BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Revisit Net Energy Metering Tariffs Pursuant to Decision 16-01-044, and to Address Other Issues Related to Net Energy Metering.	Rulemaking 20-08-020 (Filed August 27, 2020)

CAlifornians for Renewable Energy (CARE)
Request for Official Notice

Rule 13.9 of the Commission's Rules of Practice and Procedure provides that "[o]fficial notice may be taken of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 *et. seq*." California Evidence Code Section 452, subsection (c) states that judicial notice may be taken of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Official acts subject to judicial notice under Evidence Code Section 452(c) include records, reports and orders of administrative Agencies.

On July 9, 2021 Defendants California Public Utilities Commission et al. filed Notice of Motion and Motion of California Public Utilities Commission and Commissioners to Dismiss Sixth Amended Complaint and Motion to Strike References to Second Supplement from Sixth Amended Complaint and Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss Plaintiffs' Sixth Amended and Second Supplemental Complaint; and Motion to Strike References to Second Supplement from Sixth Amended Complaint, before the United States District Court Central District of California Case No. 2:11-CV-04975-JWH-JCG, Document 271 & 271.1. [Attachment 1].

Respectfully submitted,

/s/ Michael E. Boyd
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July 21, 2021

Attachment 1

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al.

Plaintiffs,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION, et al.

Defendants.

Case No: 2:11-cv-04975-JWH

NOTICE OF MOTION AND MOTION OF CALIFORNIA PUBLIC UTILITIES COMMISSION AND COMMISSIONERS TO DISMISS SIXTH AMENDED COMPLAINT AND MOTION TO STRIKE REFERENCES TO SECOND SUPPLEMENT FROM SIXTH AMENDED COMPLAINT

Date: September 10, 2021
Time: 9:00 a.m.
Courtroom: Hon. John W. Holcomb

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that at 9:00 a.m. on Friday, September 10, 2021, or as soon thereafter as counsel may be heard by the Court, Defendants, California Public Utilities Commission ("CPUC") and current Commissioners of the CPUC in their official capacities will hereby and do move that the Court, pursuant to Federal Rules of Civil Procedure, Rules 12(b)(1) and 12(b)(6), for dismissal of the Sixth Amended and Second Supplemental Complaint with prejudice. The briefing schedule for this Motion was set by the Court's May 19, 2021, Minute Order (ECF 269).

NOTICE IS FURTHER GIVEN that, in the alternative if the Motion to Dismiss is denied or leave to amend is given, Defendants also seek to strike all references to a Second Supplement to the Sixth Amended Complaint pursuant to Rule 12(f) in that there is no supplemental material contained in the pleading.

These Motions, joined pursuant to Rule 12(g), are made on the grounds that (1) Plaintiffs lack Article III standing, (2) CAlifornians for Renewable Energy lacks statutory standing, (3) this Court lacks jurisdiction over as-applied claims under the Public Utilities Regulatory Policies Act of 1978, (4) the pleading is an improper motion for reconsideration and violates the law of the case, (5) the claims made are outside the scope of remand, (6) the pleading fails otherwise to state a claim upon which relief can be granted, and (7) the pleading is not properly construed as a supplement, all of which are set forth more fully in the Memorandum of Points and Authorities.

This Motion is made following the conference of counsel pursuant to L.R. 7-3, which occurred telephonically between Ian P. Culver and Meir Westreich on June 18 and July 2, 2021.

This Motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, all other papers and pleadings on file in this

/ / /

matter and especially the purported May 17, 2021, Plaintiffs' Sixth Amended and Second Supplemental Complaint, and the oral arguments of counsel.

Dated: July 9, 2021

Respectfully submitted,

AROCLES AGUILAR
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STEPHANIE E. HOEHN
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UNITED STATES DISTRICT COURT
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SOLUTIONS FOR UTILITIES, INC., et al.

Plaintiffs,

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CALIFORNIA PUBLIC UTILITIES COMMISSION, et al.

Defendants.

Case No: 2:11-cv-04975-JWH

Hon. John W. Holcomb, District Judge

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SIXTH AMENDED AND SECOND SUPPLEMENTAL COMPLAINT; AND MOTION TO STRIKE REFERENCES TO SECOND SUPPLEMENT FROM SIXTH AMENDED COMPLAINT

Date: September 10, 2021
Time: 9:00 a.m.
Place: Via Zoom

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GLOSSARY[1]

Avoided Cost	The incremental cost to an electric utility of electric energy, capacity, or both, which, but for the purchase from a qualifying facility, the utility would generate itself or purchase from another source. *CARE v. CPUC* at 932 (citing 18 C.F.R. § 292.101(6)).
Capacity costs	"The costs associated with providing the capability to deliver energy; they consist primarily of the capital costs of facilities." *CARE v. CPUC* at 934 (cleaned up). "The CPUC is not required to take capacity costs into account in the NEM program." *Id.* at 939.
CARE	Plaintiff CAlifornians for Renewable Energy, a non-profit corporation.
CPUC	Defendant California Public Utilities Commission, a state regulatory agency allowed "to determine exactly how [it] will comply with PURPA and FERC's regulations." *CARE v. CPUC* at 931.
DLAP	Default Load Aggregation Point. "DLAP is an hourly day-ahead electricity market price, in other words, what the utility is paying one day out in the marketplace. DLAP does not include capacity costs." *CARE v. CPUC* at 934.
FERC	Federal Energy Regulatory Commission.
NEM	Net Energy Metering. A retail billing program for public utility consumers with solar power generation facilities installed at the site of the consumer's consumption, *e.g.*, their home, which offsets the retail rate for the volume of electricity consumed by the volume of electricity generated from the on-site solar facility. "The NEM Program calculates how much electricity a consumer uses and how much electricity a consumer generates over a twelve-month period. If the consumer generates more electricity than it uses, then the excess electricity goes back into the electrical grid. The utility pays the consumer for this electricity based on the default load aggregation point price." *CARE v. CPUC* at 934. The price paid is called the Net Surplus Compensation Rate, which the CPUC has determined should be the utility's DLAP. Plaintiffs Boyd and Sarvey participate in the NEM program. *Id.* at 946 (Nguyen, J., dissenting).

