U.S. COURT OF APPEALS CASE NO. 15-56352

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIAN NEWTON

Plaintiff and Appellant,

v.

PARKER DRILLING MANAGEMENT SERVICES, INC.

Defendant and Appellee.

APPELLEE'S ANSWERING BRIEF

On Appeal From The United States District Court
For The Central District of California, District Court Case 15-cv-02517
The Honorable R. Gary Klausner

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Parker Drilling Management Services, Ltd. f/k/a Parker Drilling Management Services, Inc.'s parent company (i.e. its sole member) is wholly owned by Parker Drilling Company, which is a publicly traded company.

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INTRODUCTION

Appellant Brian Newton ("Newton"), an employee working on an oil platform on the outer Continental Shelf off the coast of California, sued his employer, appellee Parker Drilling Management Services, Inc. ("Parker Drilling"), alleging its wage and hour employment practices violate California law. Newton, along with the class of employees he purports to represent, stays on the oil platform for 14 days at a time, working regularly scheduled 12 hour shifts. Among other things, he alleges that under California law he is entitled to be paid for more than the 12 hours he is scheduled to work each day – he wants "on-call" pay for the hours between shifts when he cannot leave the platform.

The problem with Newton's claims is that under the Outer Continental Shelf Lands Act ("OCSLA," 43 U.S.C. § 1331 et seq.), the oil platform on which Newton works is covered exclusively by federal law. Essentially, the oil platform is treated like a "federal enclave," as if it were an area of federal jurisdiction landlocked within state. Under OCSLA, state law cannot be adopted as surrogate federal law unless there is a "significant void or gap" in federal law regarding an issue.

Here, there is no significant void or gap in federal law relevant to Newton's wage and hour claims. The federal Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq*. ("FLSA") is a comprehensive federal statute providing for the payment

of minimum wages and overtime for hours worked, leaving no significant gaps to be filled by state law as applied to Newton's employment claims. Thus, Newton's complaint based solely on California law lacks a cognizable legal theory and fails to state claims upon which relief can be granted. The district court properly entered judgment on the pleadings in favor of Parker Drilling, and the judgment should be affirmed.

ISSUE PRESENTED

This appeal presents just one issue for review: Did the district court err in finding that, pursuant to the Outer Continental Shelf Lands Act (OCSLA), California state law should not be adopted as surrogate federal law where there is no "significant void or gap" in federal law regarding plaintiff Newton's wage and hour labor law claims?

WAIVER OF ISSUE PRESENTED

Newton's issue presented in his Appellant's Opening Brief ("AOB") contains four parts. AOB at 1-2. However, Newton did not raise the first of those parts in his briefing below and he does not address it in any detail on appeal. *See* AOB 1-49; Dkt. 16 at 1-28. For that reason, Newton has waived any issue related to the first part of his issue presented.

The first part of Newton's issue presented states that as to his California law claims in his complaint "at least some of the alleged California wage-and-hour

violations took place on vessels to and from California's coast and on the coast of California itself." AOB at 1. That allegation is not found anywhere in Newton's first amended complaint ("FAC"). *See* ER 27:18-23 (the only factual allegations in the FAC on which Newton's legal claims are based); *see also* ER 25-40. Nor did Newton make any argument of alleged wrong regarding this new issue in opposing Parker Drilling's motion for judgment on the pleadings in the district court. *See* Appellee's Excerpts of Record ("AER") 1-28. On appeal, Newton only makes a cursory reference to this new allegation and argument in one sentence in his Summary of Argument, but then does not address it again in his opening brief. *See* AOB at 8.

By failing to raise this issue below, and further by failing to address it on appeal, Newton has waived any issue of error. *See Hargis v. Foster*, 312 F.3d 404, 408 (9th Cir. 2002) (Ninth Circuit refuses to consider claim raised for first time on appeal); *cf. Walsh v. Nevada Dept. of Human Resources*, 471 F.3d 1033, 1037 (9th Cir. 2006) (Court considered an issue abandoned because not raised in response to a defendant's motion to dismiss so that it was not ruled on by the district court); *see Milne v. Hillblom*, 165 F.3d 733, 736-737 n. 6 (9th Cir. 1999) (failure to present any argument or authority on issue constitutes waiver).

STATEMENT OF THE CASE AND STATEMENT OF FACTS

A. Newton's Complaint and Parker Drilling's Motion for Judgment on the Pleadings

Newton filed his action against Parker Drilling in California Superior Court and Parker Drilling removed it to federal court based on federal question jurisdiction. Dkt. 1, 2. Newton's FAC alleges state law claims against Parker Drilling arising solely out of activity on drilling platforms subject to exclusive federal jurisdiction under OCSLA. Appellant's Excerpts of Record ("ER") 25-40.

