

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 17, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

OKANOGAN HIGHLANDS
ALLIANCE and STATE OF
WASHINGTON,

Plaintiffs,

v.

CROWN RESOURCES
CORPORATION and KINROSS
GOLD, U.S.A., INC.,

Defendants.

NO: 2:20-CV-147-RMP

ORDER GRANTING PLAINTIFFS’
FIRST MOTIONS FOR PARTIAL
SUMMARY JUDGMENT

BEFORE THE COURT are Motions for Partial Summary Judgment, ECF Nos. 49, 50, filed by Plaintiffs Okanogan Highlands Alliance and the State of Washington. The Court heard oral argument via video conferencing. Okanogan Highlands Alliance was represented by Paul Kampmeier. Assistant Attorney General Elizabeth Harris appeared on behalf of the State of Washington. Jonathan W. Rauchway presented argument for Defendants Crown Resources Corporation

1 and Kinross Gold, U.S.A., Inc. The Court has reviewed the motions, the record,
2 heard oral argument and is fully informed.

3 **BACKGROUND**

4 Plaintiffs Okanogan Highlands Alliance (“OHA”) and the State of
5 Washington filed this case pursuant to the citizen suit provision of the federal Clean
6 Water Act, 33 U.S.C. § 1365. *See* ECF Nos. 1, 58. Plaintiffs allege that Crown
7 Resources Corporation (“Crown”) and codefendant, Kinross Gold, U.S.A, Inc.
8 (“Kinross”), have violated various terms of its National Pollutant Discharge
9 Elimination System (“NPDES”) permit, issued by the Washington State Department
10 of Ecology (“Ecology”), for the Buckhorn Mountain Mine in Washington State.
11 ECF Nos. 1 at 16–28, 58 at 11–17.

12 Crown owns the Buckhorn Mountain Mine (the “Mine”) in Okanogan
13 County, Washington. ECF No. 1 at 13. Gold production began in 2008 and
14 concluded in 2017 and the Mine is now undergoing reclamation. ECF No. 62 at 3.
15 Industrial stormwater is collected at the Mine and that water is pumped from the
16 Mine’s dewatering wells as part of the hydrologic closure of the Mine. *Id.* at 3.

17 On November 1, 2007, Ecology issued to Crown an initial combined
18 “National Pollutant Discharge Elimination System” (“NPDES”) and “State Waste
19 Discharge Permit” (“SWD”) under state and federal water quality law. *See Crown*
20 *Res., Corp. v. Dep’t of Ecology*, 10 Wash. App. 2d 1040, 2019 WL 4942459 at *2
21 (Wash. Ct. App. Oct. 8, 2019). “The permit authorized the discharge of treated

1 mine water and stormwater to four outfalls . . . subject to compliance with
2 specified effluent limits.” *Id.*

3 Crown submitted a renewal application in October of 2011, representing
4 under the penalty of law, that the Mine discharges to waters of the United States.
5 ECF Nos. 49 at 11–12, 49-1 at 59–60, 62 at 4.

6 On February 27, 2014, Ecology issued Crown a combined NPDES and
7 waste discharge permit effective March 1, 2014, through February 28, 2019, which
8 was modified on April 29, 2014, and April 1, 2015 (the “Permit”). ECF Nos. 49 at
9 12, 49-1 at 74, 62 at 4. The Permit is issued “in compliance with the provisions of
10 The State of Washington Water Pollution Control Law Chapter 90.48 Revised
11 Code of Washington and The Federal Water Pollution Control Act (The Clean
12 Water Act) Title 33 United States Code, Section 1342 et. seq.” ECF No. 49-1 at
13 74.

14 The Permit has been extended administratively pending issuance of a new
15 NPDES permit in accordance with Ecology’s rules. ECF Nos. 49 at 12, 62 at 5.
16 The Permit provides that “[a]ny permit noncompliance constitutes a violation of
17 the Clean Water Act and is grounds for enforcement action” ECF Nos. 50 at
18 4 (citing ECF No. 49-1 at 132–133), 62 at 11.

19 Crown appealed the Permit to the Washington Pollution Control Hearings
20 Board (“PCHB”). ECF No. 49 at 13, 62 at 6; *see also Crown Res. Corp., v. Dep’t*
21 *of Ecology*, PCHB No. 14-018, 2015 WL 4719130 at *1 (Wash. Pol. Control Bd.

