

# Appendix A

Ninth Circuit Panel Opinion  
(Feb. 27, 2024)

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 27 2024

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

THE ESTATE OF ISABELLA “BELLA”  
HERNDON; et al.,

Plaintiffs-Appellants,

v.

NETFLIX, INC.,

Defendant-Appellee.

No. 22-15260

D.C. No. 4:21-cv-06561-YGR

MEMORANDUM\*

Appeal from the United States District Court  
for the Northern District of California  
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted February 15, 2024  
San Francisco, California

Before: MILLER, BADE, and VANDYKE, Circuit Judges.

Plaintiffs-Appellants (Plaintiffs) appeal from the district court’s order granting Defendant-Appellee Netflix, Inc.’s motion to dismiss the First Amended Complaint (FAC) and granting Netflix’s motion to strike under California’s anti-SLAPP statute. In March 2017, Netflix released the show *13 Reasons Why*, which

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

portrayed the suicide of the main character. After watching the show in April 2017, minor Isabella Herndon (Bella) committed suicide.

Four years after her death, Bella's father, John Herndon, and brothers, J.H. and T.H., sued Netflix in a putative class action. In the FAC, John Herndon, as the successor in interest to Bella, brought a survival action against Netflix for (1) strict liability based on its failure to warn about the show's alleged risks to mental health and (2) negligence. J.H. and T.H. brought a claim against Netflix for wrongful death. The district court dismissed these claims with prejudice under Federal Rule of Civil Procedure 12(b)(6). The district court also struck the FAC under California's anti-SLAPP statute, Cal. Code Civ. Proc. § 425.16(b).

We review de novo the district court's order granting the motion to dismiss and granting the motion to strike under California's anti-SLAPP statute. *Holt v. County of Orange*, 91 F.4th 1013, 1017 (9th Cir. 2024); *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 261 (9th Cir. 2013). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court did not err by dismissing John Herndon's survival claims as time-barred. California Code of Civil Procedure section 366.1 provides that a survival action may be commenced before the expiration of the later of two terms: (a) "[s]ix months after the person's death" or (b) "[t]he limitations period that would have been applicable if the person had not died." Cal. Code Civ. Proc.

§ 366.1. Plaintiffs contend that, had Bella not died, the limitations period for her claims would not have begun until her eighteenth birthday, pursuant to the minor tolling provision in California Code of Civil Procedure section 352. *Id.* § 352(a).

In answering questions of statutory interpretation, California courts first consider the ordinary meaning of the language in question, the text of related provisions, and the overall statutory structure, and, if the language is unambiguous after considering these sources, need not look further. *See Larkin v. Workers' Comp. Appeals Bd.*, 358 P.3d 552, 555 (Cal. 2015). Plaintiffs' argument fails because the ordinary meaning of the phrase "limitations period" is distinct from the ordinary meaning of the phrase "tolling period." "Limitations period" ordinarily means the statutorily-defined time limit for bringing a claim based on the nature of the claim and the date of accrual. *See Norgart v. Upjohn Co.*, 981 P.2d 79, 92 (Cal. 1999) ("Under the statute of limitations, a plaintiff must bring a cause of action for wrongful death within one year of accrual . . . . The limitations period is thus defined by the Legislature."); *see also Limitation*, Black's Law Dictionary (11th ed. 2019). In contrast, a "tolling statute" suspends or interrupts the limitations period in various situations. *Mitchell v. State Dep't of Pub. Health*, 205 Cal. Rptr. 3d 261, 269 (Ct. App. 2016) ("The term 'tolled' in the context of the statute of limitations is commonly understood to mean 'suspended' or 'stopped.'"); *see also Tolling Statute*, Black's Law Dictionary (11th ed. 2019). Moreover,

interpreting the phrase “limitations period” as being distinct from a “tolling period” is consistent with the overall statutory scheme, which places the sections providing for limitations periods in a separate chapter from the sections providing for tolling periods. *Compare* Cal. Code Civ. Proc. Part 2, Title 2, Ch. 3 § 335 (listing the “periods of limitation,” which are the “periods prescribed for the commencement of actions”), *with* Cal. Code Civ. Proc. Part 2, Title 2, Ch. 4 (separately listing tolling statutes). Furthermore, California courts have explained that “minority does not toll a limitations period or excuse noncompliance unless a statute specifically says so.” *Blankenship v. Allstate Ins. Co.*, 111 Cal. Rptr. 3d 528, 535 (Ct. App. 2010).

We therefore predict that the California Supreme Court would interpret the phrase “limitations period” to mean the statutorily-defined time limit for bringing a claim based on the nature of the claim and the date of accrual, without inclusion of a tolling period. *See Larkin*, 358 P.3d at 555. And because actions for the death of an individual caused by a wrongful act or neglect of another must be brought “[w]ithin two years,” *Shalabi v. City of Fontana*, 489 P.3d 714, 717 (Cal. 2021), John Herndon’s claims, which were brought over four years after Bella died, were appropriately dismissed as time-barred.

