

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARC ANDERSON and ELLEXA CONWAY, )	Case No. 15-cv-02172-SC
on their own behalf and on )	
behalf of a class of others )	<u>ORDER DENYING REMAND</u>
similarly situated, )	
)	
Plaintiffs, )	
)	
v. )	
)	
SEAWORLD PARKS AND )	
ENTERTAINMENT, INC., )	
)	
Defendant. )	
_____ )	

**I. INTRODUCTION**

The Court turns now to a motion by Plaintiffs to remand this case to State Court. ECF No. 15 ("Mot."). The motion challenges the original notice of removal,<sup>1</sup> is fully briefed,<sup>2</sup> and is appropriate for resolution without oral argument pursuant to Civil Local Rule 7-1(b). For the reasons set forth below, the motion is DENIED.

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<sup>1</sup> See ECF No. 1 ("Notice").  
<sup>2</sup> See ECF Nos. 23 ("Opp'n"), 29 ("Reply"); see also ECF No. 28 (re-noticing the motion on the same grounds).

1 **II. FACTS**

2 This case includes both the facts alleged in the First Amended  
3 Complaint, ECF No. 9-1 ("FAC"), and an unusual procedural history  
4 that has followed. As to the former, certain individuals claim to  
5 have been deceived by certain advertising statements made by  
6 Defendant SeaWorld Parks and Entertainment, Inc. ("SeaWorld" or  
7 "Defendant"). FAC ¶¶ 1-12. SeaWorld is well known for and  
8 frequently advertises that it cares for sea creatures, including  
9 Orcas (otherwise known as "killer whales"). Id. at ¶¶ 4-5, 8-9,  
10 55, 61, 73. Plaintiffs allege these claims are false, and that in  
11 reliance thereon they financially supported SeaWorld through the  
12 purchase of tickets. FAC ¶¶ 11-12, 19-20, 56-57, 65-66, 77-78.  
13 However, Plaintiffs here do not seek any monetary damages on behalf  
14 of the class. Instead, they seek monetary damages only for  
15 themselves, while seeking injunctive relief for the entire class.  
16 Id. at ¶¶ 12, 58, 67, 79, 80. The injunctive relief sought would  
17 include: (1) ordering SeaWorld to refrain from making statements  
18 Plaintiffs believe to be false or misleading regarding orca health;  
19 and (2) ordering Seaworld to inform the public on its website that:  
20 (a) captivity negatively impacts orca health, (b) orca lifespans  
21 are shorter in captivity than in the wild, (c) collapsed dorsal  
22 fins are common only in captive orcas, and (d) SeaWorld separates  
23 closely related and tightly-knit orca family members. Id.

24 Procedurally, this case was originally filed in the Superior  
25 Court of the State of California for the City and County of San  
26 Francisco ("state court"). Notice ¶ 1. Defendant successfully  
27 removed on the theory that the case involved at least \$5 million,  
28 sat in diversity, and had a plaintiff class of at least 100 people,

1 giving federal courts jurisdiction under the Class Action Fairness  
2 Act ("CAFA"). Id. at ¶ 4-5; see 28 U.S.C. § 1332(d). Plaintiffs  
3 argue that this calculation is improper, as Plaintiffs  
4 intentionally did not seek any class damages, thus falling well  
5 below the monetary threshold required. Mot. at 1-6. Accordingly,  
6 Plaintiffs now seek remand back to state court.

7       When the original motion for remand was filed, the Court  
8 quickly learned that Plaintiffs had filed other cases pending  
9 elsewhere in the country. Notice ¶ 6(d)-(e); ECF Nos. 1-3 and 1-4  
10 (jointly, "Hall v. SeaWorld Compl."), 6-1 ("Gaab v. SeaWorld  
11 Compl."); 24 Ex. A ("Kuhl v. SeaWorld Compl."); 24 at 69-74.<sup>3</sup>  
12 These other cases are highly similar in nature to this case, except  
13 that the other cases are in federal court, plead extra information  
14 about SeaWorld's alleged mistreatment of orcas, and affirmatively  
15 seek over \$5 million in monetary damages. The Defendant also  
16 asserts -- and submissions by Plaintiffs in no way dispute (they  
17 may generally support) -- that the class in the instant case would  
18 include the named plaintiffs in some or all of the above cited  
19 suits. See Notice ¶ 6, ECF No. 24 at 69-74, Opp'n at 3 n.1, 4 n.3,  
20 10, 10 n.6.

21 \_\_\_\_\_  
22 <sup>3</sup> A comparison of these other three cases showed that Hall v.  
23 SeaWorld and Gaab v. SeaWorld have overview and fact sections which  
24 are word-for-word identical except for: (1) definition of the named  
25 plaintiffs (Gaab has a second named Plaintiff, causing all its  
26 following paragraphs to be numbered one higher than in Hall); (2) a  
27 time-based reference in paragraphs 211 and 212, respectively ("Just  
28 last month" versus "Two months ago"); and (3) Subsection "K" which  
includes specific plaintiff allegations. When compared to Hall or  
Gaab, Kuhl v. Seaworld is substantially similar, with almost all  
the same section headings and lots of identical language (sans the  
noted differences), though it occasionally skips a paragraph  
present in the former two complaints. Compare Kuhl v. SeaWorld  
Compl. with Hall v. SeaWorld Compl. and Gaab v. SeaWorld Compl.