[1] *CARE v. CPUC* references in this glossary are all to *CAlifornians for Renewable Energy v. Cal. Pub. Utils. Comm'n*, 922 F.3d 929 (9th Cir. 2019) (*CARE v. CPUC*), *cert. denied sub nom.*, *Boyd et al. v. Cal. Pub. Utils. Comm'n*, 140 S. Ct. 2645 (2020).

PURPA	Public Utility Regulatory Policies Act of 1978.
QF	Qualifying Facility. A QF is either a "small power production facility" or "cogeneration facility." *CARE v. CPUC* at 932 (citing 18 C.F.R. §§ 292.201 & 292.203).
RPS	A Renewables Portfolio Standard is a state program that sets targets by which utilities must source specific amounts of electricity from eligible renewable resources. "CPUC-regulated utilities have met their 2020 targets and are on track to reach their 2030 targets. Most of these goals have been met by purchasing energy from producers with capacity over 20 [megawatts]." *CARE v. CPUC* at 934-35. California's Renewable Portfolio Standard Program is codified at Article 16 (commencing with § 399.11) of the Cal. Pub. Util. Code.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By the time the Court awarded summary judgment to the Defendants on the Fifth Amended and First Supplemental Complaint (Fifth Complaint), it had afforded Plaintiffs numerous opportunities to articulate a claim for which relief could be granted and given Plaintiffs every benefit of the doubt as to each allegation, however vaguely worded. This Court's Order Granting Defendant CPUC's Motion for Summary Judgment scrutinized the challenged Defendants' programs implemented pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA) in light of Plaintiffs' claims and determined that "CARE Plaintiffs have failed to meet their summary judgment burden of identifying violations of PURPA…" Order Granting Summ. J., at 10, December 28, 2016 (ECF 217).

The Ninth Circuit similarly reviewed the CPUC's PURPA programs and Plaintiffs' claims, affirmed all aspects of the Summary Judgment Order *save one*, and remanded the case for this Court to consider Plaintiffs' claims consistent with its holding: "where a utility uses energy from a QF [Qualifying Facility] to meet a state RPS [Renewables Portfolio Standard], the avoided cost must be based on the sources that the utility could rely upon to meet the RPS." *CAlifornians for Renewable Energy v. Cal. Pub. Utils. Comm'n*, 922 F.3d 929, 937 (9th Cir. 2019), *cert. denied sub nom.*, *Boyd et al. v. Cal. Pub. Utils. Comm'n*, 140 S. Ct. 2645 (2020) (*CARE v. CPUC*). Plaintiffs plainly admit, "If a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources." Sixth Am. 2d Supplemental Compl., ¶ 31 (6AC, ECF 267). Plaintiffs never once allege that their resources aid a utility in meeting its RPS obligation, or that they are certified as RPS resources; they allege only that their resources are renewable energy sources. Instead, Plaintiffs hope that the Court will not discern the legal distinction between RPS-certified resources and non-RPS-certified renewable resources – a distinction that the Ninth Circuit underscored.

Because Plaintiffs do not allege this threshold question in the Ninth Circuit's remand order – whether a utility is in fact using Plaintiffs' energy to meet the utility's RPS – Plaintiffs' challenges to the avoided-cost rates in the CPUC's PURPA programs are contrary to the Ninth Circuit's holding, are non-justiciable, and are beyond the scope of the Ninth Circuit's limited remand. As discussed at the status conference on May 17, 2021, the Defendants agreed that the Plaintiffs should amend their complaint in order for the CPUC to know what it is defending itself against after the narrow remand from the Ninth Circuit, yet this Sixth Complaint does not state a claim within the scope of remand. The Sixth Complaint fails to heed the law of the case, instead continuing to make the prior unsupported allegations that this Court and the Ninth Circuit have previously rejected.

Even more fundamentally, this Court lacks subject matter jurisdiction and is obliged to dismiss this case over which it lacks the power to adjudicate. Plaintiffs fail to meet the fundamental Article III requirement of standing and CARE lacks statutory standing in federal court under PURPA.

The Defendants therefore respectfully request that the Sixth Complaint be dismissed with prejudice. Alternatively, the Defendants request that references to supplementation be stricken from the title of the Sixth Complaint for failure to meet the Rule 15(d) standard.

II. BACKGROUND

A. The CPUC

The CPUC is a constitutionally established agency consisting of five members[1], and it may fix retail rates and establish rules for California utilities. Cal. Const., art. XII, §§ 1-6; Cal. Pub. Util. Code § 701. The CPUC acts through the

[1] Per Fed.R.Civ.P. 25(d) current Commissioners are automatically substituted in their official capacity for former Commissioners who have completed their term of service.

issuance of formal decisions voted upon at public meetings, after notice and an opportunity for hearing. Cal. Pub. Util. Code §§ 306 and 311. CPUC decisions are subject to judicial review. *See id.* §§ 1756-1768. The Eleventh Amendment bars federal actions against state agencies like the CPUC, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984), and precludes an award of damages such as CARE is seeking, *CARE v. CPUC*, 922 F.3d at 941. CPUC Commissioners have absolute immunity in suits for damages against them when acting in their legislative capacity. *CARE v. CPUC*, 922 F.3d at 941.