The FAC contains just six lines of factual allegations to support Newton's claims. ER 27:18-23. Newton alleges that for almost two years, from January 25, 2013 to January 15, 2015, he worked for Parker Drilling on an oil platform off the California coast. *Id.* He claims his "shift" typically lasted 14 days, during which he was paid for 12 hours each day but was not paid for the other 12 hours in the day. *Id.* During the 14 days he was on the platform, Newton alleges he could not reasonably leave. *Id.*

Based on these simple allegations, Newton alleges seven claims against Parker Drilling under California labor law, for (1) minimum wage violations; (2) pay stub violations; (3) unfair competition; (4) failure to timely pay final wages; (5) failure to provide lawful meal periods; (6) failure to pay overtime and double time premium wages; and (7) civil penalties under the Private Attorneys General Act of 2004. ER 25-40. He sets forth his legal theory of liability in the

allegations of his complaint, as follows: "Time during which a worker cannot leave his or her worksite, even sleeping time, is considered hours worked under California law. (*Mendiola v. CPS Security Solutions, Inc.* (Cal., Jan. 8, 2015) 15 Cal. Daily Op. Serv. 203 [60 Cal.4th 833].)." ER 28:6-9, 35:20-22. Although the FAC is not labeled a class action, it contains class action allegations. *See, e.g.,* ER 26-27.

Two months after removal, Parker Drilling moved for judgment on the pleadings, or alternatively, for summary judgment. Dkt. 8. Its motion was based on established law that under OCSLA, the fixed drilling platform on the Outer Continental Shelf at issue here is governed exclusively by federal law. Further, the law of the adjacent state is "surrogate" federal law only where adoption of state law is "necessary" to fill a "significant void or gap" in federal law. *Id.* Because there are no gaps in federal law as to Newton's claims, California state law does not apply and Parker Drilling is entitled to judgment as a matter of law.

B. The District Court Decision Granting Parker Drilling's Motion

The district court issued a detailed seven-page decision addressing the motion. Relying on OCSLA, U.S. Supreme Court case law, Fifth Circuit Court of Appeals case law (the jurisdiction in which most OCSLA cases arise), case law in the Ninth Circuit, and the FLSA, the district court granted Parker Drilling's motion for judgment on the pleadings. ER 5-11.

In its order, the district court first found that Newton's claims are subject to OCSLA so that the law to be applied is "exclusively federal." ER 7. The court found state law applies only to the extent it is necessary "to fill a significant void or gap" in federal law, and there are no such voids or gaps in the FLSA, the governing federal law for all of Newton's claims. *Id.* Contrary to Newton's contention, the court found the "savings clause" in the FLSA does not allow California law to govern concurrently with the FLSA. ER 8. Thus, the district court concluded, Newton's state law claims all fail. ER 8-10.

The district court entered judgment in favor of Parker Drilling and Newton appealed. Dkt. 38.

SUMMARY OF ARGUMENT

Because Newton's claims against Parker Drilling based on various alleged wage and hour violations under California law arose out of his employment on an oil platform on the outer Continental Shelf, they are governed by OCSLA. Under OCSLA, the law to be applied is exclusively federal. The statute allows for the law of an adjacent state to be adopted as "surrogate" federal law, but only where the state law is "applicable and not inconsistent with" federal law. Courts have interpreted that statutory language to mean that OCSLA only incorporates state law to the extent necessary to fill a "significant void or gap" in federal law. Contrary

to Newton's argument, there is no new "*Union Texas*" test that negates the required "significant void or gap" in federal law before state law can be applied.

Applying OCSLA to Newton's complaint, there is no significant void or gap in the FLSA's coverage of Newton's claims that would allow California law to fill the void. The FLSA is a comprehensive federal statute providing for the payment of minimum wages and overtime for hours worked, including in the situation here, where the employer resides on the employer's premises. It also has provisions intended to ensure employees obtain proper meal and rest benefits. Federal law requires employers to keep accurate records of hours worked and wages paid to employees, and prescribes penalties where employers fail to comply. Similarly, the FLSA regulates timely payment of earned wages when an employee is terminated or quits his or her job. Because federal law does not contain any significant voids or gaps in its coverage of Newton's claims, state law is not a necessary surrogate here.

This result does not change because the FLSA contains a savings clause, indicating states can provide more generous wage and hour rules than the FLSA does. Although the FLSA does not preempt state law, the standard for whether state law applies under OCSLA is necessarily more stringent than general preemption principles, given the exclusivity of federal jurisdiction. The savings

clause in the FLSA does not allow California law to govern concurrently with the FLSA under OCSLA.