1 The Court also learned that the Judicial Panel for  
2 Multidistrict Litigation ("JPML") was going to consider whether  
3 consolidation in a multidistrict litigation case (an "MDL") was  
4 appropriate. ECF No. 3. The Court therefore denied attempts by  
5 parties to expedite ruling on this motion to allow the JPML a  
6 chance to consider consolidation. ECF No. 27. The JPML found that  
7 "[t]hese actions do share factual issues," that three actions  
8 subject to a pending motion to consolidate in the Southern District  
9 of California "essentially constitute but a single action," and  
10 that "litigation thus really involves just two actions pending in  
11 two California districts." ECF No. 34 ("JPML Order"). The JPML  
12 ultimately encouraged coordination and cooperative efforts to  
13 minimize or eliminate duplicative efforts, but denied consolidation  
14 as an MDL in its Order dated August 5, 2015. Id.

15 Thus, the Court now has before it, still pending, the instant  
16 motion to remand. The motion does not call for the Court to decide  
17 whether class certification is or may be proper, only whether the  
18 Court should retain jurisdiction over this case at this juncture.

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20 **III. LEGAL STANDARD**

21 **A. Remand**

22 "A motion to remand is the proper procedure for challenging  
23 removal." Moore-Thomas v. Alaska Airlines, Inc., 553 F.3d 1241,  
24 1244 (9th Cir. 2009). Remand may be ordered either for lack of  
25 subject matter jurisdiction or for any defect in the removal  
26 procedure. See 28 U.S.C. § 1447(c). "[R]emoval statutes are  
27 strictly construed against removal." Luther v. Countrywide Home  
28 Loans Servicing LP, 533 F.3d 1031, 1034 (9th Cir. 2008). "The

1 presumption against removal means that the defendant always has the  
2 burden of establishing that removal is proper." Moore-Thomas, 553  
3 F.3d at 1244. As such, any doubts regarding the propriety of the  
4 removal favor remanding the case. See Gaus v. Miles, Inc., 980  
5 F.2d 564, 566 (9th Cir. 1992).

6 **B. The Class Action Fairness Act**

7 CAFA provides that a district court has original jurisdiction  
8 where there is diversity between any member of a plaintiff class  
9 and any defendant and "in which the matter in controversy exceeds  
10 the sum or value of \$5,000,000, exclusive of interest and costs."  
11 28 U.S.C. § 1332(d)(2). There must be at least 100 members in the  
12 plaintiff class. Id. at § 1332(d)(5)(B).

13 **C. Amount In Controversy**

14 When determining the amount in controversy, the Court first  
15 considers whether it is "facially apparent" from the complaint that  
16 the jurisdictional minimum has been satisfied. See Singer v. State  
17 Farm Mut. Auto., Ins. Co., 116 F.3d 373, 377 (9th Cir. 1997);  
18 Alexander v. FedEx Ground Package Sys., Inc., No. C 05-0038 MHP,  
19 2005 WL 701601, at \*2 (N.D. Cal. Mar. 25, 2005). This includes  
20 considering claims for damages (general or special), attorneys'  
21 fees, and punitive damages. See Conrad Assoc. v. Hartford Accident  
22 & Indem. Co., 994 F.Supp. 1196, 1198 (N.D. Cal. 1998); Alexander,  
23 2005 WL 701601, at \*2. Attorneys' fees in a class action "cannot  
24 be allocated solely to those [named] plaintiffs for purposes of  
25 amount in controversy." Alexander, 2005 WL 701601, at \*2 (quoting  
26 Conrad, 994 F.Supp. at 942).

27 If damages are not specified by the complaint, the Court may  
28 review facts submitted by parties and may require parties to submit

1 "summary-judgment-type evidence" relevant to the amount in  
2 controversy. Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1336 (5th  
3 Cir. 1995); Matheson v. Progressive Specialty Ins. Co., 319 F.3d  
4 1089, 1090 (9th Cir. 2003); Alexander, 2005 WL 701601, at \*2. The  
5 party seeking removal "must prove with legal certainty that CAFA's  
6 jurisdictional amount is met." Vigil v. HMS Host USA, Inc., No. C  
7 12-02982 SI, 2012 WL 3283400, at \*5 (N.D. Cal. Aug. 10, 2012)  
8 (citing Lowdermilk v. U.S. Bank Nat'l Ass'n, 479 F.3d 994, 1000  
9 (9th Cir. 2007)).

10 Where "a defendant's assertion of the amount in controversy is  
11 challenged . . . both sides submit proof and the court decides, by  
12 a preponderance of the evidence, whether the amount-in-controversy  
13 requirement has been satisfied." Dart Basin Operating Co. v.  
14 Owens, --- U.S. ----, 135 S. Ct. 547, 554 (2014) (citing 28 U.S.C.  
15 § 1446(c)(2)(B)). The Ninth Circuit has recently remanded where  
16 Courts fail to review adequate proof of the amount in controversy.  
17 Ibarra, 775 F.3d at 1195 (9th Cir. Jan 8, 2015).

18 [T]he Supreme Court has said that a defendant can  
19 establish the amount in controversy by an unchallenged,  
20 plausible assertion of the amount in controversy in its  
21 notice of removal. Dart, 135 S. Ct. at 554-55. Yet,  
22 when the defendant's assertion of the amount in  
23 controversy is challenged by plaintiffs in a motion to  
24 remand, the Supreme Court has said that both sides submit  
25 proof and the court then decides where the preponderance  
26 lies. Id. Under this system, CAFA's requirements are to  
27 be tested by consideration of real evidence and the  
28 reality of what is at stake in the litigation, using  
reasonable assumptions underlying the defendant's theory  
of damages exposure.