B. Public Utility Regulatory Policies Act of 1978 (PURPA)

Congress enacted PURPA in the wake of the national energy crisis to encourage cogeneration and small power production facilities and to reduce the reliance of electric utilities on oil and gas. *FERC v. Mississippi,* 456 U.S. 742, 745, & 750-51 (1982); *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.,* 461 U.S. 402, 404-05 (1983). Congress authorized the Federal Energy Regulatory Commission (FERC), in consultation with the States, to adopt rules requiring utilities[2] to purchase electric energy from qualifying facilities (QFs)[3], and requiring State regulatory authorities to implement FERC's rules.[4] PURPA is codified generally at 16 U.S.C. §§ 2601, *et seq.*, with definitions in 16 U.S.C. § 796, and other requirements at 16 U.S.C. § 824a-3.

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[2] Under PURPA, an electric utility is defined as an individual, corporation, or federal or state agency that sells electric energy. 16 U.S.C. § 796(4), (22)(A).

[3] 16 U.S.C. § 824a-3(a)(2). "Qualifying facility" is an "eligible" cogeneration or small power production facility. 18 C.F.R. § 292.101(b)(1) (2020). "Qualifying small power production facility" and "qualifying cogenerator facility" are facilities that apply for an order from FERC or self-certify that the facility meets FERC's requirements. 16 U.S.C. § 796(17)(C), (18)(B); 18 C.F.R. § 292.207 (2020).

[4] *See* 16 U.S.C. § 824a-3(f). State regulatory authority and State commission are defined in 16 U.S.C. § 796(15), (21).

FERC's regulations governing the utility obligation to purchase from QFs are set forth in 18 C.F.R. § 292.303 (1980). Section 210(f) of PURPA delegates to States the authority to establish rules, including rates, for these purchases. 16 U.S.C. § 824a-3(f); 18 C.F.R. §§ 292.101(b)(1), 292.304 (2020). The rates paid to QFs must be just and reasonable, in the public interest, and may not exceed the *utility's* incremental cost of alternative electric energy, or "avoided" cost. *See* 16 U.S.C. § 824a-3(b); 18 C.F.R. §§ 292.304(a)(1), (b)(2), (e) (2020). Avoided cost is the "incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6) (2020). PURPA was never intended to "subsidize" QFs or assure that a QF would never operate at a loss. *Swecker v. Midland Power Co.*, 807 F.3d 883, 884 (8th Cir. 2015) (cleaned up); *see also Exelon Wind 1 L.L.C. v. Nelson*, 766 F.3d 380, 384 (5th Cir. 2014) ("While Congress sought to promote energy generation by Qualifying Facilities, it did not intend to do so at the expense of the American consumer."). The focus of avoided-cost rates is on costs that the *utility* avoids in purchasing from the QF.

PURPA does not require that every CPUC procurement program involving renewable energy be implemented pursuant to PURPA. Even under PURPA, States have considerable discretion over the manner in which FERC's regulations are implemented. *FERC v. Mississippi*, 465 U.S. at 750; *see also Cal. Pub. Utils. Comm'n*, 133 FERC ¶ 61,059, at ¶ 24 (Oct. 21, 2010).

FERC's regulations afford States "latitude" in implementing PURPA. *FERC v. Mississippi*, 456 U.S. at 751; *see also Indep. Energy Producers Ass'n v. Cal. Pub. Utils. Comm'n,* 36 F. 3d 848, 856 (9th Cir. 1994) ("PURPA delegates to the states broad authority to implement section 210."). States are not required to adopt a specific rate or rate scheme, and may comply through the issuance of regulations, by resolving disputes on a case-by-case basis, or any other means reasonably designed

to give effect to FERC's regulations. *FERC v. Mississippi,* 456 U.S. at 749-51. The factors to be considered by State commissions, "to the extent practicable," in setting avoided cost rates are: (1) utility system cost data; (2) the terms of any contract, including contract duration; (3) the availability of power from a QF during the system and seasonal periods; (4) the relationship of the availability of power from the QF to the ability of the utility to avoid costs; and (5) the costs or savings resulting from variations in line losses. *Id.*; 18 C.F.R. § 292.304(e) (2020). Finally, the utility purchase obligation has never been absolute, as a utility need not pay for electricity that exceeds what is needed to serve its customers. *See City of Ketchikan, Alaska,* 94 FERC ¶ 61,293, 2001 WL 275023, at *6 (2001) ("the purchase rate should only include payment for energy or capacity which the utility can use to meet its total system load").

PURPA has a specific enforcement scheme. *Indus. Cogenerators v. FERC,* 47 F.3d 1231, 1234 (D.C. Cir. 1995); *see* 16 U.S.C. § 824a-3(g), (h). Section 210(g) of PURPA authorizes "as applied" challenges in state court to enforce requirements established by a State regulatory authority under PURPA. 16 U.S.C. § 824a-3(g). Section 210(h) of PURPA authorizes petitions by an electric utility or a QF to enforce the implementation of FERC's rules by a State regulatory authority ("implementation" challenges). 16 U.S.C. § 824a-3(h)(2)(B). If FERC does not initiate an enforcement action within sixty (60) days of filing the section 210(h) petition, the petitioner may bring an action in district court against the State regulatory authority to enforce compliance. *Id*. The court may only "issue such injunctive or other relief as may be appropriate." *Id.* PURPA does not authorize damages or other equitable relief. *CARE v. CPUC*, 922 F.3d at 941-943 (including that a § 1983 claim cannot be brought for PURPA violations because PURPA has a comprehensive remedial scheme that provides fewer remedies than § 1983); *see also* Order Mot. Dismiss, 6-9, March 14, 2012 (ECF 82); *aff'd Solutions for Utils., Inc. v. CPUC*, 596 Fed. Appx. 571 (9th Cir. 2015) *rehg. denied*.