2. The district court also did not err by dismissing the claims brought by Bella’s siblings for lack of standing under the wrongful death statute. When a

decedent has no spouse, domestic partner, issue, or grandchild, only immediate successors under California's probate code may bring a wrongful death action. *See Scott v. Thompson*, 109 Cal. Rptr. 3d 846, 848–49 (Ct. App. 2010). Under California's probate code, the immediate successor if a decedent lacks a spouse, domestic partner, or issue, is "the decedent's parent or parents equally," if alive, not the decedent's siblings. *Id.* (quoting Cal. Prob. Code § 6402). Therefore, because Bella's father is still alive, the district court correctly held that J.H. and T.H. lacked standing to bring a wrongful death action.

3. Netflix has not sought, and agrees it will not seek, attorney's fees against Plaintiffs if we affirm the district court's order dismissing Plaintiffs' claims. Plaintiffs concede that if we affirm the district court on statute of limitations and standing grounds, Netflix's agreement not to seek attorney's fees moots their argument that the district court erred in its application of the anti-SLAPP statute. Given this concession, and the overlap between the standards governing the Rule 12(b)(6) motion and the anti-SLAPP motion, we do not separately address the district court's motion to strike. *See Planned Parenthood Fed'n of Am., Inc v. Ctr. for Med. Progress*, 890 F.3d 828, 833–35 (9th Cir. 2018).

4. Plaintiffs requested leave to amend if we reverse on either the statute of limitations issue or the wrongful death standing issue. Because we affirm on both procedural issues, any amendment would be futile. *See Newland v. Dalton*,

81 F.3d 904, 907 (9th Cir. 1996) (courts “need not accommodate futile amendments”).

**AFFIRMED.**

# Appendix B

District Court Order Denying Remand  
(Nov. 12, 2021)



United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

**THE ESTATE OF B.H., et al.,**  
Plaintiffs,  
v.  
**NETFLIX, INC.,**  
Defendant.

Case No. 4:21-cv-06561-YGR

**ORDER DENYING MOTION TO REMAND  
AND MOTION FOR JURISDICTIONAL  
DISCOVERY**

Dkt. Nos. 25, 26

Plaintiffs the Estate of B.H., John Herndon, B.H.’s father and successor in interest, J.H., a minor, and T.H. a minor, on behalf of themselves and others similarly situated (collectively “plaintiffs”), have filed a motion to remand this class action against defendant Netflix, Inc. (“Netflix”). Plaintiffs have also filed a motion for jurisdictional discovery.

Having carefully considered the papers submitted on both motions along with the pleadings in this action, and for the reasons set forth below, the Court **DENIES** both motions.<sup>1</sup>

**I. BACKGROUND**

On April 30, 2021, plaintiffs filed their class action complaint in the Superior Court of the State of California for the County of Santa Clara. (Dkt. No. 3-1, the “Complaint.”) The class action alleged claims for failure to adequately warn, wrongful death, and negligence stemming from an alleged increase in youth suicide after Netflix released its show *Thirteen Reasons Why*. Netflix removed the class action complaint to this Court on August 25, 2021, asserting that jurisdiction is proper under the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1332(d)(2)(A). (Dkt. No. 3.) After the case was removed to this Court, plaintiffs filed a First Amended Complaint, which included new class definitions. (Dkt. No. 22.) Plaintiffs then filed a motion to

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<sup>1</sup> Pursuant to Federal Rule of Civil Procedure 78(b) and Civil Local Rule 7-1(b), the Court finds this motion appropriate for decision without oral argument and **VACATES** the hearing set for November 16, 2021.

1 remand and a motion for discovery necessary to establish exceptions to CAFA jurisdiction. (Dkt.  
2 Nos. 25-26.)

## 3 **II. LEGAL STANDARD**

4 A defendant's removal is proper where the federal courts have original jurisdiction over an  
5 action brought in state court. 28 U.S.C. § 1441(a). Pursuant to CAFA, this Court has original  
6 jurisdiction over class actions in which there are at least 100 class members, at least one of which  
7 is diverse in citizenship from any defendant, and for which the aggregate amount in controversy  
8 exceeds the sum of \$5 million, exclusive of interest and costs. 28 U.S.C. § 1332(d); *Ibarra v.*  
9 *Manheim Invs., Inc.*, 775 F.3d 1193, 1196-97 (9th Cir. 2015). Generally, courts strictly construe  
10 the removal statute against removal jurisdiction. *See, e.g., Provincial Gov't of Marinduque v.*  
11 *Placer Dome, Inc.*, 582 F.3d 1083, 1087 (9th Cir. 2009). However, "no antiremoval presumption  
12 attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class  
13 actions in federal court." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 89  
14 (2014).