25 Ibarra, 775 F.3d at 1197-98.

26 Requirements to certify a suit for injunctive or declaratory  
27 relief brought under Fed. R. Civ. P. 23(b)(2) are "unquestionably  
28 satisfied when members of a putative class seek uniform injunctive

1 or declaratory relief from policies or practices that are generally  
2 applicable to the class as a whole." Parsons v. Ryan, 754 F.3d  
3 657, 687-88 (9th Cir. 2014) (citing Rodriguez v. Hayes, 591 F.3d  
4 1105, 1125 (9th Cir. 2010)). Such suits have far fewer procedural  
5 protections than suits for damages under Fed. R. Civ. P. 23(b)(3),  
6 as the inquiry under Fed. R. Civ. P. 23(b)(2) "does not require an  
7 examination of the viability or bases of the class members' claims  
8 for relief, does not require that the issues common to the class  
9 satisfy a Rule 23(b)(3)-like predominance test, and does not  
10 require a finding that all members of the class have suffered  
11 identical injuries." Id. at 688. The only inquiry the rule makes  
12 is whether "the party opposing the class has acted or refused to  
13 act on grounds that apply generally to the class." Fed R. Civ. P.  
14 23(b)(2); see also Parsons, 754 F.3d at 688.

15 The amount in controversy in class actions requesting an  
16 injunction may be determined by the cost of compliance by  
17 Defendant. See Int'l Padi, Inc. v. Diverlink, No. 03-56478, 2005  
18 WL 1635347, at \*1 (9th Cir. July 13, 2005) ("in determining the  
19 amount in controversy, we may also include the value of the  
20 requested injunctive relief to either party." (citing Cohn v.  
21 Petsmart, Inc., 281 F.3d 837, 840 (9th Cir. 2002); Ridder Bros.,  
22 Inc. v. Blethen, 142 F.2d 395, 399 (9th Cir. 1944)); but see In re  
23 Ford Motor Co./Citibank, N.A., 264 F.3d 952, 961 (9th Cir. 2001)  
24 (if "administrative costs of complying with an injunction were  
25 permitted to count as the amount in controversy, then every case,  
26 however trivial, against a large company would cross the

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1 threshold." (citation omitted))<sup>4</sup>; Ecker v. Ford Motor Co., No.  
2 CV0206833SVWTJLX, 2002 WL 31654558, at \*2-3 (C.D. Cal. Nov. 12,  
3 2002) (determining amount in controversy by value of the injunction  
4 to the Plaintiffs);<sup>5</sup> see generally § 3703 Viewpoint From Which  
5 Amount in Controversy Is Measured, 14AA Fed. Prac. & Proc. Juris. §  
6 3703 (4th ed.).

7 On a motion for remand, a Court "may require payment of just  
8 costs and any actual expenses, including attorney fees, incurred as  
9 a result of the removal." 28 U.S.C. § 1447(c) (emphasis added).  
10 The Court may award fees "when a defendant's removal, while 'fairly  
11 supportable,' was wrong as a matter of law." Balcorta v. Twentieth  
12 Century-Fox Film Corp., 208 F.3d 1102, 1106 (9th Cir. 2000).

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16 <sup>4</sup> Ford Motor Co. at times seems to rebuff the Ritter panel's  
17 decision, on which Int'l Padi relies. But Ford Motor Co. states,  
18 in relevant portion, that "[t]he question then becomes whether each  
19 plaintiff is asserting an individual right or, rather, together the  
20 plaintiffs 'unite to enforce a single title or right in which they  
21 have a common and undivided interest.'" Ford Motor Co., 264 F.3d at  
22 959 (citation omitted). If the former, the test is the cost to the  
23 defendants of an injunction running in favor of one plaintiff,  
24 whereas "[i]f it is the latter, we may then look to the 'either  
25 viewpoint' rule to determine jurisdiction." Id. (citing Snyder v.  
26 Harris, 394 U.S. 332, 335 (1969)). Here, Plaintiffs must have a  
27 "common and undivided interest" or their class claims for  
28 injunction necessarily fail. See Parsons, 754 F.3d at 687-88.  
Therefore, the "either viewpoint" rule applies.

<sup>5</sup> There is some confusion within the courts on this area of law.  
For example, Simmons v. PCR Tech., 209 F. Supp. 2d 1029, 1034 (N.D.  
Cal. 2002), states that "[t]he amount in controversy may include  
the cost of complying with such an injunction." In so doing, it  
cites Schwarzer, Tashima & Wagstaffe, Cal. Practice Guide: Fed.  
Civ. Pro. Before Trial ¶ 2:483 (The Rutter Group 2001) and Ford  
Motor Co., 264 F.3d at 958. However, Ford Motor Co. at that page  
cites the proposition as an argument by parties, not the panel's  
ruling. See Ford Motor Co., 264 F.3d at 960-61. Moreover, these  
cases address jurisdiction by diversity and minimal value due to a  
single named Plaintiff rather than pursuant to 28 U.S.C. § 1332(d).



1 **IV. DISCUSSION**

2 This case may be resolved on two grounds. The first ground is  
3 that the value of the injunction-only case may be measured by the  
4 value of the injunction to the Defendant. Such valuation exceeds  
5 \$5 million, and therefore creates jurisdiction under CAFA. The  
6 Court relies primarily on this ground in making its ruling.

7 The second ground relates to the interplay between preclusion  
8 and CAFA. The briefs filed by parties focused far more on this  
9 second ground, related specifically to issue preclusion. Claim  
10 preclusion (res judicata) would bar a claim from being pursued in  
11 its entirety (e.g., future claims by absent litigants), whereas  
12 issue preclusion (collateral estoppel) would prevent a party (e.g.,  
13 absent class members or SeaWorld) from re-litigating a specific  
14 issue within a case without actually preventing those future claims  
15 from being filed -- even though the results may be foregone  
16 conclusions. While issue preclusion on its own would not normally  
17 form a sufficient basis to deny remand, on these unusual facts it  
18 exposes a backdoor that if permitted would frustrate the intent of  
19 Congress in CAFA.