C. California's Renewables Portfolio Standard Program

California's Renewables Portfolio Standard (RPS) Program[5] generally requires electric utilities to procure specified quantities of "renewable" electricity, meaning it was generated using a technology specified in California Public Resources Code section 25741. *See* Pub. Util. Code §§ 399.11(a) & (b), 399.12(e), (h) & (j), and 399.25. More specifically, electric utilities are required to procure "renewable energy credits" (RECs) from facilities certified as eligible by the California Energy Commission. *See* Cal. Pub. Util. Code § 399.12(h). A REC represents "a certificate of proof associated with the generation of electricity from an eligible renewable energy resource, issued through the accounting system established by the [California] Energy Commission pursuant to Section 399.25, that one unit of electricity was generated and delivered by an eligible renewable energy resource." *Id.*

Therefore, not every renewable energy resource is a facility that can help a utility meets its RPS obligations. Rather, only generators that have been certified by the California Energy Commission as meeting all statutory and regulatory criteria can produce RECs that may then be procured by a utility to meet its RPS obligation.

Additionally, the Ninth Circuit observed that "[a]s CARE acknowledged in its brief, RECs are not covered under PURPA; rather, they are considered state programs and do not factor into the avoided cost determination." *CARE v. CPUC*, 922 F.3d at 940; *see also Wheelabrator Lisbon, Inc. v. Connecticut Dep't of Pub. Util. Control,* 531 F.3d 183, 189-90 (2nd Cir. 2008) (RECs are a matter of state law, not governed by PURPA).

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[5] California Public Utilities Code, Division 1, Part 1, Chapter 2.3, Article 16 (§§ 399.11 through 399.33).

D. Allegations of the Sixth Complaint

Plaintiffs are the nonprofit corporation CARE and two individually named members of CARE. 6AC ¶ 4. The introduction to the Sixth Complaint states that CARE, as well as unnamed "California based small scale energy companies" and two individuals, seek various relief and damages from the CPUC and its official members who allegedly have acted "to effectively undermine the federal policy of promoting the viability and integration of small energy generating companies and protecting them from monopolistic practices." *Id.* at 2.

The Sixth Complaint is substantially similar to the Fifth Complaint and consists of assertions fashioned from legal conclusions, some of which are incorrect, and others merely parrot or distort the adjudicated conclusions from the most recent Ninth Circuit opinion. Plaintiffs generally claim that a utility is "required to calculate an avoided cost for natural gas, an avoided cost for coal, and an avoided cost for solar; rather than calculating a single avoided cost based on all the energy sources" and that the CPUC may "just as permissibly aggregate all sources that could satisfy its RPS obligation." *Id.* ¶¶ 21, 30. Plaintiffs admit that "[i]f a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources." *Id.* ¶ 31. Additionally, Plaintiffs state that the CPUC and utilities are "generally indistinguishable" so as to "render the actions of one the actions of the other." *Id.* ¶ 44.

The Sixth Complaint alleges two claims. The first claim is for the enforcement of PURPA, where Plaintiffs appear to claim that the two individual CARE members' rooftop solar installations that "have operated at a loss" under the NEM program offer "guaranteed energy supplies of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forego capital investments, which would thereby entitle Plaintiffs to avoided capacity costs." *Id.* ¶¶ 35-38, 52, 54-57. Plaintiffs write that the Defendants "have generally failed to perform regulatory functions" and state

incomprehensibly that the Plaintiffs have been "prevented from obtaining a reasonable return on their investments in renewable excess energy avoided capacity costs." *Id.* ¶ 60-61. Plaintiffs seek monetary damages, in an amount to be determined, for the CPUC's alleged failure to enforce PURPA. *Id.* ¶¶ 67, 68, 70. The second claim is for equitable, injunctive, and declaratory relief. *Id.* ¶¶ 71-76.

III. PROCEDURAL HISTORY

In 2011, CARE and Solutions for Utilities Inc. (SFUI) brought suit against the CPUC and Southern California Edison Company alleging violations of PURPA and 42 U.S.C. § 1983. Compl. June 10, 2011 (ECF 1). The Court dismissed the § 1983 claims and CARE's PURPA claims and entered summary judgment for Defendants, finding that SFUI did not have standing to bring its PURPA claim. Order Granting Summ. J., January 3, 2013 (ECF 147). Only CARE appealed. The Ninth Circuit's 2015 Memorandum Opinion determined with finality that the Court correctly dismissed the following claims: CARE's § 1983 claim for First Amendment violations; CARE's claim for fees under the CPUC's intervenor compensation program; CARE's § 1983 claim for PURPA violations because "Congress did not intend to permit a PURPA claim to be brought under § 1983," and CARE's takings claims. *Solutions for Utils., Inc. v. CPUC*, 596 Fed. Appx. at 571-73. The Ninth Circuit did, however, determine that the Court erred in dismissing CARE's PURPA enforcement claims because CARE had fulfilled the requirement to exhaust its administrative remedies. *Id.* at 572.

