, 1280 (1991) (similar), *as modified* (Nov. 27, 1991), *review denied* (Jan. 23, 1992); *Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co.*, 114 Cal. App. 3d 783, 795 (1981), *reh'g denied* (Feb. 19, 1981) (similar). As discussed above, neither of those two factors is present here. First, PCFFA has alleged its own injuries both directly and by assignment, and second, it does not seek "damages on behalf of its members." Finally, as discussed above, even if Defendants were correct that PCFFA lacks standing under California law or may not recover some of its alleged damages, those are matters for the state court to resolve.

**B. PCFFA's Claims Are Not Removable Under OCSLA.**

Defendants' arguments for OCSLA jurisdiction are meritless. As an initial matter, Defendants' contention that OCSLA or perhaps federal-question jurisdiction attaches "because the OCS is a federal enclave, and the Dungeness crabs are federal resources," Opp. at 18, makes no sense and is irreconcilable with both *San Mateo IV* and OCSLA's jurisdictional grant and purposes. Defendants cite no case where OCSLA jurisdiction has attached solely because the plaintiff's injuries involve deep water marine life, and PCFFA has found none.

OCSLA grants district courts original jurisdiction over "cases and controversies arising out of, or in connection with . . . any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals." 43 U.S.C. § 1349(b)(1). The Ninth Circuit in *San Mateo IV* addressed the scope of OCSLA's jurisdictional grant by reference to "the structure and purpose of OCSLA as a whole." 32 F.4th at 752. The court explained that "the purpose of OCSLA was 'to assert the exclusive jurisdiction and control of the Federal Government of the United States over the seabed and subsoil of the outer Continental Shelf, and to provide for the development of its vast *mineral* resources.'" *Id.* (emphasis added) (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479 n.7 (1981)). The Fifth Circuit has likewise long stated that "[c]learly, . . . the efficient exploitation of the minerals of the OCS, . . . was at least a primary reason for OCSLA." *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988).

OCSLA in general, and the jurisdictional grant in particular, focus on mineral rights and mineral production; neither says anything about marine life or other non-mineral resources.

Defendants argue that the Submerged Lands Act, 43 U.S.C. § 1301(e) ("SLA"), defines "'natural resources' to include the very 'crabs' whose fisheries, PCFFA alleges, have been injured," and suggest that definition extends OCSLA jurisdiction over all cases involving Dungeness crab. *See* Opp. at 20. The Alaska Supreme Court rejected an indistinguishable argument in the context of federal preemption in *State v. Bundrant*, 546 P.2d 530 (Alaska 1976). There, several criminal defendants charged under state law with harvesting king crab outside permitted areas and seasons argued that "in the OCSLA Congress intended to establish federal preemption of all the natural resources of the outer shelf, including crab." *Id.* at 545. The court discussed the history of the SLA and OCSLA, noting that "although they were closely related in time and origin, the SLA and the OCSLA constitute separate acts of Congress" and therefore "one cannot argue that the SLA definition of 'natural resources' is directly applicable to the terms of the OCSLA." *Id.* The court refused to hold that OCSLA "preclude[s] a state from regulating fishing by its own citizens on the high seas," and found it "far more plausible . . . that Congress did not believe that the OCSLA in any manner affected the state's rights to regulate the taking of sponges, crabs, and other forms of sedentary and nonsedentary marine life." *Id.* at 547. The court held that OCSLA distinguishes "between the inorganic resources of the subsoil and seabed (principally oil), which were thenceforth to be the exclusive domain of the federal government, and organic marine life resources, which were not affected by the act." *Id.* at 546. Defendants cite no contrary authority from any court concerning either preemption or subject-matter jurisdiction. Their theory that any case involving marine life on the Continental Shelf is within the exclusive jurisdiction of the federal courts has no support.