20 The Court addresses first the damages ground, then the  
21 concerns raised by parties about preclusion, and then its concern  
22 about the intent of Congress via CAFA. Finally, the Court  
23 considers attorney's fees.

24 **A. Damages Pleaded**

25 Even were the Court to make all reasonable factual assumptions  
26 in favor of Plaintiffs, Plaintiffs' motion fails because the value  
27 of this case exceeds the \$5 million CAFA threshold.

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1 No party challenges that there is diversity or that the class  
2 would be fewer than 100 people. Notice ¶ 6. The argument between  
3 parties revolves around whether Plaintiffs have pleaded an amount  
4 in controversy less than \$5 million. Plaintiffs assert they have.  
5 Mot. at 3-7. If true, the Defendant, as the party seeking removal,  
6 "must prove with legal certainty that CAFA's jurisdictional amount  
7 is met." Vigil, 2012 WL 3283400, at \*5 (citing Lowdermilk, 479  
8 F.3d at 1000). Defendant has submitted a notice and evidence that  
9 it has met the jurisdictional amount. See generally Notice.  
10 Plaintiffs, in their motion to remand, challenge the relevance and  
11 legal sufficiency of that evidence, though do not appear to  
12 challenge any fact related to volume or value of ticket sales.

13 Here, it seems that "[SeaWorld's] assertion of the amount in  
14 controversy is challenged by plaintiffs in a motion to remand."  
15 See Ibarra, 775 F.3d at 1197-98. If so, this means that "both  
16 sides [must] submit proof and the [C]ourt decides, by a  
17 preponderance of the evidence, whether the amount-in-controversy  
18 requirement has been satisfied." Dart, 135 S. Ct. 547, 554. An  
19 argument could be made that evidence is not required here where the  
20 validity -- vice relevance and sufficiency -- of Defendant's  
21 evidence is unchallenged. But the Court need not make any such  
22 distinction, because even if Dart and Ibarra require factual  
23 evidence, the Court finds that here it has received adequate  
24 evidence from both sides to resolve the instant motion.

25 Plaintiffs make legal arguments pointing out why the text of  
26 their complaint does not implicate or otherwise request monetary  
27 damages for Plaintiffs. As the Court "may also include the value  
28 of the requested injunctive relief to either party[,]" Int'l Padi,

1 2005 WL 1635347, at \*1, the Court reasonably infers -- and pleaded  
2 facts suggest -- that Plaintiffs accrue no cognizable monetary  
3 benefit from this injunction. If the Court were to provide an  
4 opportunity to Plaintiffs to submit evidence, the Court is  
5 confident Plaintiffs would claim the injunction has a low monetary  
6 value (at this stage in litigation) to ensure their claims fall  
7 below CAFA's threshold. Moreover, Plaintiffs cite Dart and Ibarra,  
8 Reply at 4, thereby assuring the Court that Plaintiffs knew they  
9 could submit evidence should they have desired. Thus the Court is  
10 satisfied Plaintiffs have had an opportunity to present evidence.

11 Defendant SeaWorld has submitted evidence with its notice of  
12 removal, and later supplemented that evidence to include an  
13 erroneously missing exhibit, the First Amended Complaint to this  
14 action, and attachments to their opposition motion. See ECF Nos.  
15 1, 6, 9, 24. SeaWorld's evidence includes three of the complaints  
16 in other pending actions. Hall v. SeaWorld Compl.; Gaab v.  
17 SeaWorld Compl.; Kuhl v. SeaWorld Compl. It also includes an  
18 affidavit by William Powers, Seaworld's Corporate Director of  
19 Budgeting and Forecasting. ECF No. 1 at 9 (Powers Decl.) Mr.  
20 Powers provides uncontroverted evidence that "in each of the past  
21 four years, SeaWorld sold in excess of 500,000 tickets" on-site,  
22 just at the San Diego park, at an average cost of at least \$50.  
23 Id. SeaWorld sold an additional 500,000 per year in each of the  
24 last four years online to California customers (determined by zip  
25 code) for the San Diego park, at an average cost of at least \$30.  
26 Id. The Court is thus satisfied it has what limited evidence it  
27 needs from both parties, especially in this case where the dispute  
28 is primarily legal rather than factual.

1 Even absent any showing of monetary value of an injunction to  
2 the Plaintiffs, the facts readily suggest by a preponderance of the  
3 evidence that Defendant would place an enormous (negative) value on  
4 the injunctive relief if awarded. See Int'l Padi, 2005 WL 1635347,  
5 at \*1. Plaintiffs' implied argument is that the Court should not  
6 consider the value of allegedly improper ticket sales already sold  
7 within the class period. The Court does not reach this argument,  
8 but assuming arguendo that Plaintiffs are correct, the Court is  
9 still permitted to make "reasonable assumptions" as to SeaWorld's  
10 theory of damage exposure. Ibarra, 775 F.3d at 1198. A reasonable  
11 assumption here includes that past performance (per the figures  
12 below) is indicative (albeit not determinative) of SeaWorld's  
13 expected future ticket sales -- and so can be used to calculate  
14 future losses. SeaWorld makes uncontroverted claims that the value  
15 of past ticket sales is "in excess of \$160 million" based on sales  
16 of at least 4 million tickets during the class period. Opp'n at 4;  
17 Mot. at 1, 4; Powers Decl. Using simple math, to arrive at a loss  
18 of \$5 million in future ticket sales, using the lower rate of \$30  
19 per ticket, only 166,667 fewer tickets need be sold. See Powers  
20 Decl. This comprises at most a loss of 16.7% of ticket sales.<sup>6</sup>

21 <sup>6</sup> The 16.7% rough figure assumes future sales will match past sales  
22 but-for an injunction, that all losses will be realized in a single  
23 year, and that all such losses will be suffered from online revenue  
24 rather than on-site sales revenue (each of which yield at least  
25 500,000 ticket sales, adding up to a least 1,000,000 tickets per  
26 year). Expanding the period or allowing for the loss of on-site  
27 sales (where tickets cost more) would decrease the percentage of  
28 future ticket sales reduction that would be required for Defendant  
to meet the jurisdictional threshold. For example, ticket sales  
over two years only require an 8.35% overall reduction in (online)  
future sales. Assumptions in reaching this 16.7% figure therefore  
favor Plaintiffs in every way possible, which is proper where the  
Defendant has the burden of proof and where doubts regarding the  
propriety of the removal favor remand. See Gaus, 980 F.2d at 566.