On the first remand, and in its Fifth Complaint, CARE alleged generally that the CPUC regulations and orders do not provide for PURPA-compliant interconnection and pricing and enable utilities to avoid offering PURPA-compliant contracts to QFs. Fifth Am. 1st Supplemental Compl., ¶¶ 17-18 (5AC, ECF 185). In its ensuing motion for summary judgment, the CPUC defended its implementation of PURPA by describing its PURPA programs including those that CARE raised in its petitions at FERC: the 2010 Qualifying Facility and Combined Heat and Power

Program Settlement (QF Settlement) with its standard offer contract for QFs with capacity of 20 megawatts or less with a Short-Run Avoided Cost rate using a Market Index Formula; the Renewable Market Adjusting Tariff (Re-MAT) Program; the NEM program's net surplus compensation rate for sales of electricity that exceed the customer's consumption of electricity where the solar generator is installed; and the AB 1613 Combined Heat and Power Facilities (CHP) program. Def.'s Mot. Summ. J. (ECF 113).

The Court's order on summary judgment meticulously combed Plaintiffs' complaint and responded to every conceivable claim and argument. Order Granting Summ. J. at 10 (ECF 217). Giving Plaintiffs every benefit of the doubt, the Court extracted,

> As far as the Court can ascertain from CARE Plaintiffs' pleadings and papers, their core allegation is that none of the programs CPUC has authorized require PG&E or its fellow IOUs to purchase electric energy from small power production facilities—such as those operated by Boyd and Sarvey—at the IOUs' "full avoided cost," as the term is defined under federal law.

And:

> In their opposition papers, CARE Plaintiffs for the first time argue that the CPUC-approved NEM net surplus compensation rate ("NSCR") violates PURPA because it (1) does not provide for a separate "capacity payment;" (2) does not reflect long-run avoided costs ("LRAC"); and (3) is not based only on renewable generators.

Id. at 10. The Court determined that CARE Plaintiffs failed to identify any violations of PURPA or its implementing regulations and entered summary judgment for CPUC Defendants on the remaining causes of action. *Id.* at 20. This Order was the subject of CARE's second appeal to the Ninth Circuit.

The Ninth Circuit similarly scrutinized the CPUC's implementation of PURPA, including its QF Settlement Standard Offer Contract, the NEM program with net surplus compensation, and the Re-MAT and AB 1613 CHP programs. *CARE v. CPUC,* 922 F.3d at 933-36 (quoting from Order Granting Summ. J.). On April 24, 2019, the Ninth Circuit upheld the Court's summary judgment order in all respects save one: whether the avoided-cost prices for RPS facilities that a utility actually uses to meet a state RPS are based on prices from resources for which utilities receive RPS credit. *CARE v. CPUC*, 922 F.3d at 936-38. The Ninth Circuit considered CARE's argument that the CPUC "impermissibly base[s] avoided cost on the cost of natural gas benchmark, rather than a renewables benchmark." *Id.* at 936. The Ninth Circuit did not hold that the avoided cost for any renewable resource is to be based on renewable resources. Rather, the Ninth Circuit held that "where a state has an RPS and the utility is using a QF's energy to meet the RPS … the avoided cost must be based on the sources that the utility could rely upon to meet the RPS." *Id.* at 937. The Ninth Circuit was explicit in its narrow holding and underscored the threshold requirement that a QF actually helps a utility in meeting the utility's RPS obligations: "And if a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources." *Id.* at 938. The Ninth Circuit remanded this case back to the Court on this single issue.

With the exception of this single matter that was remanded, the Ninth Circuit found no fault in the CPUC's implementation of PURPA in all other alleged respects. The Ninth Circuit upheld the Court's order on summary judgment that NEM customers such as Plaintiffs do not provide capacity to the utility and thus are not entitled to compensation for capacity under PURPA, that QFs are not, under PURPA, entitled to compensation for RECs, that CARE Plaintiffs are in fact interconnected to the utility, and held *for the second time* that CARE is not entitled to equitable damages and attorney's fees under PURPA. *Id.* at 938, 940-41.

IV. THE COURT SHOULD DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

A. Standard of Review under FRCP 12(b)(1)

As federal courts have limited jurisdiction, this Court is obliged to dismiss this case "for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

B. Plaintiffs Lack Article III Standing

The Plaintiffs lack Article III standing because the Sixth Complaint fails to demonstrate a concrete injury caused by the CPUC that is likely to be remedied by the requested relief. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (a Plaintiff must allege suffering an actual, concrete, and particularized injury-in-fact, that the defendant caused the injury, and that judicial intervention is likely to redress the injury). Plaintiffs fail to meet the constitutional requirement for standing on remand.[6]

First, as discussed above, the remand considers only the relevance of the California RPS Program to PURPA. But the Plaintiffs' Sixth Complaint does not even allege that the electrical energy produced by Plaintiffs has ever been used by a utility to meet its RPS obligation or that any of their resources actually participate in the California RPS Program. *See* Cal. Pub. Util. Code §§ 399.12(e), (h), and (i) (defining foundational terms for the California RPS Program), and § 399.25 (requiring the California Energy Commission to certify facilities producing

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[6] Note that this Court did not rule in response to Defendants' consistently raised arguments that Plaintiffs lack standing; rather, the Court expressly avoided the issue at summary judgment and disposed of the case in the Defendants' favor on other grounds. Order Granting Summ. J., 20 (ECF 217).

renewable energy claimed for RPS purposes as eligible resources). Plaintiffs' Sixth Complaint implies that the existence of the California RPS must change the calculation of avoided-cost rates for non-RPS QFs, 6AC at ¶¶ 56, 57, & 62, when in fact, and Plaintiffs admit, the existence of an RPS changes the calculation of avoided-cost rates only for QFs that are RPS-certified and where the utility uses that QF's energy to meet its RPS requirements. *See* 6AC ¶ 31 ("If a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources."). In sum, Plaintiffs have not shown they have any injury or interest whatsoever in the sole issue for which this case was remanded.