Defendants say "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," Opp. at 19, but that novel argument cannot be squared with the Ninth Circuit authority Defendants agree is controlling. "The general rule, referred to as the 'well-pleaded complaint rule,' is that a civil action arises under federal law for purposes of § 1331 when a federal question appears on the face of the complaint." *Oakland II*, 969 F.3d at 903. "There are a few exceptions to the well-pleaded-complaint rule,"

including the "'special and small category' of state-law claims that arise under federal law for purposes of § 1331 'because federal law is a necessary element of the claim for relief.'" *Id.* at 904 (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006) (cleaned up)). The Supreme Court "has articulated a test for deciding when this exception to the well-pleaded-complaint rule applies," *id.*, which is captured in *Grable*, 545 U.S. 308, and its progeny. *See* Mot. at 2–3, 12–14. Defendants do not attempt to apply *Grable* to their "federal resources" theory and do not cite any case upholding jurisdiction on any theory similar their assertion that "[b]ecause federal law governs the crabs as natural resources of the United States, PCFFA's claims necessarily arise under federal law." Opp. at 20. None of their citations or documentary submissions have anything to do with federal-question jurisdiction in district court. *Id.* at 18–20. The argument is meritless.

Defendants' other argument, that "PCFFA's Complaint focuses on Defendants' 'direct extractions of fossil fuels,' not some alleged deception," Opp. at 21, is obviously wrong and ignores the Complaint's actual allegations. PCFFA alleges that Defendants' "lead role in promoting, marketing, and selling their fossil fuels products between 1965 and 2015; their efforts to conceal the hazards of those products from consumers; their promotion of their fossil fuel products despite knowing the dangers associated with those products; [and] their dogged campaign against regulation of those products based on falsehoods, omissions, and deceptions" all "substantially and measurably contributed to" PCFFA's injuries. Compl. ¶ 76. The Complaint describes at length Defendants' efforts to understand the science of climate change and adapt their own operations to its expected arrival, their failure to warn, and their campaigns to mislead the public about those facts. *See id.* ¶¶ 77–162. The Complaint then reiterates that Defendants' conduct, including expressly "their wrongful promotion of their fossil fuel products and concealment of known hazards associated with use of those products" are "a substantial factor in causing" PCFFA's injuries. *Id.* ¶ 165. Defendants' contention that this case is not "focuse[d] on . . . some alleged deception," Opp. at 21, cannot even colorably be squared with the Complaint.

In view of the Complaint's actual allegations, the Ninth Circuit's decision in *Honolulu II* explains why Defendants' argument fails:

> Defendants' sporadic OCS activities cannot shoehorn OCSLA jurisdiction for just any tort claim. The parties agree that some Defendants engaged in exploration, development, and production on the OCS. If that were the test, then Defendants might have an argument. Yet federal jurisdiction does not exist because oil and gas companies' OCS activities are too attenuated and remote from Plaintiffs' alleged injuries. . . . Plaintiffs contend that oil and gas companies created a nuisance when they misled the public. But just because Defendants were allegedly trying to hoodwink the public about harm from oil and gas operations—partially occurring on the OCS—does not mean that OCS activities caused Plaintiffs' injuries. The connection is too tenuous.

39 F.4th at 1112 (citations omitted); *see also San Mateo IV*, 32 F.4th at 754–55. So too here. Under *Honolulu II* and *San Mateo IV*, "even if OCS-produced oil accounts for 30% of annual domestic production, as Defendants assert," finding OCSLA jurisdiction here "would dramatically expand OCSLA's scope," and "build a bridge too far." *Honolulu II*, 39 F.4th at 1112–13 (cleaned up).

### C. Defendants' Other Jurisdictional Theories Are Squarely Foreclosed by Circuit Precedent, and PCFFA Is Entitled to Attorneys' Fees and Costs Incurred from Removal.

None of Defendants' other jurisdictional theories have merit, and Defendants do not seriously argue otherwise. For the reasons stated in PCFFA's Motion and in the Introduction to this Reply, Defendants' federal officer removal arguments and *Grable* arguments concerning their First Amendment defenses are meritless. *See* Mot. at 12–14, 15–16; *supra* Part I. Defendants say those grounds for removal "are pending before the Ninth Circuit" in their appeal from Judge Alsup's order granting remand in the *Oakland* case, Opp. at 22, and that only their OCSLA and CAFA arguments "required full briefing here," Opp. at 25. No court has found that either of those theories support removal in analogous cases, and this Court should likewise reject them. Defendants also "respectfully preserve" five other theories of jurisdiction, but "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*, *Honolulu II*, and *Oakland II*. Opp. at 23. PCFFA agrees.