15 Under CAFA, the removing party bears the burden of establishing federal jurisdiction.  
16 *Ibarra*, 775 F.3d at 1197. The removing party must prove by a preponderance of the evidence that  
17 the amount in controversy exceeds the jurisdictional threshold, *Dart Cherokee*, 574 U.S. at 88  
18 (citing 28 U.S.C. § 1446(c)(2)(B)), that the number of class members exceeds 100, and that  
19 minimal diversity exists between the parties. *See Abrego v. Dow Chem. Co.*, 443 F.3d 676, 685  
20 (9th Cir. 2006).

21 When a party moves to remand under CAFA, they present either a "facial" attack or a  
22 "factual" attack on the removing party's showing of the jurisdictional elements. A facial attack  
23 does not present any new evidence, but instead argues that the allegations offered "are insufficient  
24 on their face to invoke federal jurisdiction." *Salter v. Quality Carriers, Inc.*, 974 F.3d 959, 964  
25 (9th Cir. 2020) (quoting *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (cleaned up and  
26 citation omitted)). By contrast, a "factual" attack "contests the truth of the [] factual allegations,  
27 usually by introducing evidence outside the pleadings." *Salter*, 974 F.3d at 964 (quoting *Leite*,  
28 749 F.3d at 1121 (citation omitted)). When a removing party is presented with a facial attack, the

1 Court applies a lower evidentiary standard; in those cases, a removal “need not contain evidentiary  
2 submissions but only plausible allegations of jurisdictional elements.” *See Salter*, 974 F.3d at 964  
3 (quoting *Arias v. Residence Inn by Marriott*, 936 F.3d 920, 922 (9th Cir. 2019)) (cleaned up).

4 When the attack is factual, courts apply a higher evidentiary standard. The removing party “must  
5 support [the] jurisdictional allegations with ‘competent proof’ . . . under the same evidentiary  
6 standard that governs in the summary judgment context.” *Salter*, 974 F.3d at 964 (quoting *Leite*,  
7 749 F.3d at 1121 (citations omitted)).

### 8 **III. DISCUSSION**

#### 9 **A. Identifying The Operative Complaint For Removal**

10 Plaintiffs filed the First Amended Complaint after Netflix’s removal to this Court. Before  
11 the Court can begin a jurisdictional analysis, it must determine which complaint is operative for  
12 removal purposes. “[T]he circuits have unanimously and repeatedly held that whether remand is  
13 proper must be ascertained on the basis of the pleadings at the time of removal. . . . This unanimity  
14 seems firmly to establish that plaintiffs’ attempts to amend a complaint after removal to eliminate  
15 federal jurisdiction are doomed to failure.” *Broadway Grill, Inc. v. Visa Inc.*, 856 F.3d 1274, 1277  
16 (9th Cir. 2017). The Ninth Circuit has recognized a narrow exception for amendments that  
17 provide some amplification for federal jurisdiction. *Id.* (explaining the “very narrow” exception  
18 set forth in *Benko v. Quality Loan Service Corp.*, 789 F.3d 1111 (9th Cir. 2015)). The Ninth  
19 Circuit has clarified that the very narrow exception does not “strike a new path to permit plaintiffs  
20 to amend their class definition, add or remove defendants, or add or remove claims in such a way  
21 that would *alter the essential jurisdictional analysis.*” *Id.* at 1279 (emphasis supplied).

22 Here, plaintiffs First Amended Complaint includes express class definitions that were not  
23 present in their original Complaint filed in the state court. The proposed classes are as follows:

24 *California Negligence and Failure-to-Warn Class*: All ascertainable California  
25 citizens (the harmed minors who survived or their successors in interest on behalf of  
26 the decedents who did not) who watched Netflix’s Show, in full or in part, and assert  
27 that they suffered as a result of Netflix’s failure to adequately warn and/or as a result  
of being negligently targeted and manipulated by Netflix (or its streaming and  
content-delivery products) to watch the Show.

28 *Global Wrongful-Death Class*: All ascertainable beneficiaries (or their equivalents

1 such as those otherwise legally entitled or with standing to bring claims for wrongful  
2 death or an equivalent under their state or national laws) of decedents who watched  
3 Netflix's Show, in full or in part, and died as a result of Netflix's failure to adequately  
warn and/or as a result of being negligently targeted and manipulated by Netflix (or  
its streaming and content-delivery products) to watch the Show.

4 (First. Am. Compl. ¶ 76.) Both parties agree that plaintiffs' original Complaint did not include  
5 such express class definitions even though it made broad class-type allegations.