1           The Court also considers the damage done by the accusations  
2 currently being lobbied against SeaWorld. SeaWorld's reputation,  
3 its ability to secure third-party vendors to market ticket sales,  
4 and its ability to retain sponsors have all been hit. See, e.g.,  
5 Gaab v. SeaWorld Compl. ¶¶ 176-202. This is in spite of continued  
6 efforts by SeaWorld to issue positive press. Id. at ¶¶ 203-220.  
7 If the Court were to issue the injunction Plaintiffs request,  
8 forcing SeaWorld to stop positive advertising and affirmatively  
9 admit prior wrongdoing, the Court is persuaded that the cost would  
10 be far greater than the simple cost of changing words on a webpage.  
11 SeaWorld's reputation would be further soiled, it would be still  
12 harder to secure third-party vendors for ticket sales, and at least  
13 two sponsors (namely American Express and British Airways, id. at ¶  
14 201, as cited in comparable cases) would be even more pressured to  
15 cut ties with SeaWorld. All these factors impact ticket sales.

16           The Court thus arrives at a reasonable conclusion that the  
17 value of compliance to SeaWorld would more likely than not reduce  
18 future sales by at least 16.7% in a single year or else result in  
19 at least 166,667 future fewer tickets sold over a reasonable period  
20 of time. This calculation does not include the value of developing  
21 a new, viable marketing campaign or correcting allegedly harmful  
22 practices toward certain animals, which could be costly and may be  
23 necessitated by the injunction.<sup>7</sup>

24           <sup>7</sup> The Court is unable to consider such matters without evidence.  
25 The Court also notes Plaintiffs cite Porfiria Yocupicio v. Pae  
26 Group, LLC et al., No. 15-55878 (9th Cir. July 30, 2015), ECF No.  
27 35-1 at 11. Per Porfiria, the Court cannot aggregate individual  
28 and class claims together to reach the minimal amount in  
controversy required. See id. Here, the Court does not need (or  
seek) to do so, and using such an approach (which is not permitted)  
would still not yield damages in excess of \$5 million.

1           Therefore, on the facts as pleaded, the Court finds that the  
2 amount in controversy is sufficiently high based on the value of  
3 the injunction to SeaWorld to merit federal jurisdiction.  
4 Accordingly, Plaintiffs do allege a case worth at least \$5 million,  
5 giving the Court original jurisdiction under CAFA. Therefore,  
6 Plaintiffs' motion to remand is DENIED.

7           **B.    Preclusion Law**

8           Parties argue at length whether preclusion would apply to  
9 prevent the filing of individual damages claims were this  
10 injunctive-only suit permitted to continue in state court. See  
11 Mot. at 7, Opp'n at 8-10, Reply at 3-10. Defendant's concern  
12 includes that this injunctive-only case will claim-preclude future  
13 individuals who are part of the class and seek damages. This  
14 concern would normally be misplaced, as the law in the Ninth  
15 Circuit is generally contrary. Moreover, this motion concerns  
16 jurisdiction, not class certification. The Court nonetheless fully  
17 explains its rationale as necessary background to understand the  
18 Court's analysis in the section to follow this one.

19           In the Ninth Circuit, "the general rule is that a class action  
20 suit [brought under Fed R. Civ. P. 23(b)(2)] seeking only  
21 declaratory and injunctive relief does not bar subsequent  
22 individual damages claims by class members, even if based on the  
23 same events." In re Yahoo Mail Litig., No. 13-CV-04980-LHK, 2015  
24 WL 3523908, at \*15 (N.D. Cal. May 26, 2015) (quoting Hiser v.  
25 Franklin, 94 F.3d 1287, 1291 (9th Cir. 1996)); see also In re  
26 Jackson Lockdown/MCO Cases, 568 F.Supp. 869, 892 (E.D. Mich. 1983)  
27 ("every federal court of appeals that has considered the question  
28 has held that a class action seeking only declaratory or injunctive

1 relief does not bar subsequent individual suits for damages." ).  
2 Plaintiffs cite an MDL where defendants allegedly price-fixed costs  
3 of flat-screen components, and two states challenged certification  
4 of injunction-only classes. In re TFT-LCD (Flat Panel) Antitrust  
5 Litig., No. 7-1827 SI, 2012 WL 273883, at \*1-2 (N.D. Cal. Jan. 30,  
6 2012). There, Judge Illston reasoned (and found on the facts of  
7 that case) that claims for monetary damages typically relied on  
8 different facts than claims for injunctive relief. Id. (citing  
9 Cooper v. Fed. Reserve Bank, 467 U.S. 867, 876 (1984)). Judge  
10 Illston therefore read the Supreme Court in Wal-Mart Stores, Inc.  
11 v. Dukes, ---U.S. ----, 131 S. Ct. 2541 (2011) to suggest only that  
12 "a Rule 23(b)(2) judgment, with its one-size-fits-all approach and  
13 its limited procedural protections, will not preclude later claims  
14 for individualized relief." LCD, 2012 WL 273883, at \*3; see also  
15 In re Yahoo Mail, 2015 WL 3523908, at \*15 (quoting LCD).