1 July 30, 2015). Ecology conceded certain errors in the Permit that were identified
2 during the PCHB hearing, which Ecology corrected in the second Permit
3 modification on April 1, 2015. ECF Nos. 49 at 13, 62 at 7. The PCHB issued a
4 46-page ruling in July 2015 affirming the Permit as modified. ECF Nos. 49 at 13,
5 62 at 7.

6 Crown appealed, and the Washington State Superior Court for Ferry County
7 affirmed the PCHB’s findings of fact and conclusions of law in March 2017. ECF
8 Nos. 49 at 13, 62 at 7. On appeal, Division III of the Washington Court of Appeals
9 affirmed the lower court’s ruling and the Permit on October 8, 2019. ECF Nos. 49
10 at 13, 662 at 7; *see also Crown Res., Corp.*, 10 Wash. App. 2d 1040, 2019 WL
11 4942459 (Oct. 8, 2019).

12 In the present suit, Plaintiffs allege that Crown is in violation of numerous
13 conditions of the Permit and such violations constitute violations of an “effluent
14 standard or limitation,” as defined by section 505(f) of the Clean Water Act
15 (“CWA”), 33 U.S.C. § 1365, subject to enforcement under the CWA’s citizen suit
16 provisions. ECF Nos. 1 at 28, 58 at 18.

17 In answering Plaintiffs’ Complaints, Crown asserted the following
18 defenses:

19 3. [Plaintiffs’] claims are barred because there has been no
20 discharge of a pollutant from a point source to navigable waters as
21 required to establish jurisdiction under the Clean Water Act.

1 4. [Plaintiffs'] claims are barred because there has been no
2 addition of a pollutant as required to establish jurisdiction under the
Clean Water Act.

3 ECF Nos. 39 at 17, 59 at 16 (hereinafter referred to as "defenses 3 and 4"). As
4 summarized by OHA, "[d]efenses 3 and 4 allege that jurisdiction is lacking
5 because Crown has not discharged a pollutant from a point source to navigable
6 waters and because there has not been an addition of a pollutant." ECF No. 49 at
7 17.

8 Defendants assert that Plaintiffs "mischaracterize" defenses 3 and 4. ECF
9 No. 61 at 2. Rather, "[d]efenses three and four are aimed only at alleged violations
10 of the [State Waste Discharge] portion of the 2014 Permit, in other words,
11 provisions of the 2014 Permit that were not issued under the federal CWA." ECF
12 No. 61 at 3. The 2014 Permit is "not neatly divided into NPDES provisions and
13 SWD provisions." *Id.* Defendants argue that determining which permit
14 provisions are enforceable under which regulatory program will require resolution
15 of disputed issues of material fact, rendering summary judgment not appropriate at
16 this juncture. *Id.*

17 OHA and the State move for partial summary judgment on defenses 3 and 4.
18 asserted by Defendants Crown Resources Corporation and Kinross Gold U.S.A.,
19 Inc. (collectively, "Crown"). *See* ECF Nos. 49, 50. In addition to finding defenses
20 3 and 4 not viable in response to Plaintiffs' claims, OHA requests that the Court
21

1 rule as a matter of law that Plaintiffs may enforce all permit conditions at issue in
2 this case. ECF No. 64 at 3.

3 LEGAL STANDARD

4 “A party may move for summary judgment, identifying each claim or
5 defense—or the part of each claim or defense—on which summary judgment is
6 sought.” Fed. R. Civ. Proc. 56(a). Summary judgment is appropriate where the
7 moving party establishes “that there is no genuine issue of dispute as to any
8 material fact and the movant is entitled to judgment as a matter of law.” *Celotex*
9 *Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

10 Parties opposing summary judgment must cite to “particular parts of
11 materials in the record” establishing a genuine dispute or show why the materials
12 cited do not establish either the absence or presence of a genuine dispute. Fed. R.
13 Civ. P. 56(c)(1). “If the evidence is merely colorable or if not significantly
14 probative, summary judgment may be granted.” *Anderson v. Liberty Lobby Inc.*,
15 477 U.S. 242, 249–50 (1986) (internal citations omitted).