Because Newton brought his claims solely under California law, which does not apply under OCSLA, Newton's first amended complaint lacks a cognizable legal theory and therefore fails to state claims upon which relief can be granted. The district court properly entered judgment on the pleadings in favor of Parker Drilling, and the judgment should be affirmed.

ARGUMENT

A. OCSLA Applies to Newton's Claims

Newton does not dispute that OCSLA – the Outer Continental Shelf Lands Act – governs in this case. *See, e.g.,* AOB at 9-10. The Supreme Court has recognized that the purpose of OCSLA "was to define a body of law applicable to the seabed, the subsoil, and the fixed structures such as those in question here on the outer Continental Shelf." *Rodrigue v. Aetna Cs. & Sur. Co.*, 395 U.S. 352, 355 (1969). The "outer Continental Shelf" generally includes all submerged lands within United States territorial waters but more than three miles from the coast of a state. 43 U.S.C. § 1331(a); *Valladolid v. Pacific Operations Offshore, LLP*, 604 F.3d 1126, 1130 (9th Cir. 2010). Both Newton and the putative class allegedly worked on oil platforms located in the central portion of the Santa Barbara Channel, more than three miles from the California coastline. ER 27:20; AER

29:11-20. The oil platforms are permanently attached to the seabed and were erected for the purpose of resource extraction. AER 29:11-18. Case law has found oil platforms such as the one Newton worked on are "artificial islands" within the meaning of OCSLA. *See, e.g., Hollier v. Union Texas Petroleum Corp.*, 972 F.2d 662, 664 (5th Cir. 1992); 43 U.S.C. § 1333(a)(1).

1. Under OCSLA, exclusively federal law applies

Pursuant to OCSLA at 43 U.S.C. § 1333(a)(1)[1], the law to be applied to these oil platforms, or "artificial islands," on the outer Continental Shelf is exclusively federal. The statute states:

> (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom . . . to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State.

§ 1333(a)(1); *see also Rodrigue*, 395 U.S. at 355-357 (under OCSLA, federal law is to be applied "to these artificial islands as though they were federal enclaves in an upland State"); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479 (1981); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 100 (1971).

[1] Unless otherwise indicated, all statutory references in this brief are to the OCSLA in volume 43 of the United States Code.

The statute does allow for the law of an adjacent state to be adopted as "surrogate" federal law for structures on the outer Continental Shelf in some circumstances. The statute states:

> (2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . .

§ 1333(a)(2)(A); *see also Union Oil Co. v. Oppen*, 501 F.2d 558, 560-61 (1971).

Interpreting the statutory language requiring state laws to be "applicable and not inconsistent with" OCSLA in order to be adopted as federal law, the Supreme Court in *Rodrigue* first described the purpose behind the requirement: "Since federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems, the Act supplemented gaps in the federal law with state law through the 'adoption of State law as the law of the United States.'" *Rodrigue*, 395 U.S. at 357. The Court concluded that "[i]t is evident from this that federal law is 'exclusive' in its regulation of this area, and that state law is adopted only as surrogate federal law." *Ibid.* In other words, "state law could be used to fill federal voids." *Id.* at 358.

By allowing state law to be incorporated to fill a federal law gap, however, OCSLA does not open the floodgates to the broad application of state law in OCSLA cases. Almost 50 years ago, the Fifth Circuit spoke to the statutory requirement that OCSLA only incorporates state law to the extent there is a "necessity to fill a significant void or gap" in federal law, and applied the requirement to the facts before it. *Continental Oil Co. v. London S.S. Owners' Mut. Ins. Assoc.*, 417 F.2d 1030, 1036 (5th Cir. 1969). That early opinion has been a benchmark for other OCSLA cases. *See, e.g., Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973); *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir. 1985); *Oppen v. Aetna Ins. Co.*, 485 F.2d 252, 255 (9th Cir. 1973).

At issue in *Continental Oil* was the applicability of a Louisiana statute permitting a direct action against an insurer prior to obtaining a judgment against the insured in case involving a platform covered by OCSLA. *Id.* at 1031-1032. In finding that the state statute was not adopted as surrogate federal law, the court specifically rejected the argument that § 1333(a)(2)(A) intended to "export the whole body of adjacent law onto the Outer Continental Shelf for automatic application to any and all occurrences" unless inconsistent with OCSLA or other federal law. *Id.* at 1035-1036. The court held this interpretation gave too much weight to the term "not inconsistent" and not enough to "applicable" and the overarching purpose and history of OCSLA. *Id.* at 1035-1040. The court reasoned

that the "approach [which] accords initially a superiority to adjacent state law" until excluded by federal law "is hardly in keeping with the course of legislative history in which the notion of supremacy of state law administered by state agencies was expressly rejected." *Continental Oil*, 417 F.2d at 1036.