6 In its Notice of Removal, Netflix alleged that while the "Plaintiffs failed to include a class  
7 definition in their Complaint, Plaintiffs purport to bring the Action on behalf of class members  
8 allegedly harmed by the Netflix Show *Thirteen Reasons Why*, which was distributed throughout  
9 the United States via Netflix streaming service. Because the class is not geographically limited, it  
10 includes members nationwide, and CAFA's requirement is satisfied." (Dkt. No. 3 at ¶ 6.) Indeed,  
11 plaintiffs filed suit in their original Complaint as class-representatives "on behalf of all others  
12 similarly situated," without any geographic restrictions or limitations. (Compl. ¶¶ 73, 78, 82.) In  
13 a subsection entitled "Netflix's failure to adequately warn harmed and caused the death of many  
14 children," the original Complaint references an "alarming story" from shortly after the shows  
15 release where a school in Florida reported a significant spike in self-mutilation and threats of  
16 suicide. (Compl. ¶ 44.) The same section also alleges that "[t]he effect was not merely domestic.  
17 For example, similar devastating impacts were identified in Canada." (Compl. ¶ 48.) Plaintiffs'  
18 own description of its "ascertainable and numerous" class in its original Complaint is consistent  
19 with this broad scope. Plaintiffs described their classes as: "Here, as a result of Netflix's  
20 inadequate warnings, Netflix caused the death of an estimated hundreds, possibly a thousand,  
21 children who committed suicide since the release of the Show, with their many survivors, heirs,  
22 etc., holding viable claims. Beyond those who died, there are many more who suffered substantial  
23 trauma at the hands of callous business decisions that prioritized reaching certain business  
24 milestones over the safety of Netflix's customers." (Compl. ¶ 69.)

25 Now, after removal, plaintiffs have limited the failure to warn class to "all ascertainable  
26 California citizens" and have submitted declarations that this limitation was intended when the  
27 Complaint was filed in state court. *Broadway Grill* does not give this Court discretion to consider  
28 the First Amended Complaint. Restricting the class to California citizens when a limitation did

1 not exist in the original Complaint is the exact definitional change rejected by the Ninth Circuit.  
2 *Broadway Grill*, 856 F.3d at 1277-78 (“Instead of being composed of all the merchants in the state  
3 of California, regardless of citizenship, the class, as defined in the amended complaint, became  
4 exclusively composed of California citizens. We conclude such an amendment is outside the  
5 exception recognized in *Benko* and thus cannot affect the removability of the action.”).  
6 Accordingly, the Court considers the original Complaint as filed in the state court as the operative  
7 complaint for removal.

### 8 **B. Whether An Express Class Definition Is A Prerequisite For Removal**

9 A threshold issue presented in the motion to remand is whether the case should be  
10 remanded to the state court on the basis that the original Complaint does not expressly include a  
11 “class definition.” Under CAFA, a “class action” is defined as “any civil action filed under rule  
12 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure  
13 authorizing an action to be brought by 1 or more representative persons as a class action.” 28  
14 U.S.C. § 1332(d)(1)(B). To “determine whether the matter in controversy” exceeds the sum of \$5  
15 million, “the claims of the individual class members shall be aggregated.” *Id.* § 1332(d)(6). The  
16 phrase “class members” includes “persons (named or unnamed) who fall within the *definition of*  
17 *the proposed* or certified *class*.” *Id.* § 1332(d)(1)(D) (emphasis supplied).

18 There is no dispute that this case is a class action within the meaning of CAFA. In its  
19 Notice of Removal, Netflix highlights that “Plaintiffs fail to include a [class] definition in their  
20 complaint.” (Dkt. No. 3 at ¶ 4.) Plaintiffs argue that this dispenses of Netflix’s jurisdictional  
21 argument and that the case should be remanded. Specifically, plaintiffs argue that in order for  
22 there to be “class members” in this case, “there must be a definition of the proposed or certified  
23 class in a class action.” Since there is no class definition, plaintiffs argue that there are no class  
24 members, and in turn no class under section 1332(d)(1). The Court is not persuaded.

25 To begin, the Court notes that CAFA does not provide a meaning for “definition of the  
26 proposed . . . class” and that the Ninth Circuit has not addressed this precise issue. However, in  
27 analyzing whether a district court can consider amendments to a pleading, the Ninth Circuit has  
28 stated that “[a] class definition, however, will always be present in any class action complaint,

1 state or federal.” *Broadway Grill*, 856 F.3d at 1278. *Broadway Grill* does not explain why. The  
 2 First Circuit’s decision cited by the parties, which is instructive here, helps fill the gap as the only  
 3 case analyzing whether removal can be denied based on an insufficient “class definition.” In  
 4 *College of Dental Surgeons of Puerto Rico v. Connecticut General Life Insurance Company*, the  
 5 First Circuit acknowledged that “[a] complaint that contains class-type allegations historically has  
 6 been assumed to assert a class action before formal class certification.” 585 F.3d 33, 40 (1st Cir.  
 7 2009). Ultimately, the First Circuit held that evaluating the inadequacy of a class definition is a  
 8 question for the class certification stage and not on a motion for remand under CAFA. *Id.* at 42.