16 DISCUSSION

17 I. Defenses 3 & 4

18 Defendants assert in defenses 3 and 4 that Plaintiffs’ claims are barred
19 because there has been no discharge of a pollutant from a point source to navigable
20 waters nor an addition of a pollutant as required to establish jurisdiction under the
21 Clean Water Act. ECF Nos. 39 at 17, 59 at 16. In other words, Defendants contend

1 that Plaintiffs’ Clean Water Act claims, and this Court’s jurisdiction, must be limited
2 to only those provisions of the Permit regulating point source discharges to
3 navigable waters. *See* ECF No. 61 at 6. It is Defendants’ position that any provision
4 regulating other kinds of discharges, namely those included in the Permit pursuant to
5 the State Waste Discharge (“SWD”) program, are not enforceable under the Clean
6 Water Act. *See id.* at 7 (“[T]he 2014 Permit limits at those monitoring wells are not
7 NPDES permit provisions because they do not regulate the addition of pollutants to
8 navigable waters from a point source.”).

9 OHA argues that Crown’s defenses 3 and 4 are not viable defenses to
10 Plaintiffs’ claims because Plaintiffs need not demonstrate that there has been a
11 discharge or addition of pollutants from a point source to navigable waters to
12 establish either jurisdiction or Defendants’ liability under the Clean Water Act. ECF
13 No. 64 at 3. The State contends that to require a citizen suit plaintiff to demonstrate
14 the same would “impose a new and inappropriate burden on Clean Water Act citizen
15 suit plaintiffs.” ECF No. 66 at 2.

16 The Clean Water Act explicitly allows private citizens to bring civil suits
17 pursuant to 33 U.S.C. § 1365(a)(1) to enforce “effluent standards or limitations.”
18 *See Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (“The primary means for
19 enforcing these limitations and standards is the NPDES . . .”). An “effluent
20 standard or limitation” includes “(7) a permit or condition of a permit issued under
21

1 section 1342 of this title that is in effect under this chapter” 33 U.S.C.

2 § 1365(f)(7).

3 As stated by Defendants in previously moving for dismissal, “[a]ll parties
4 agree that citizen suit jurisdiction under the federal Clean Water Act . . . requires
5 allegations of ongoing violations of an ‘effluent standard or limitation’ including ‘a
6 permit or condition’ thereof.” ECF No. 30 at 3; *see also Gwaltney of Smithfield,*
7 *Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987) (concluding that
8 provision of Clean Water Act does not confer federal jurisdiction over citizen suits
9 for violations that are “wholly past”).

10 The Court finds no support for Defendants’ assertion that jurisdiction under
11 the Clean Water Act is dependent upon a showing of a discharge of a pollutant from
12 a point source to navigable waters or addition of a pollutant. *See Gill v. LDI*, 19
13 F.Supp.2d 1188, 1195 (W.D. Wash. 1998) (holding that “[Defendant] is wrong when
14 it asserts that the only violations that count are discharge violations” because a
15 “[v]iolation of any condition in an NPDES permit is considered a violation of the
16 CWA.”).

17 One type of Clean Water Act citizen suit, invoking § 1365(f)(1), requires a
18 plaintiff to prove that a defendant, without an NPDES permit, “(1) discharged, i.e.,
19 added (2) a pollutant (3) to navigable waters (4) from (5) a point source.” *See*
20 *Citizens All. for Prop. Rights v. City of Duvall*, No. C12–1093RAJ, 2014 WL
21 1379575, at *2 (W.D. Wash. Apr. 8, 2014) (quoting *Comm. to Save Mokolumne*

1 *River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 307–08 (9th Cir. 1993)); *see also*
2 *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) (finding that
3 a NPDES permit is required “when there is a direct discharge from a point source
4 into navigable waters or when there is the functional equivalent of a direct
5 discharge.”).