Because none of Defendants' theories for federal subject-matter jurisdiction have even arguable merit and most are directly foreclosed by controlling authority in cases to which Defendants themselves were parties, the Court should award PCFFA its fees and costs incurred because of

removal.[3] And while fees under 28 U.S.C. § 1447(c) are typically warranted only where "the removing party lacked an objectively reasonable basis for seeking removal, . . . district courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case." *Martin*, 546 U.S. at 141. Courts "departing from the general rule should be faithful to the purposes of awarding fees under § 1447(c)," *id.* (cleaned up), which include "reduc[ing] the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff." *Id.* at 140. Defendants have filibustered this case for nearly five years pursuing an encyclopedia of jurisdictional theories, ranging from meritless to frivolous, that have been rejected by more than a dozen district courts as well as the First, Third, Fourth, Eighth, Ninth, and Tenth Circuits. No court has embraced any of them. When PCFFA's counsel inquired after the May 2023 case management conference before this Court whether Defendants would withdraw any of those arguments, Defendants refused to do so. *See* Decl. of K. Jones, Dkt. 224-1, ¶ 2. These circumstances, whether objectively unreasonable or unusual, call for sanctions.

Even assuming Defendants had a reasonable basis to pursue the two theories that are not squarely foreclosed—namely, CAFA and OCSLA—the Court should still award PCFFA its partial fees and costs incurred briefing and arguing Defendants' remaining removal theories. Courts in this District and elsewhere in this Circuit have awarded partial fees where, as here, "the Ninth Circuit has rejected the very arguments [a defendant] advances" as to certain bases for removal, while "the

[3] Defendants say their continued press for federal jurisdiction is reasonable because in 2018, "Judge Alsup had *agreed with Defendants* that removal was proper" on federal-question grounds, Opp. at 24. They do not mention that the Ninth Circuit reversed that holding in 2020, *see Oakland II*, 969 F.3d 895, or that in October 2022 Judge Alsup "addresse[d] all of the remaining possible grounds for removal jurisdiction and f[ound] that remand [wa]s required," *City of Oakland v. BP P.L.C.*, No. 17-cv-06011-WHA, 2022 WL 14151421, at *8 (N.D. Cal. Oct. 24, 2022), which is why the case is again on appeal. Defendants' reliance on *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), is also puzzling, both because it was decided in 2021—three years after Defendants removed this case—and because it involved a motion to dismiss a case filed in federal court in the first instance and not the heightened standard applicable to federal removal jurisdiction. The Second Circuit expressly "reconcile[d] [its] conclusion with the parade of recent opinions" granting and affirming remand in analogous cases concerning climate change, and stated that "their reasoning does not conflict with our holding." *Id.* at 93–94. That is plainly not an "endorsement[] of Defendants' removal arguments." *See* Opp. at 24.

merits of [other] arguments are questionable." *Haeck v. 3M Co.*, No. 23-cv-45-EMC, 2023 WL 2330420, at *6, *7 (N.D. Cal. Mar. 1, 2023); *see also NextG Networks of Cal., Inc. v. City of Scottsdale*, No. 2:10-cv-229 JWS, 2010 WL 11629025, at *2 (D. Ariz. Apr. 7, 2010) (awarding partial fees where defense counsel "should have, but did not" realize case was not removable after conferring with plaintiff's counsel, and defendant's "pre-motion" refusal to admit a fact requiring remand "rendered [the plaintiff's] motion practice more expensive than it otherwise would have been"); *cf. PNC Bank Nat'l Ass'n v. Ahluwalia*, No. C 15-1264 WHA, 2015 WL 3866892, at *6 (N.D. Cal. June 22, 2015) (Alsup, J.) (awarding fees where "[t]he bottom line" was that a defendant "kn[ew] that his removals [we]re improper because there is no subject-matter jurisdiction, the court warned him previously that he could be sanctioned, [and] he knew that [the plaintiff] asked for sanctions"). If the Court determines a fee award is warranted, PCFFA can be prepared to submit supporting documentation and argument as necessary for the Court to determine the award amount.

## III. CONCLUSION

This case must be remanded, and there is no need for the Court to await further instruction from any higher court. Because Defendants lacked an objectively reasonable basis for believing this case was removable from state court, this Court should "require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c).

Dated: August 28, 2023

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