Thus, the *Continental Oil* court concluded that "the deliberate choice of federal law, federally administered" on the Outer Continental Shelf "requires that 'applicable' be read in terms of necessity – necessity to fill a significant void or gap." *Id.* at 1036. Because federal maritime law provided "substantive rights and remedies" with respect to the issue in dispute, there was no significant gap necessitating application of the Louisiana direct action statute. *Id.* at 1036-1037. The court therefore held that the statute was not incorporated by § 1333(a)(2)(A). *Id.* at 1035.

Other cases have followed *Continental Oil* and reached similar results. In *Nations v. Morris*, 483 F.2d 577, the court held that the Louisiana direct action statute at issue in *Continental Oil* did not apply to a case arising out of a work-related injury on a drilling rig in the Outer Continental Shelf, because the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") provided a federal remedy and there were no gaps to fill. *Id.* at 589-590; *see also Couvillion v. Nicklos Oil & Gas Co.*, 671 F. Supp. 446, 448 fn. 2 (E.D. La. 1987) (under *Continental Oil*, "for a state law provision to be incorporated into OCSLA, the

provision must not only be 'applicable,' in the sense that the state law would apply in the absence of a federal scheme, but it must be necessary, in the sense that it fills some 'void' or 'gaps' in OCSLA.").

In *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506, the court held that an OCSLA platform worker who was allegedly terminated from his employment for claiming benefits under the LHWCA could not maintain a state law retaliatory discharge claim, because federal law already provided a remedy for retaliation. The *LeSassier* Court applied *Continental Oil*'s "necessity" requirement and rejected the argument that "state provisions which merely duplicate or supplement federal provisions are not 'inconsistent' or otherwise barred, even if parallel state provisions result in superior awards." *Id.* at 508. And in *Oppen v. Aetna Ins. Co.*, 485 F.2d at 255, citing *Continental Oil* with approval the Ninth Circuit held that §1333(a)(2)(A) does not adopt state law for "every occurrence arising out of operations conducted on a fixed platform attached to the outer Continental Shelf."

As discussed below, the district court properly relied on this long-established law founded on the Supreme Court decision in *Rodrigue* and as further applied by the Fifth Circuit in *Continental Oil* to conclude "there are no 'significant voids or gaps' in the applicability of the governing federal law, the [FLSA], to the actions of which Plaintiff complains." ER 7.

2. Contrary to Newton's opening brief, there is no separate "*Union Texas*" test

In an attempt to avoid the situation here, where there are no gaps in federal law to be filled with California state law, Newton makes a new argument on appeal, that he did not raise in the district court. For the first time on appeal, he cites to *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, 895 F.2d 1043 (5th Cir. 1990), and claims that in it, the Fifth Circuit penned a new test that omits the "significant void or gap" requirement. See AOB at 13-17. Then, citing to a single decision the Fifth Circuit issued more than 25 years later, Newton claims that "[t]he Fifth Circuit applies the *Union Texas* standard to all OCSLA cases." *See* AOB at 13, citing *Tetra Technologies, Inc. v. Cont'l Ins. Co.*, 814 F.3d 733 (5th Cir. 2016).

Newton's newly fashioned argument has no merit. There is no *new* test that is applied to all OCSLA cases. Instead, the opinions in *Union Texas* and *Tetra Technologies* show that the court in those cases followed the *Continental Oil* analysis. It determined that OCSLA applied, but there was no federal law to apply so the only law that could apply was state law. In other words, the court found under OCSLA that a significant gap or void in federal law existed, so that state law (which traditionally governs the interpretation and performance of the contracts at issue) was required as a surrogate. The three "conditions" cited in *Union Texas* are consistent with *Rodrigue* and *Continental Oil* and are not new.

Contrary to here, where the parties agree OCSLA applies, *Union Texas* raised the threshold issue of whether OCSLA applied at all to contracts between the parties or whether maritime law applied instead. *See Union Texas*, 895 F.2d at 1047 ("the contention comes down to an assertion that these collective contracts were maritime in nature and thus subject exclusively to admiralty law"). In that context, the court described three "conditions" that must be met before state law could apply as surrogate federal law under OCSLA, to adjudicate the contract claims. *Id.* First, OCSLA had to apply (it did). *Id.* Second, federal maritime law could not apply (it did not). *Id*. And third, the state law could not be inconsistent with federal law. *Id.* The court addressed only the first two of these conditions in its opinion and never reached the third. *Id.* at 1047-1050. It concluded that "[b]ecause the contracts at issue were nonmaritime, OCSLA came into force so that Louisiana state law applies to the claims for liens . . . ." *Id.* at 1050.