9 In light of the foregoing, the Court understands that its duty is to analyze the undisputed  
 10 class-type allegations in order to discern what the proposed class is without weighing the  
 11 adequacy of any purported class definition, whether express or implied. This approach is  
 12 consistent with CAFA’s legislative history which stresses that vague class definitions cannot be  
 13 used to evade federal jurisdiction.<sup>2</sup>

14 Here, plaintiffs filed suit as class-representatives “on behalf of all others similarly situated”  
 15 without any express geographical restriction. (Compl. ¶¶ 73, 78, 82.) Even without an expressly  
 16 stated “class definition,” “class members” are referenced several times in the original complaint.  
 17 *See, e.g.*, Compl. ¶ 68 (“the members of the class”); *id.* ¶ 68(a) (“each class member”); *id.* ¶ 68(c)  
 18 (“members of the class”). Furthermore, as discussed above, plaintiffs’ original Complaint  
 19 characterizes what they view as “ascertainable and numerous” classes. (Compl. ¶ 69.) That  
 20 conceded description includes at least three classes of similarly situated individuals. The first  
 21 relates to those similarly situated persons, who Netflix “as a result of Netflix’s inadequate  
 22 warnings, [] caused the death of an estimated hundreds, possibly a thousand, children who

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24 <sup>2</sup> *See* Senate Report, S. Rep. 109-14, S. Rep. No. 14, 109th Cong. 1st Sess. 2005, 2005  
 25 WL 627977 \*43 (Feb. 28, 2005) (“[N]amed plaintiffs will not be able to evade federal jurisdiction  
 26 with vague class definitions or other efforts to obscure the citizenship of class members. The law  
 27 is clear that, once a federal court properly has jurisdiction over a case removed to federal court,  
 28 subsequent events generally cannot ‘oust’ the federal court of jurisdiction. While plaintiffs  
 undoubtedly possess some power to seek to avoid federal jurisdiction by defining a proposed class  
 in particular ways, they lose that power once a defendant has properly removed a class action to  
 federal court.”). Plaintiffs criticize reliance on this Senate Report. However, the Ninth Circuit in  
*Broadway Grill* considered it in reaching its holding concerning amended class definitions. 856  
 F.3d at 1278-79.

1 committed suicide since the release of the Show.” (*Id.*) The second relates to “their many  
2 survivors, heirs, etc., holding viable claims.” (*Id.*) The third relates to the “many more who  
3 suffered substantial trauma at the hands of callous business decisions that prioritized reaching  
4 certain business milestones over the safety of Netflix’s customers.” (*Id.*) These are enough to  
5 support the jurisdictional analysis under CAFA.<sup>3</sup>

### 6 C. Whether CAFA’s Jurisdictional Requirements Are Satisfied

#### 7 i. Numerosity

8 A district court shall not have original jurisdiction pursuant to CAFA if the number of  
9 members of all proposed plaintiff classes in the aggregate is less than 100. 28 U.S.C. §  
10 1332(d)(5)(B). Plaintiffs do not dispute that the number is less than 100. (Dkt. No. 26 at 11 n.4.)  
11 Instead, plaintiffs argue that Netflix has failed to plead and prove that there are at least 100 class  
12 members.

13 Here, the Court finds that Netflix’s Notice sets forth a plausible allegation that the  
14 plaintiffs’ class is composed of over 100 individuals. The Notice of Removal incorporates  
15 plaintiffs’ admission that there “are hundreds, possibly a thousand” proposed class members.  
16 Plaintiffs argue that Netflix has not met its burden because it has not produced any evidence,  
17 however, this misconstrues the standard applicable here. As outlined in the legal standard section,  
18 Netflix is only required to produce evidence when a factual attack is made. Plaintiffs actually  
19 agree here with the plausible allegation that there “are hundreds, possibly a thousand” proposed  
20 class members. Thus, evidence was not required. *Salter*, 974 F.3d 959 at 964-65 (holding that the  
21 district court erred in requiring factual evidence when the truth of CAFA jurisdictional allegations  
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23 <sup>3</sup> Plaintiffs’ strategy here illustrates why it is improper to consider amendments to a class  
24 definition on a motion to remand after a case has been removed. As discussed below, plaintiffs  
25 argue that their original class action complaint lacked a “class definition” and that this precluded  
26 removal. They do not argue that the Court can or should consider the amended class definitions in  
27 order to clarify whether the numerosity, minimal diversity, and the amount in controversy  
28 requirements were satisfied. However, plaintiffs seek to reap the benefit of the amendment in  
forging their purported class into a home state exception. Plaintiffs are the masters of their  
complaint for jurisdictional purposes. *Hawaii ex rel. Louie v. HSBC Bank Nevada, N.A.*, 761 F.3d  
1027, 1040 (9th Cir. 2014). *Broadway Grill* instructs that plaintiffs could have structured their  
Complaint to avoid CAFA in the first instance and before removal. Because they did not, they  
cannot avoid CAFA through amendments that would alter the jurisdictional analysis.