16 This general rule has some limited exceptions, but they are  
17 often seen when considering a motion for class certification. In  
18 Cholakyan (cited by Plaintiffs), plaintiffs alleged violations of  
19 consumer protection statutes due to purchases of defendant's  
20 vehicles, and consequently sought to certify a class under Rule  
21 23(b)(2). See Cholakyan v. Mercedes-Benz, USA, LLC, 281 F.R.D.  
22 534, 558-60 (C.D. Cal. 2012). But when the court there realized  
23 the proposed class included former owners and lessees of vehicles  
24 who could not benefit from the injunctive relief sought, the court  
25 denied certification. Id. at 559 ("Rule 23(b)(2) demands that  
26 plaintiff seek an indivisible injunction benefiting all its members  
27 at once."). Cholakyan read Dukes as unsettled law where a request  
28 for injunctive relief "placed class members' ability to pursue

1 individualized claims for monetary relief in question." Id. at  
2 565.<sup>8</sup> That court therefore felt obligated to raise its concern in  
3 its order, though stopped short of finding that the named plaintiff  
4 (and retained counsel) were inadequate as other grounds existed to  
5 support denial of class certification -- not denial of remand. Id.

6 In another case relied upon by Cholakyan, Ms. Fosmire (the  
7 lead plaintiff) sought damages on one ground but not also on a  
8 second, available ground. Fosmire v. Progressive Max Ins. Co., 277  
9 F.R.D. 625, 634 (W.D. Wash. 2011). The court found that claims  
10 splitting by Ms. Fosmire, excluding a certain type of damages  
11 (stigma damages), "create[d] a conflict between her interests and  
12 the interests of the putative class, rendering her an inadequate  
13 class representative." Id. Therefore, class certification was  
14 denied. Id. at 635. Again, this was not denial of remand.

15 Here, Plaintiff concedes that "[t]o the extent the present  
16 case raises issues of fact or law that also are raised by future  
17 suits for damages, collateral estoppel may apply to those specific  
18 issues." Reply at 8 n.3 (citing Cholakyan, 281 F.R.D. at 565).  
19 The Court goes further -- here, collateral estoppel will almost  
20 certainly apply to those issues, barring the issue from being  
21 re-litigated.<sup>9</sup> Moreover, as explained by the Ninth Circuit, "[i]t

22 <sup>8</sup> Despite this language, Yahoo Mail asserted that Cholakyan  
23 "concluded that none of the remedies proposed by the plaintiff  
24 would result in classwide relief . . . [but] did not discuss  
25 whether certification of an injunctive relief class would preclude  
26 individual damages claims." Yahoo Mail, 2015 WL 3523908, at \*15  
27 n.7. The Court decides this motion without resolving said tension.

28 <sup>9</sup> Both parties cite Frank v. United Airlines, Inc., 216 F.3d 845,  
853 (9th Cir. 2000). See Mot. at n.2, Opp'n at 9-10. Upon review,  
Frank instructs in line with the Court's findings, to include that  
there are additional procedural requirements for Fed. R. Civ. P.  
23(b)(3) not applicable to Rule 23(b)(2). Frank, 216 F.3d at 851.  
It does not, however, ultimately answer the immediate concern here



1 is now settled that a federal court must give to a state-court  
2 judgment the same preclusive effect as would be given that judgment  
3 under the law of the state in which the judgment was rendered."  
4 Ross v. Alaska, 189 F.3d 1107, 1110-11 (9th Cir. 1999). Therefore,  
5 issue preclusion will ensue from this case whether heard in federal  
6 or state court should certain substantive portions be decided prior  
7 to any pending case(s) that include damages.

8 Normally, the Court's conclusion that there would almost  
9 certainly be issue preclusion would not necessitate claim  
10 preclusion, as was the concern in Cholakyan. The Court agrees that  
11 Plaintiffs are normally permitted to seek a solely injunctive  
12 class. Mot. at 7-8. And as Plaintiffs point out, the law  
13 generally supports the ability of absent class members to still  
14 seek to bring damages. Reply at 7-9. But the key difference here  
15 -- and where Plaintiffs' argument fails -- is that the claims for  
16 monetary damages which typically rely on different facts than  
17 claims for injunctive relief here rely on almost exactly the same  
18 facts. Thus the edict of Cooper as reflected in LCD are, in this  
19 specific case, inapposite. See Cooper, 467 U.S. at 876; LCD, 2012  
20 WL 273883, at \*2 (citing Cooper). Plaintiffs pleaded a summary of  
21 all or almost all the same facts as their cases for damages (except

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22 because preclusion did not apply on the facts of that case. Id. at  
23 853. Even so, Frank makes clear that "once an issue is actually  
24 and necessarily determined by a court of competent jurisdiction,  
25 that determination is conclusive in subsequent suits based on a  
26 different cause of action involving a party to the prior  
27 litigation." Id. (citing Montana v. United States, 440 U.S. 147,  
28 153 (1979)). Whether preclusion ultimately will apply here or in  
any case depends on "the requirements of identity of parties,  
identity of the factual claim or issue, adequate notice, and  
adequate representation[,] [which] apply to both claim and issue  
preclusion." Id. (citing Richards v. Jefferson County, Ala., 517  
U.S. 793, 800-01 (1996)).