6 “The second type of CWA citizen suit is one, invoking subsection
7 1365(f)(7), for violation of an NPDES permit.” *Citizens All. for Prop. Rights*, No.
8 C12–1093RAJ, 2014 WL 1379575, at *2; *see also* ECF No. 1 at 12. In bringing this
9 second type of CWA citizen suit, “citizen groups may enforce even valid permit
10 conditions that regulate discharges outside the scope of the Clean Water Act, namely
11 discharges that may never reach navigable waters.” *Nw. Env’t Advocs. v. City of*
12 *Portland*, 56 F.3d 979, 988–89 (9th Cir. 1995); *see also Atchafalaya Basinkeeper v.*
13 *Chustz*, 682 F.3d 356, 359 (5th Cir. 2012) (noting that the “unmistakably clear
14 language” of § 1356(f)(6)¹, allowing for citizen suits for violations of “a permit or
15 condition thereof,” never mentions “discharges.”).

17
18 ¹ *See* 35 U.S.C. § 1365(f)(6) (effective to December 3, 2018) (“[T]he term
19 ‘effluent standard or limitation under this chapter’ means ‘a permit or condition
20 thereof issued under section 1342 of this title, which is in effect under this
21 chapter’ . . .”). The “permit or condition of a permit” subpart became § 1365(f)(7)
subsequent to the addition of current subpart (5). Thus, case law referring to the
“permit or condition of a permit” subpart as § 1365(f)(6) is fully applicable.

1 There is no dispute that Defendants hold an effective NPDES Permit issued
2 pursuant to 33 U.S.C. § 1342, and there is binding authority recognizing that citizens
3 may bring Clean Water Act suits to enforce an NPDES permit condition, including
4 planning, monitoring, and reporting requirements, as well as state standards that are
5 incorporated into an NPDES permit. ECF No. 49-1 at 66; *See Gill*, 19 F.Supp.2d at
6 1195 (citing *Nw. Env't Advocs. v. City of Portland*, 56 F.3d at 988–89). Thus,
7 Plaintiffs do not need to demonstrate that there has been a discharge or addition of
8 pollutants from a point source to navigable waters to establish this Court's
9 jurisdiction or to establish Defendants' potential liability for a Clean Water Act suit.

10 Accordingly, Defendants' defenses 3 & 4 are not viable defenses to Plaintiffs'
11 claims as a matter of law.

12 **II. Plaintiffs can Enforce All Permit Conditions at Issue**

13 The parties disagree as to whether a citizen suit under the Clean Water Act
14 seeking to enforce an “effluent standard or limitation,” including a NPDES permit or
15 condition[s] of a NPDES permit, may encompass those conditions imposed pursuant
16 to state law program, such as SWD, which are included in a combined permit.

17 **Clean Water Act & NPDES Permit**

18 “The Clean Water Act anticipates a partnership between the States and the
19 Federal Government, animated by a shared objective: ‘to restore and maintain the
20 chemical, physical and biological integrity of the Nation's waters.’” *Arkansas v.*
21 *Oklahoma*, 503 U.S. at 101 (quoting 33 U.S.C. § 1251(a)). To that end, the Clean

1 Water Act establishes the NPDES permit system for regulating discharges of
2 pollutants into waters of the United States. *Ass'n to Protect Hammersley, Eld, &*
3 *Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir. 2002) (citation
4 omitted).

5 “A cornerstone of the Clean Water Act is that the ‘discharge of any pollutant’
6 from a ‘point source’ into navigable waters of the United States is unlawful unless
7 the discharge is made according to the terms of an NPDES permit obtained from
8 either the United States Environmental Protection Agency (“EPA”) or from an
9 authorized state agency.” *Id.* (quoting 33 U.S.C. §§ 1311(a), 1342).

10 In Washington State, the Department of Ecology (“Ecology”) is authorized
11 by the EPA to administer the Clean Water Act’s NPDES program. *Assn’ to Protect*
12 *Hammersley*, 299 F.3d at 1009–1010. Washington’s NPDES permit program is set
13 forth at WAC 173-220. Consistent with the CWA, NPDES permits are required for
14 the discharge of pollutants from a point source to any surface water of the state.
15 WAC 173-220-020.