In addition, only declaratory or prospective injunctive relief is available to the Plaintiffs.[7] "To satisfy the redressability requirement of Article III standing, the plaintiff must show that 'it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 96 (2d Cir. 2017) (citing *Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs., Inc.*, 528 U.S. 167, 180–81 (2000)). The individual Plaintiffs' desire to operate their rooftop solar facilities for more money and not "at a loss" is not a particularized injury caused by the CPUC that can be redressed by this lawsuit. 6AC ¶ 57.

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[7] CPUC Commissioners have absolute immunity in suits for damages against them in their official capacity. *See Supreme Court of Va. v. Consumers Union,* 446 U.S. 719, 731-34, (1980) (rulemaking is a legislative function accorded absolute immunity), *see also Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (a claim of an unworthy motive or intent does not destroy the immunity.) The Eleventh Amendment bars CARE's claim for equitable relief and money damages leaving CARE the possibility of only prospective injunctive relief under the *Ex Parte Young* exception to the Eleventh Amendment. *CARE v.* CPUC, 922 F.3d at 941. It is the law of the case that PURPA does not authorize damages or other equitable relief. *Id.* at 941-943 (including that a § 1983 claim cannot be brought for PURPA violations because PURPA has a comprehensive remedial scheme that provides fewer remedies than § 1983); *see also* Order Mot. Dismiss, 6-9, March 14, 2012, *aff'd Solutions for Utils., Inc. v. CPUC*, 596 Fed. Appx. 571.

C. CARE Lacks Statutory Standing

A claim must be dismissed where a party lacks statutory standing. *See Vaughn v. Bay Envt'l. Mgmt., Inc.*, 567 F.3d 1021, 1024 (9th Cir. 2009). CARE lacks statutory standing under PURPA, as the federal statute limits standing expressly to electric utilities, qualifying cogenerators, and qualifying small power producers. *See* 16 U.S.C. § 824a-3(h)(2)(B). CARE is not alleged to be a QF. Instead, the Sixth Complaint alleges that CARE is "an organization representing electric utilities which are Qualified Facilities." 6AC ¶ 52. It is irrelevant that any members of CARE self-certified as QFs because that does not confer standing on CARE, a separate corporate entity. *See Sausalito v. O'Neill*, 383 F.3d 1186, 1199-1200 (9th Cir. 2004) ("would-be plaintiffs" have no standing if not conferred by statute).

D. This Court Lacks Jurisdiction to Hear Any Claim as to How PURPA Is Applied to CARE or Its Members.

This court lacks jurisdiction over complaints that the Plaintiffs have been materially harmed and damaged by California's application of PURPA to the Plaintiffs. PURPA has a specific enforcement scheme. *Indus. Cogenerators v. FERC*, 47 F.3d at 1234; *see* 16 U.S.C. § 824a-3(g) and (h). Federal courts only have subject matter jurisdiction to hear claims that a state is not implementing PURPA because PURPA delegates to States the authority to establish rules, including rates, for purchases made under PURPA. 16 U.S.C. § 824a-3(f) and (h); 18 C.F.R. § 292.304 (2020). However, in the Sixth Complaint, the Plaintiffs allege an as-applied claim, namely that [P.G.& E.] does not pay the Plaintiffs what the Plaintiffs would like. 6AC ¶¶ 53-58. The Ninth Circuit in fact forewarned that such arguments "veer[] into the category of an as-applied challenge that can only be brought in state court." *CARE v. CPUC*, 922 F.3d at 939, n. 4 (cleaned up). As the Ninth Circuit affirmed, the CPUC is implementing PURPA. *Id.* at 942 (affirming as specified Order Granting Summ. J). To the extent Plaintiffs have a claim about the

CPUC's rules implementing PURPA as applied to the Plaintiffs, Plaintiffs could initiate a complaint at the CPUC or challenge CPUC decisions in state court. 16 U.S.C. § 824a–3(g)(1); *see* Order Granting Summ. J., 19-20 (ECF 217) (finding Plaintiffs' arguments about being denied contracts as not properly before the federal district court); *see also Portland Gen. Elect. Co. v. FERC*, 854 F.3d 692, 697 (D.C. Cir. 2017) (explaining that PURPA relies on state adjudications for enforcing PURPA rights).

The California RPS Program—central to the issue on remand—is a matter of state, not federal jurisdiction. *See New York v. FERC*, 535 U.S. 1, 24 (2002) (state jurisdiction over utility resource portfolios); *Wheelabrator Lisbon, Inc. v. Connecticut Dep't of Pub.Util. Control*, 531 F.3d at 189 (state law controls credits that track compliance with RPS obligations, not PURPA).

Thus, to the extent Plaintiffs' bald conclusions state any claim (and as explained below they do not), such a claim is only proper in state court pursuant to 16 U.S.C. § 824a-3(g).

V. PLAINTIFFS' SIXTH COMPLAINT SHOULD BE DISMISSED WITHOUT LEAVE TO AMEND FOR FAILURE TO STATE A CLAIM

A. Standard of Review under FRCP 12(b)(6)

Rule 8(a) of the Federal Rules of Civil Procedure requires a complaint to contain a "short and plain statement of the claim showing that the pleader is entitled to relief," in order to give the defendant "fair notice of what the… claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While a complaint need not contain detailed factual allegations, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id*. at 555 (cleaned up). The allegations in the complaint "must be enough to raise a right to relief above the speculative level," and allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 555 & 570;

Ashcroft v. Iqbal, 556 U.S. 662 (2009). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663.