1 details related to the specific named plaintiffs in this suit. See  
2 FAC ¶¶ 19-20). Insofar as facts from former suits are missing, the  
3 Court can reasonably infer or else learn those facts through review  
4 of the former complaints.<sup>10</sup> Plaintiffs included such facts because  
5 they sought damages for the named plaintiffs in their individual  
6 capacities and because all four suits aim at injunctive relief.

7 The Court need not detail whether such pleadings are adequate  
8 for a class under Fed. R. Civ. P. 23(b)(2) or (b)(3). However,  
9 where a case requesting only injunctive relief relies on the same  
10 facts as another, already-pending case that requests damages, and  
11 the injunctive case is comprised of a subset of members who are  
12 party to the earlier damages case(s), a court's concern may be  
13 reasonably heightened that the effects of issue preclusion from  
14 hearing the injunctive case first may effectuate claim preclusion.  
15 The Court is therefore concerned that, in the unusual procedural  
16 posture of this case and on these specific facts, named Plaintiffs  
17 (and their counsel) may not be adequate representatives.

18 That said, Plaintiffs are correct that this is a motion about  
19 jurisdiction, not class certification. Reply at 2. Cases cited  
20 that allow for exceptions to the general rule rely on analysis of

21 \_\_\_\_\_  
22 <sup>10</sup> The Court has no trouble spotting that, while shorter, the FAC  
23 in the instant case is a summary of the same factual allegations  
24 presented in Hall, Gaab, and Kuhl. Compare FAC ¶¶ 1-12, 24-37 with  
25 Hall v. SeaWorld Compl. and Gaab v. SeaWorld Compl. and Kuhl v.  
26 SeaWorld Compl. The arguments in the FAC here (in summary form) or  
27 in the other three case complaints (in full form) tend to prove  
28 SeaWorld's allegedly deceptive practices or its harm of orcas. The  
facts provide no greater basis for monetary damages vice just  
injunctive relief, except as applied to ticket sales (which in the  
instant case is limited to named plaintiffs rather than the class).  
Thus the Court concludes that the facts of the other complaints are  
presently part of this injunction-only case or will necessarily be  
offered as evidence in this case.

1 class certification factors, which is a subsequent determination  
2 separate and apart from a court's jurisdiction. See United Steel  
3 v. Shell Oil Co., 602 F.3d 1087, 1089 (9th Cir. 2010). Therefore,  
4 the Court cannot deny remand solely on grounds of preclusion.

5 **C. Congressional Intent**

6 The Court does, however, find that the above analysis yields a  
7 conflict with CAFA's intent, making remand improper. "Canons of  
8 statutory construction dictate that if the language of a statute is  
9 clear, we look no further than that language in determining the  
10 statute's meaning. . . . A court looks to legislative history only  
11 if the statute is unclear." Lenz v. Universal Music Corp., No. 13-  
12 16106, 2015 WL 5315388, at \*4 (9th Cir. Sept. 14, 2015) (omission  
13 in original)(citation omitted)). In addition, "[w]here Congress  
14 has made its intent clear, we must give effect to that intent."  
15 Miller v. French, 530 U.S. 327, 336 (2000) (citation omitted).

16 Here, the Court's first ground (that based on value of the  
17 injunction to the Defendant the amount in controversy exceeds \$5  
18 million) would obviate any need to consider intent. However, if  
19 the Court did not rely on that ground, the Court would still be  
20 faced with Plaintiffs' failure to meaningfully address the impact  
21 of issue preclusion (vice claim preclusion) on the sister suits  
22 that Plaintiffs have brought. See Reply at 7-10; but c.f. Notice ¶  
23 6(d)-(e); Hall v. SeaWorld Compl.; Gaab v. SeaWorld Compl.; Kuhl v.  
24 SeaWorld Compl.; 24 at 69-74. When considering the other pending  
25 cases,<sup>11</sup> granting remand here effectively strips the federal

26 <sup>11</sup> "For jurisdictional purposes, [the Court's] inquiry is limited  
27 to examining the case as of the time it was filed in state court."  
28 Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1349 (2013).  
However, when this case was filed, two other damages cases were

1 jurisdiction required in already pending cases due to the likely  
2 preclusive impact of this injunction-only case (if decided first).  
3 Thus, on these unusual, specific facts, granting remand in line  
4 with the statutory text meaningfully prevents litigation of the  
5 other cases in federal court -- cases where the same statutory text  
6 provides original jurisdiction to federal courts.<sup>12</sup> Therefore, it  
7 is appropriate here for the Court to consider Congress's intent.

8 The intent of Congress in CAFA provides adequate grounds to  
9 deny remand. The relevant text of CAFA reads:

10 The district courts shall have original jurisdiction of  
11 any civil action in which the matter in controversy  
12 exceeds the sum or value of \$5,000,000, exclusive of  
interest and costs, and is a class action in which--

13 (A) any member of a class of plaintiffs is a citizen of a  
State different from any defendant[.]

14 28 U.S.C. § 1332(d)(2). On its face, this statutory text evidences  
15 Congress's intent to offer a federal forum to class actions between  
16 parties sitting in diversity where the value in question is above a  
17 certain threshold. Moreover, "Congress designed the terms of CAFA  
18 specifically to permit a defendant to remove certain class or mass  
19 actions into federal court. 28 U.S.C. § 1332(d)." Ibarra v.  
20 Manheim Investments, Inc., 775 F.3d 1193, 1197 (9th Cir. Jan 8,  
21 2015). And lest that be unclear, the Ninth Circuit in the very  
22 next breath stated that "Congress intended CAFA to be interpreted  
23 expansively. S.Rep. No. 109-14, at 42 (Feb. 28, 2005)." Ibarra,  
24 ///

25 already pending, and there is now a third. See Hall v. SeaWorld  
26 Compl.; Gaab v. SeaWorld Compl.; Kuhl v. SeaWorld Compl.; ECF No.  
24 at 69-74.