1 were not disputed). Plaintiffs' pleading is also a judicial admission sufficient to establish the  
2 jurisdictional element. *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376-77 (9th Cir.  
3 2006). CAFA's numerosity requirement is met.

#### 4 **ii. Minimal Diversity**

5 CAFA confers jurisdiction on federal district courts over class actions when, among other  
6 things, "any member of a class of plaintiffs is a citizen of a State different from any defendant."  
7 28 U.S.C. § 1332(d)(2)(A). There is no dispute here that Netflix and the named plaintiffs are not  
8 diverse. Netflix nevertheless argues that minimal diversity is met because plaintiffs filed their  
9 class action on behalf of class members harmed by *Thirteen Reasons Why*, which was distributed  
10 throughout the United States and internationally via Netflix's streaming platform. Netflix also  
11 highlights that there are no geographical limits to the class and points to the allegation concerning  
12 Florida's spike in youth at-risk behavior after the show was released. (Dkt. No. 3 at ¶ 6.)

13 Again, plaintiffs do not dispute that they are seeking a global class and "that minimal  
14 diversity very likely exists." (Dkt. No. 26 at 11 n.4.) Instead, plaintiffs argue that Netflix has not  
15 met its factual burden of proving by preponderance of the evidence that there are class members  
16 outside of California. However, plaintiffs misconstrue the burdens of a facial attack. They have  
17 not contested the truth of Netflix's allegation. Furthermore, Netflix's allegation that minimal  
18 diversity is satisfied is plausible given the broad class proposed in plaintiffs' Complaint. Indeed,  
19 Ninth Circuit case law suggests that the burden is low. In *Ehrman v. Cox Communs., Inc.*, a  
20 defendant's burden was satisfied even though allegations were made on information and belief  
21 based upon the plaintiffs' own pleading. 932 F.3d 1223, 1227-1228 (9th Cir. 2019). Plaintiffs  
22 have not persuaded that a different result should be reached, especially where their own  
23 allegations identify harms in Florida and Canada for a sprawling global class. (Compl. ¶¶ 44, 49.)  
24 Accordingly, the minimal diversity requirement is met.

#### 25 **iii. Amount in Controversy**

26 There is no dispute here that the Complaint did not expressly allege an amount in  
27 controversy. Netflix nevertheless argues that the amount of controversy is sufficient based upon  
28 the face of the Complaint due to the wrongful death damages sought.



1 The removing party may not establish federal jurisdiction “by mere speculation and  
2 conjecture, [or] with unreasonable assumptions.” *Ibarra*, 775 F.3d at 1197-98. Instead, it must  
3 rely on “real evidence and the reality of what is at stake in the litigation.” *Id.* Nevertheless, “a  
4 defendant’s notice of removal need include only a plausible allegation that the amount in  
5 controversy exceeds the jurisdictional threshold.” *Dart Cherokee*, 574 U.S. at 89.

6 Here, Netflix’s Notice of Removal outlines the assumptions that it makes concerning the  
7 amount in controversy. First, Netflix highlights the various economic and non-economic damages  
8 for injuries allegedly suffered in connection with wrongful death claims. (Dkt. No. 3 at ¶ 9.)  
9 Second, it alleges that “Courts have recognized that individual claims for wrongful death are  
10 sufficient to establish that the complaint has put in controversy more than \$75,000 for purposes of  
11 diversity jurisdiction under 28 U.S.C. § 1332(a)” for individual claims. (*Id.*) Third, assuming  
12 there are only 100 putative class members with just \$75,000 each, the amount put in controversy  
13 by the plaintiffs is more than \$5 million. (*Id.*)

14 Plaintiffs do not dispute that the amount in controversy exceeds \$5,000,000. (Dkt. No. 26  
15 at 11 n.4.) Instead, they argue that Netflix is still required to produce evidence in order to satisfy  
16 its burden. Again, this is inconsistent with the controlling legal standard. Since the plaintiffs have  
17 not challenged the “reasonable assumptions” in Netflix’s plausible allegations, and instead  
18 embrace their truth, the amount in controversy requirement is met. *Salter*, 974 F.3d at 965; *see*  
19 *also Ibarra*, 775 F. 3d at 1199 (permitting reasonable assumptions in calculating the amount of  
20 controversy).<sup>4</sup> Furthermore, plaintiffs’ judicial admission concedes that the amount in controversy  
21 is sufficient to satisfy this element. *Singer*, 116 F.3d at 376-77 (holding that a judicial admission  
22 may establish the amount in controversy). Accordingly, all three CAFA factors are satisfied and  
23 removal was proper.