16 **State Waste Discharge (SWD) Permit Program**

17 Washington State’s Waste Discharge Permit Program is “applicable to the
18 discharge of waste materials from industrial, commercial, and municipal operations
19 into ground and surface waters of the state and into municipal sewerage systems.”
20 WAC 173-216-010. The regulation does not apply to “point source discharge[s] of
21 pollutants into navigable waters of the state which are regulated by the National

1 Pollutant Discharge Elimination System (NPDES) Permit Program, chapter 173-220
2 WAC.” *Id.* Nonetheless, “[f]or a given facility, permit requirements under this
3 chapter and NPDES permit requirements under Water Pollution Control Act, RCW
4 90.48.260, shall under normal circumstances, be contained in a single permit
5 document.” WAC 173-216-140.

6 **Combined Permit**

7 Ecology regulates water quality under both state and federal law primarily
8 through the use of combined NPDES and state waste discharge permits, such as
9 those at issue in this case. *Crown Res., Corp.*, 10 Wash. App. 2d. 1040, 2019 WL
10 4942459, at *2 n. 2.

11 Here, there is no dispute that Crown’s NPDES Waste Discharge Permit No.
12 WA0052434 is a “combined permit,” meaning it was issued “[i]n compliance with
13 the provisions of The State of Washington Water Pollution Control Law, Chapter
14 90.48 Revised Code of Washington and The Federal Water Pollution Control Act
15 (The Clean Water Act) Title 33 United States Code, Section 1251 et seq.” ECF
16 No. 49-1 at 74. Furthermore, there is no dispute that the Permit is “not neatly
17 divided into NPDES provisions and SWD provisions.” ECF No. 61 at 3.

18 For the reasons outlined below, the Court finds that Plaintiffs may seek to
19 enforce all Permit conditions under the citizen suit provision of the Clean Water
20 Act consistent with (1) case law in the Ninth Circuit and (2) the plain language of
21 the Permit.

1 Defendants contend that to the extent Plaintiffs’ claim relies on a Permit
2 provision that does not regulate the addition of pollutants to navigable waters from a
3 point source, those claims cannot support a citizen suit provision under the CWA.
4 ECF No. 61 at 8 (citing 40 C.F.R. § 123.1(i)(2)) (“If an approved State program has
5 greater scope of coverage than required by Federal law the additional coverage is not
6 part of the Federally approved program.”); *see also Oregon Nat. Res. Council v.*
7 *United States Forest Serv.*, 834 F.2d 842, 849–50 (1987) (finding that the plaintiffs
8 did not have a cause of action under citizen suit provision to enforce state water
9 quality standards, as affected by nonpoint sources); *holding limited by Nw. Env’t*
10 *Advocs. v. City of Portland*, 56 F.3d 979, 989 n. 11 (9th Cir. 1995) (“When this
11 Court and other courts have held that citizens may not enforce water quality
12 standards under § 505(a)(1), they addressed standards that were not included in a
13 NPDES permit.”) (citing *Oregon Nat. Res. Council*, 834 F.2d 842).

14 “The Ninth Circuit rule, however, is that state standards, including narrative as
15 opposed to numerical criteria, incorporated into an NPDES permit may be enforced
16 through a citizens’ suit.” *Gill*, 19 F. Supp. 2d at 1195 (citing *Nw. Env’t Advocs. v.*
17 *City of Portland*, 56 F.3d 979). In *Northwest Environmental Advocates v. City of*
18 *Portland*, the plaintiffs brought suit on the basis of an Oregon NPDES permit
19 condition which provided that “no wastes shall be discharged and no activities shall
20 be conducted which will violate Water Quality Standards as adopted in OAR 340–
21 41–445” 56 F.3d at 985. The Ninth Circuit rejected the district court’s holding

1 that it lacked jurisdiction for the citizen enforcement of water quality violations,
2 because “[t]he plain language of CWA § 505 authorizes citizens to enforce *all*
3 permit conditions.” *Id.* at 986 (emphasis in original).

4 “The Supreme Court has acknowledged citizen standing under CWA
5 § 505(a)(1) and (f)(6), to enforce permit conditions based on both EPA-promulgated
6 effluent limitations and state-established standards.” *Nw. Env’t Advocs.*, 56 F.3d at
7 988 (citing *E.P.A. v. California*, 426 U.S. 200, 224–25 (1976)). As noted above,
8 “citizen groups may enforce even valid permit conditions that regulate discharges
9 outside the scope of the Clean Water Act, namely discharges that may never reach
10 navigable waters.” *Nw. Env’t Advocs.*, 56 F.3d at 988–89 (citation omitted).