27 <sup>12</sup> The Court is cognizant that issue preclusion does not normally  
28 remove jurisdiction to hear a case. Here, however, the preclusive  
effects are so pervasive that they are likely to do so de facto.

1 775 F.3d at 1197. There can thus be no question that Congress  
2 intends for high-value class suits to be heard in federal court.

3 Here, Defendants have sought a federal forum four times --  
4 thrice in the Southern District of California, and once here.  
5 Should the case here be returned to state court and the state court  
6 case hears this case first, all four presently-pending cases would  
7 (or at least could) effectively be decided by the state court  
8 instead of the federal court, per the Court's earlier analysis of  
9 the almost-certainty of preclusive effects. Ross, 189 F.3d at  
10 1110-11; see also Migra v. Warren City Sch. Dist. Bd. of Educ., 465  
11 U.S. 75, 81 (1984). This would essentially deprive Defendants of a  
12 federal forum, which thereby runs contrary to Congress's intent.

13 As courts have made clear (again, per the discussion above),  
14 there is no problem with pursuing injunctive relief rather than  
15 damages in a class action. But deprivation of a federal forum in  
16 violation of Congress's intent in CAFA was not the issue faced by  
17 the cases upon which parties relied.<sup>13</sup> Nothing suggests those same  
18 courts would permit break-away, injunctive-only cases where such  
19 cases are filed primarily as a tactic to litigate already-pending  
20 federal court cases in a state court -- not where Congress intended  
21 such cases be litigated in federal court. If this strategy were

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22  
23 <sup>13</sup> Plaintiffs, for example, rely on LCD. Reply at 8-9. Whereas  
24 Judge Illson worried that granting credence to arguments of  
25 preclusion of future claims would "eviscerate the (b)(2) class,  
26 preventing its use whenever there was a chance that unknown class  
27 members might have damages claims", LCD, 2012 WL 273883, at \*3,  
28 here there are known class members who affirmatively have damages  
claims that will almost certainly be precluded. Moreover, there  
cases were within the control of an MDL and Judge Illston had no  
apparent concern that a state court might make a decision that  
would preclude the master case over which she presided, let alone  
prematurely turn control of the MDL over to a state court.

1 allowed, parties could easily circumvent CAFA by simultaneously  
2 filing a damages case and a separate injunctive-only case in  
3 different federal districts, one in a local federal court and one  
4 in a local state court. Such a strategy would allow both cases to  
5 be effectively litigated in the first instance in a state court.  
6 In turn, a federal court would be forced to accept the findings  
7 from a state court, Ross, 189 F.3d at 1110-11; Migra, 465 U.S. at  
8 81, leaving the federal court to focus only on such matters as  
9 relate entirely to predominance and damages -- matters that would  
10 almost certainly settle in light of the heightened impact of issue  
11 preclusion.<sup>14</sup> Moreover, this strategy would lead to present class  
12 members who are actively choosing (or will soon choose) whether to  
13 opt-out being precluded by a case they are not present to litigate  
14 but which may have already been decided.<sup>15</sup> These absurd results  
15 from federal courts abdicating their role in class actions are  
16 contrary to the intent of Congress per CAFA, and illustrate why, on  
17 the unusual facts of this case, remand is hereby DENIED.

18 This analysis is not to be read as a general prohibition on  
19 injunctive-only cases, on damages cases, or even seeking both forms  
20 of relief in a single case. Nor is it meant to forbid break-away  
21 cases seeking injunctive-only relief within the same federal forum.  
22 Rather, it is a cautionary message -- based on the specific factual

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23 <sup>14</sup> The Court's concern here may be consistent with the loss of  
24 federal forum being cognizable as harm in other areas of law. See,  
25 e.g., Westlands Water Dist. v. United States, 100 F.3d 94, 97-98  
(9th Cir. 1996) (loss of a federal forum may constitute prejudice  
when dismissing a case pursuant to Fed. R. Civ. P. 41).

26 <sup>15</sup> Taking this reductio argument a step still further, preclusion  
27 here could also render notice and opportunity to opt-out in pending  
28 cases meaningless; class members would uniformly act based on the  
earlier, preclusive case or else later argue notice was inadequate  
for failure to advise members of the then-pending, preclusive case.

1 circumstances of this case -- that when presently already seeking  
2 damages in one or more pending class suits in federal court, one  
3 cannot use a technically separate yet substantially similar, break-  
4 away, injunctive-only case as a backdoor to avoid the federal  
5 forum. Doing so violates the intent of Congress in CAFA, and so  
6 here merits (and provides a secondary ground for) denial of remand.

7 **D. Attorneys' Fees**

8 The Court finds that SeaWorld's removal was proper and that  
9 Plaintiffs' motion for remand was "fairly supportable" but wrong as  
10 a matter of law. See Balcorta, 208 F.3d at 1106. Even so, the  
11 Court declines to award fees. See 28 U.S.C. § 1447(c) (allowing  
12 courts discretion). The Court recognizes that Plaintiffs clearly  
13 sought to plead in a way they thought would ensure their case would  
14 continue in state court and did not expressly allege \$5 million in  
15 damages. While their strategy here fails for the two grounds  
16 provided above, the Court finds that the remand motion itself was  
17 nonetheless filed in a good faith belief remand would be granted.  
18 Accordingly, each side will bear its own fees on this motion.

19

20 **V. CONCLUSION**

21 For the reasons set forth above, Plaintiffs' motion to remand  
22 is DENIED in its entirety.

23

24 IT IS SO ORDERED.

25

26 Dated: September 22, 2015

27



UNITED STATES DISTRICT JUDGE

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