B. The Sixth Complaint Fails to Meet the Pleading Standard of Rule 8.

The Sixth Complaint lacks a "cognizable legal theory" or "sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). As noted by the Court in examining prior complaints, this complaint continues to contain "highly confusing allegations" without citation about various supposed requirements of PURPA and purported failures of the CPUC. 6AC ¶¶ 17-39 & 56-64; Order Den. Mot. Leave File 4th Am. Complt. 1st Suppl. Complt., 5-6, March 16, 2016 (ECF 184). The Sixth Complaint does not identify any specific federal statutory provision or implementing regulation the CPUC's programs allegedly violate.[8]

In weighing this Motion, this Court cannot "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide*, 328 F.3d 1136, 1139 (9th Cir. 2003). To allow conclusory resuscitations to stand as a proper pleading providing the grounds for entitlement to relief would unfairly require defendants to continue to be subjected to the expense of discovery and litigation. This Sixth Complaint does not contain

[8] Instead, Plaintiffs broadly and conclusively allege that CPUC Defendants "have generally failed to perform regulatory functions as mandated by PURPA and its FERC adopted implementing regulations...." and make unsupported and sweeping conclusions that the CPUC has "harmed the public interest by undermining the public policy purposes of PURPA" and "conspired and colluded" to cause some unexplained harm contrary to Congressional wishes. 6AC ¶¶ 61, 66, and 69.

sufficient underlying facts so as "to enable the opposing party to defend itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).[9]

C. The Sixth Complaint Impermissibly Seeks Reconsideration of Issues Already Decided in This Case.

Contrary to the law of the case, the Plaintiffs' Sixth Complaint fails to state a claim because it seeks reconsideration of matters already decided in this single, continuing lawsuit. Under the law of the case doctrine, "a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). Plainly this Court has no jurisdiction to review an appellate court's decision. *Fine v. Bellefonte Underwriters Ins. Co.*, 758 F.2d 50, 52 (2d Cir. 1985). Any claims aside from the specific issue on remand are barred by the law of this case. *See Matter of Beverly Hills Bancorp*, 752 F.2d 1334, 1337 (9th Cir. 1984) ("[o]n remand, a trial court cannot consider issues decided explicitly or by necessary implication"). Upon remand of the case for further proceedings after decision by an appellate court, the trial court must proceed in accordance with mandate and the law of case as established on appeal. *United States v. Van Pelt*, 938 F.Supp. 697 (D.Kan. 1996).

Plaintiffs' Sixth Complaint is wholly without merit, as it is substantially similar to its Fifth Complaint, merely reiterating and repackaging the same assertions explicitly previously rejected by this Court and the Ninth Circuit. This Court is "not required to accept as true conclusory allegations which are

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[9] Plaintiffs' counsel indicated during the meet and confer process preceding the filing of this Motion that Plaintiffs intend to argue that some unspecified new state implementation of PURPA is now inconsistent with federal law. Not only does the complaint not give Defendants fair notice of such claims, PURPA requires a petition to enforce with FERC before challenging state implementation of PURPA in court. 16 USC § 824a-3(h)(2).

contradicted by documents referred to in the complaint." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998).

The law of this case clearly contradicts the broad allegations that the CPUC is generally violating the purposes or provisions of PURPA. In fact, this Court dismissed all claims in Plaintiffs Fifth Complaint, finding that "CARE Plaintiffs have failed to allege a violation of PURPA or its implementing regulations" in granting summary judgment to the defendants after an analysis of California's PURPA implementation. Order Granting Summ. J., 20 (ECF 217). The Ninth Circuit affirmed this decision in all respects, reversing and remanding it only on "whether an RPS changed the calculation of avoided cost." *CARE v. CPUC*, 922 F.3d at 942.

This Court should not entertain relitigating the Plaintiffs assertions previously rejected by this Court and the Ninth Circuit. For example, despite the Ninth Circuit clearly stating "[w]e do not hold that the avoided cost must be calculated for each individual *type* of energy," the Plaintiffs allege in paragraph 20 of the Sixth Complaint that avoided cost must be calculated for each type of generating resource, the very position the Ninth Circuit rejected. *CARE v. CPUC*, 922 F.3d at 937 (emphasis in original). Similarly, the Sixth Complaint mentions capacity payments numerous times (*see* paragraphs 18, 26, 34-38, 62, and 64), but the Ninth Circuit disposed of the Plaintiffs' same capacity payment arguments in finding that a QF is not entitled to capacity costs unless it actually displaced the utility's need to construct or purchase generation, and such is not the case under the NEM program. *Id.* at 938-39. This court should not entertain the capacity allegation in paragraph 33 of the Sixth Complaint as it remains "perfunctory" and fails to bring a challenge to the specified programs within the scope of the Ninth Circuit's instruction. *CARE v. CPUC*, 922 F.3d at 939-40. Further, the Ninth Circuit affirmed that the Plaintiffs NEM resources are not eligible for capacity payments under federal law and that

California does offer a PURPA program that includes capacity costs, as CARE previously acknowledged. *Id.* at 939.