11 This reasoning has further been applied by the Ninth Circuit to a combined
12 permit. *See Cmty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, 305
13 F.3d 943, 956 (9th Cir. 2002). In *Community Association for Restoration of the*
14 *Environment v. Henry Bosma Dairy*, the combined permit at issue “contain[ed]
15 NPDES requirements and requirements from RCW 90.64, Washington’s Dairy
16 Nutrient Management Act.” *Id.* The Ninth Circuit held that the Clean Water Act
17 citizen suit plaintiff had “standing to enforce violations of the [Dairy Waste
18 Management Plan] and NPDES permits.” *Id.*

19 Here, Defendants hold a NPDES permit, and SWD requirements are
20 incorporated as conditions of the Permit. *See Nw. Env’t Advocs.*, 56 F.3d at 986
21 (“Portland holds a National Pollutant Discharge Elimination Systems (NPDES)

1 permit, and the water quality standards are conditions of its permit.”). Consistent
2 with Ninth Circuit precedent holding that the “citizen suit provision of CWA
3 specifically incorporates . . . state permit programs,” the Court finds that Plaintiffs
4 may seek to enforce all permit conditions in the case. *Ashoff v. City of Ukiah*, 130
5 F.3d 409, 413 (9th Cir. 1997) (citing 26 U.S.C. § 1365(f)(6)).

6 Furthermore, the text of the Permit is clear, and provides that “[a]ny permit
7 noncompliance constitutes a violation of the Clear Water Act and is grounds for
8 enforcement action.” ECF No. 49-1 at 132–133.

9 “[NPDES permit] terms are to be given their ordinary meaning, and when the
10 terms of a [permit] are clear, the intent of the parties must be ascertained from the
11 [permit] itself.” *Nat. Res. Def. Council, Inc. v. County of Los Angeles*, 725 F.3d
12 1194, 1205 (9th Cir. 2013) (citing *Klamath Water Users Protective Ass’n v.*
13 *Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999)). Permittees are to be judged by the
14 standards of the permits under which their discharges are authorized. 33 U.S.C. §
15 1342(k). “A permittee violates the CWA when it discharges pollutants in excess of
16 the levels specified in the permit, or where the permittee otherwise violates the
17 permit's terms.” *Nat. Res. Def. Council, Inc.*, 725 F.3d at 1204 (citations omitted);
18 *see also* 40 C.F.R. § 122.41(a) (“Any permit noncompliance constitutes a violation
19 of the Clean Water Act and is grounds for [an] enforcement action”). In other
20 words, the permit is the measuring stick against which a permittee's compliance
21 status is to be determined.

1 There is no dispute that the Permit includes the following provision entitled
2 “Duty to Comply”:

3 The Permittee must comply with all conditions of this permit. Any
4 permit noncompliance constitutes a violation of the Clean Water Act
5 and is grounds for enforcement action; for permit termination;
6 revocation and reissuance; or modification; or denial of a permit
7 renewal application.

8 ECF No. 49-1 at 132–133. The Court agrees with Plaintiffs that the “Duty to
9 Comply” provision is unequivocal, and must be given its ordinary meaning. ECF
10 No. 50 at 7; *see also Nat. Res. Def. Council, Inc.*, 725 F.3d at 1205.

11 Thus, the Court finds that Plaintiffs may seek to enforce all permit conditions
12 at issue in this case based upon Ninth Circuit precedent and the plain language of the
13 Permit.

14 Accordingly, **IT IS HEREBY ORDERED:**

15 1. Plaintiff Okanogan Highlands Alliance’s First Motion for Partial
16 Summary Judgment, **ECF No. 49**, and Plaintiff State of Washington’s First Motion
17 for Partial Summary Judgment, **ECF No. 50**, are **GRANTED**.

18 2. Defendants’ **defenses 3 & 4**, asserted at ECF Nos. 39 at 17, 40 at 17, 59
19 at 16, and 60 at 16–17, are **DISMISSED WITH PREJUDICE**.

20 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this
21 Order and provide copies to counsel.

DATED June 17, 2021.

s/ Rosanna Malouf Peterson

ROSANNA MALOUF PETERSON
United States District Judge