#### 24 **D. Whether CAFA’s Exceptions Are Satisfied**

25 In order to escape federal jurisdiction under CAFA, plaintiffs invoke two exceptions. The  
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27 <sup>4</sup> Plaintiffs’ suggestions that *Dart Cherokee* was wrongly decided or that it is inapplicable  
28 lacks any support grounded in Ninth Circuit case law. The Court has not been persuaded that any  
deviation is necessary.

1 first is the mandatory home-state exception pursuant to 28 U.S.C. § 1332(d)(4)(B). The second is  
2 the discretionary home-state exception pursuant to 28 U.S.C. § 1332(d)(3). As the party seeking  
3 to remand these proceedings, the plaintiffs bear the burden of proving that a CAFA exception  
4 applies. *See Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007).

5 Under the mandatory home-state controversy exception, the Court must decline to exercise  
6 jurisdiction where “two-thirds or more of the members of all proposed plaintiff classes in the  
7 aggregate, and the primary defendants, are citizens of the State in which the action was originally  
8 filed.” 28 U.S.C. § 1332(d)(4)(B). To meet this burden, plaintiffs must provide “some facts in  
9 evidence from which the district court may make findings regarding class members’ citizenship.”  
10 *Mondragon v. Capital One Auto Fin.*, 736 F.3d 880, 884 (9th Cir. 2013). While this  
11 “jurisdictional finding of fact should be based on more than guesswork,” the Court may “make  
12 reasonable inferences from facts in evidence.” *Id.* at 884, 886.

13 Here, plaintiffs fail to provide sufficient facts to carry their burden of showing that two-  
14 thirds of proposed class members are California citizens. They concede that they do not know the  
15 scope of their national class, let alone the composition of its members across states. Therefore,  
16 this factor is not satisfied. *Broadway Grill*, 856 F.3d at 1276 (“The district court correctly denied  
17 the motion to remand because the class, on its face, included many non-citizens of California, and  
18 [the moving party] could not establish two-thirds were California citizens.”).

19 Plaintiffs’ second exception fails for similar reasons. The Court “may, in the interests of  
20 justice and looking at the totality of the circumstances, decline to exercise jurisdiction” when more  
21 than one-third of the putative class, and the primary defendants, are citizens of the state where the  
22 action was originally filed.” 28 U.S.C. § 1332(d)(3). There is no evidence in the record to support  
23 a finding that more than one-third of the putative class are citizens of California. Therefore, this  
24 exception fails. Because plaintiffs have failed to establish that an exception to CAFA applies,  
25 their motion to remand is **DENIED WITHOUT PREJUDICE**.

#### 26 **E. Timeliness Of Removal**

27 Plaintiffs on reply raise a new argument in support of remand. For the first time, they  
28 assert that Netflix’s removal was untimely. Raising new argument in reply is improper. *See*

1 *Floyd v. Filson*, 949 F.3d 1128, 1145 n.6. (9th Cir. 2020) (holding that new argument was  
 2 forfeited when it was not raised in the opening brief); *Colgate v. JUUL Labs, Inc.*, 345 F. Supp. 3d  
 3 1178, 1196 (N.D. Cal. 2018) (declining to consider theory for dismissal raised for the first time in  
 4 reply). The timing requirements are also procedural, not jurisdictional, and can be forfeited.  
 5 *Corono-Contreras v. Gruel*, 857 F.3d 1025, 1029 (9th Cir. 2017); *Firstoe v. Reynolds Metals Co.*,  
 6 615 F.2d 1209, 1212 (9th Cir. 1980) (“Although the time limit is mandatory and a timely objection  
 7 to a late petition will defeat removal, a party may waive the defect or be estopped from objecting  
 8 to the untimeliness by sitting on his rights.”). Plaintiffs waived the issue by not raising it earlier.

#### 9 **F. Jurisdictional Discovery**

10 Plaintiffs also request jurisdictional discovery in order to meet their burden in order to  
 11 establish that a CAFA exception applies.<sup>5</sup> The request is **DENIED**.