The law of the case doctrine is founded upon the sound public policy that litigation must come to an end because no court could "efficiently perform its duty to provide expeditious justice to all if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal." *Coleman v. Calderon*, 210 F.3d 1047, 1052 (9th Cir. 2000); *see also Disimone v. Browner*, 121 F.3d 1262 (9th Cir. 1997) ("No litigant deserves an opportunity to go over the same ground twice") (cleaned up). This Court should not reconsider questions previously decided in this proceeding by allowing Plaintiffs to reassert the same arguments and to subject the defendants and the courts to the burdens of this decade-long litigation.[10]

D. Plaintiffs Fail to State a Claim Within the Scope of Remand.

The issues specifically remanded from the Ninth Circuit were "whether utilities are fulfilling any of their RPS obligations through the challenged CPUC programs" and "[t]o the extent, however, that CARE challenges either the Re-MAT or CHP Programs] for basing capacity costs on a new natural gas facility, rather than renewable energy facilities, the district court should consider such a challenge on

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[10] To the extent Plaintiffs base their renewed claim for damages on *Tanzin v. Tanvir,* 141 S. Ct. 486, 208 L. Ed. 2d 295 (2020), which postdated the Ninth Circuit's opinion, all the cases that have construed its effect have limited its holding to the context of claims brought under the Religious Freedom Restoration Act. *E.g.*, *McDaniel v. Diaz*, No. 120CV00856NONESAB, 2021 WL 147125, at *14 (E.D. Cal. Jan. 15, 2021), report and recommendation adopted, No. 120CV00856NONESAB, 2021 WL 806346 (E.D. Cal. Mar. 3, 2021) ("The Court is inclined to agree with CDCR Defendants the case was specific to the Religious Freedom Restoration Act and the right to obtain damages for a violation of that Act[.]").

remand." *CARE v. CPUC*, 922 F.3d at 938 and 940. Plaintiffs fail to state facts and law that would support either of these potential claims in their Sixth Complaint.

The Sixth Complaint's claim about the enforcement of PURPA is devoid of any mention of utilities fulfilling an RPS obligation through a California PURPA program. Nothing in the Sixth Complaint pleads facts that give rise to a reasonable inference that the Defendants violate federal law on the specific issue of "whether an RPS changed the calculation of avoided cost." *Id.* at 942. Further the Sixth Complaint is silent as to whether any CARE member's small rooftop solar generating resources have ever aided a utility in meeting its RPS obligation.[11] Indeed, as Plaintiffs correctly note, "[i]f a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources." 6AC ¶ 31.

E. Additional Pleading by the Plaintiffs Is Futile and Will Not Cure the Deficiencies in the Sixth Complaint.

This case would be further delayed and drag on at significant burden to the CPUC if the Plaintiffs were allowed to further amend or supplement their pleading, particularly when prior pleadings failed to cure deficiencies. *See*, *e.g.*, *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (liberal amendment standard does not justify amendments that prejudice the opposing party, create undue delay, are sought in bad faith, or constitute an exercise in futility). As this case already had a summary judgment ruling in the CPUC's favor and multiple periods of discovery, permitting any amendment or supplementation of claims is not only futile and long delayed but unduly prejudicial. *See Williams v. California*, 764

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[11] Sixth Complaint paragraph 55 alleges that Plaintiffs Boyd and Sarvey offer "guaranteed energy supplies from renewable energy resources" but this falls far short of alleging that any Plaintiff provides eligible renewable energy resources to a California Utility for RPS compliance within the meaning of the California RPS program, Article 16 (commencing with § 399.11) of the Cal. Pub. Util. Code. Only certified and eligible generation counts toward a utility's RPS obligation.

F.3d 1002, 1027 (9th Cir. 2014) (denying leave to amend where Plaintiffs failed in only two chances to sufficiently plead claims); *see also Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980) (a party may not respond to an adverse ruling by claiming that another theory not previously advanced provides possible grounds for relief and should be considered).

With the Sixth Complaint the Plaintiffs had an opportunity to clarify how their claims relate to the one issue for which this case was remanded, specifically the proper calculation of avoided cost of generation used for RPS purposes. Plaintiffs' claims do not in fact relate to the issue on remand. Therefore, Plaintiffs' claim to enforce PURPA should be dismissed without leave to amend.[12]

VI. ALTERNATIVELY, THIS COURT SHOULD STRIKE "AND SECOND SUPPLEMENTAL" FROM CAPTION OF SIXTH COMPLAINT

Should this Court decline to grant Defendant's Motion to Dismiss, Defendants move to strike "and Second Supplemental" from the title of the Sixth Complaint, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, because it is immaterial and mischaracterizes the pleading. Federal Rule of Civil Procedure 15(d) describes a "supplemental pleading" as "setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented" (emphasis added); *see e.g. Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 874 (9th Cir. 2010) ("Rule 15(d) provides a mechanism for parties to file additional causes of action based on facts that didn't exist when the original complaint was filed.").

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[12] Indeed, in the Local Rule 7-3 meet and confer process preceding the filing of this Motion, which took place on July 2, 2021, Plaintiffs' attorney was unable to identify how Plaintiffs might amend if given leave, indicating that it would depend on the nature of the Court's order.

The Sixth Complaint identifies no transaction, occurrence, or event that happened after April 14, 2016, the date the Fifth Complaint was filed, nor does it add a new cause of action based on facts that did not exist when the prior complaint was filed. At best, the Sixth Complaint restates Plaintiffs' existing claims and legal arguments, expands on the request for relief by adding a request for damages (which as discussed above is improper), and substitutes the names of the current CPUC Commissioners as Defendants for those that were in office when the Fifth Complaint was filed.[13] None of this constitutes a "supplement" to the Fifth Complaint. Because the Sixth Complaint does not supplement Plaintiffs' claims, and Defendants would object to any supplement, the Defendants request that the reference to supplementation be stricken from the title of the Sixth Complaint.

VII. CONCLUSION

For all the reasons above, the Sixth Complaint and its claims should be dismissed consistent with Federal Rule of Civil Procedure 41(b) and, if pursuant to

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[13] Over the course of this protracted action, the identities of the CPUC commissioners have changed multiple times, but Federal Rule of Civil Procedure 25(d) takes care of that issue by automatic substitution of parties.

Rule 12(b)(6), without leave to amend. In the alternative, the words "and Second Supplemental" should be stricken from the caption of the Sixth Complaint.

Dated: July 9, 2021

Respectfully submitted,

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