12 The Court has discretion to grant jurisdictional discovery to assist it in determining  
 13 whether it has subject matter jurisdiction. *See Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556  
 14 F.2d 406, 430 n. 24 (9th Cir. 1977). “[A]ny decision regarding jurisdictional discovery is a  
 15 discretionary one, and is governed by existing principles regarding post-removal jurisdictional  
 16 discovery, including the disinclination to entertain substantial, burdensome discovery on  
 17 jurisdictional issues.” *Abrego*, 443 F.3d at 692 (internal quotation marks and citation omitted).  
 18 Furthermore, it is appropriate to deny a request for jurisdictional discovery that is “based on a little  
 19 more than a hunch that it might yield jurisdictionally relevant facts.” *Boschetto v. Hansing*, 539  
 20 F.3d 1011, 1020 (9th Cir. 2008).

21 Limited jurisdictional discovery is permissible in those instances where it is *likely* to

---

22  
 23 <sup>5</sup> Specifically:

24 Plaintiffs seek information that is exclusively in the province of Netflix about which  
 25 accounts watched the Show, who Netflix targeted and manipulated into watching the  
 26 Show, and their contract information and account addresses—all with the simple goal  
 27 of ascertaining, if for the California citizens, there is any assertion of harm as a result  
 28 as a result of Netflix’s targeting and/or failure to adequately warn and, for both  
 California and non-California citizens alike, whether anyone died as a result of  
 Netflix’s targeting or failure to warn.

(Dkt. No. 25 at 13.)

1 support a CAFA exception. *See Modragon*, 736 F.3d at 885 (permitting jurisdictional discovery  
 2 where it was suspected that the two-thirds citizen requirement would be satisfied). Netflix has  
 3 submitted unrefuted evidence that its content can be accessed in more than 190 countries. (Long  
 4 Decl. ¶ 2.) Based on the face of plaintiffs' Complaint, which asserts global claims, it is apparent  
 5 that the class as alleged includes many non-citizens of California. Plaintiffs only speculate that  
 6 there are more California citizens in the class than non-citizens and they have not persuaded the  
 7 Court that limited discovery is appropriate. This speculation is insufficient to support a claim for  
 8 jurisdictional discovery. *Boschetto*, 539 F.3d at 1020.

9 Notably, Netflix opposed the discovery sought by plaintiffs on the ground that it does not  
 10 exist, that it would be unduly burdensome, and that it cannot establish the "simple goal" sought by  
 11 plaintiffs. Declarations were submitted in support of Netflix's assertions. Plaintiffs did not file a  
 12 reply and have effectively conceded Netflix's argument.<sup>6</sup> The request for jurisdictional discovery  
 13 is **DENIED**.

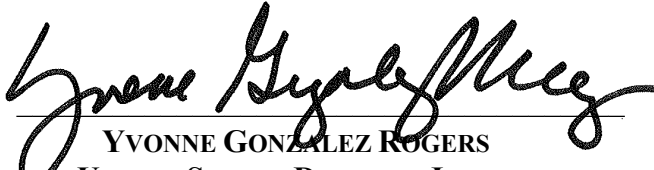
#### 14 **IV. CONCLUSION**

15 For the reasons state above, plaintiffs' motion for remand is **DENIED**. Plaintiffs' motion  
 16 for jurisdictional discovery is also **DENIED**. Pursuant to this Court's Order Granting Stipulated  
 17 Request for Order Changing time (Dkt. No. 35), plaintiffs have **14 days to file an opposition** to  
 18 Netflix's Motion to Strike/Dismiss the First Amended Complaint. Netflix has **21 days from the**  
 19 **opposition to file a reply**.

20 This Order terminates Docket Numbers 25 and 26.

21 **IT IS SO ORDERED.**

22 Dated: November 12, 2021

23   
 24 YVONNE GONZALEZ ROGERS  
 UNITED STATES DISTRICT JUDGE

25  
 26  
 27 <sup>6</sup> Netflix also presented unrefuted evidence and argument that in 2017, when *Thirteen*  
 28 *Reasons Why* was released, only 0.5% of the estimated global number of child suicides occurred in  
 California. Plaintiffs did file the Declaration of Rory Stevens in support of their motion for  
 jurisdictional discovery. (Dkt. No. 39.) However, it is not cited and its relevancy has not been  
 made clear.

# Appendix C

Ninth Circuit Order Denying Rehearing  
(May 17, 2024)

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

MAY 17 2024

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

THE ESTATE OF ISABELLA "BELLA"  
HERNDON; et al.,

Plaintiffs-Appellants,

v.

NETFLIX, INC.,

Defendant-Appellee.

No. 22-15260

D.C. No. 4:21-cv-06561-YGR  
Northern District of California,  
Oakland

ORDER

Before: MILLER, BADE, and VANDYKE, Circuit Judges.

The panel has voted to deny the petition for rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc.

Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc (Dkt. 116) are DENIED.