That *Union Texas* did not rewrite the law regarding application of OCSLA is apparent from a statement the court made later in the opinion. In allowing liens to be filed in a state parish adjacent to the Outer Continental Shelf property at issue in the case, the court stated: "Any other result here would frustrate the Congressional purpose that the OCS be treated as an area of exclusive federal jurisdiction within the state where state law will apply to fill in the gaps in the federal law." *Id.* at 1052. The requirement under OCSLA that a "significant void or gap" exist in

federal law before state law is applied as a surrogate is still the law after *Union Texas*.

More than 25 years later, in a *per curiam* decision, the Fifth Circuit had occasion to rely on *Union Texas* in a case involving similar issues, in *Tetra Technologies*, 814 F.3d 733. At the outset of the opinion, the court restated the rule of law that "[w]hen there are 'gaps in the federal law,' OCSLA adopts the law of the adjacent state, here Louisiana, as surrogate federal law '[t]o the extent that [the adjacent state's law is] applicable and not inconsistent with [OCSLA] or with other Federal laws and regulations.'" *Id.* at 738, footnotes omitted, bracketed words in opinion. However, like in *Union Texas*, there appears to be no issue whether competing federal law covered the plaintiff's claims because the issue is never addressed in the opinion. In fact, the court confirms that the plaintiff did not even argue federal law played a role in the analysis of the merits. *See id.* at 742. Unremarkably, the court remanded, finding triable issues of fact existed as to whether OCSLA applied and whether federal maritime law did not apply of its own force. *Id.* at 738-742.

Looking more closely at the test Newton promotes as the purported standard the Fifth Circuit applies to "all OCSLA cases," it is clear that the three conditions numbered by the *Union Texas* court are not new, but they only partially state the law as it applies to their facts. And the court in *Union Texas* never intended for the

conditions it enumerated for its case to overwrite the "significant void or gap" requirement established under earlier case law. What Newton describes as a "more stringent test" is still the standard for analyzing OCSLA cases and that "more stringent test" still comports with the Congressional intent in enacting OCSLA and the case law construing it. *See* AOB at 14.

In support of his argument for a new test under *Union Texas*, Newton claims the Supreme Court has changed course after *Rodrigue* and held "state law applies by default, unless it is inconsistent with federal law." *See* AOB at 15-16, citing *Gulf Offshore*, 453 U.S. 473. Again, Newton is wrong in his read of the law.

In *Gulf Offshore*, the Court "granted certiorari to resolve a conflict over whether federal courts have exclusive subject-matter jurisdiction over suits arising under OCSLA." *Id.* at 477. In its discussion, the Court reiterated Congress's approach in enacting OCSLA, stating: "Congress was not unaware, however, of the close, longstanding relationship between the Shelf and the adjacent States. *See* 1953 S.Rep., at 6. This concern manifested itself primarily in the incorporation of the law of adjacent States to fill gaps in federal law." *Id.* at 480, fn. 7 (citing *Rodrigue*, 395 U.S. at 365). The Court reiterated: "All law applicable to the Outer Continental Shelf is federal law, but to fill the substantial 'gaps' in the coverage of federal law, OCSLA borrows the 'applicable and not inconsistent' laws of the adjacent States as surrogate federal law." *Id.* at 480. Clearly, the Supreme Court

in *Gulf Offshore* did not discard the requirement that federal law contain a "substantial gap" in its coverage before OCSLA borrows "applicable and not inconsistent" state laws. *See also LeSassier v. Chevron USA*, 776 F.2d at 509 (Fifth Circuit rejected interpreting *Gulf Offshore* to discard the "necessity to fill a significant void or gap" requirement, relying on *Nations*, 483 F.2d at 585, *Rodrigue*, 395 U.S. 352, and *Continental Oil*, 417 F.2d at 1036).

In light of *Gulf Offshores*' reaffirmation of the federal "significant gap" requirement, as quoted above, Newton's quote from *Gulf Offshore* on page 15 of his Brief is misleading. At that point in the opinion, the Court is addressing the source of law that will govern whether a particular jury instruction must be made. The question was not whether state law should apply instead of federal law, but rather *which* state's law applied, Texas or Louisiana. It is in that context that the Court makes the statement quoted by Newton: "In any particular case, the adjacent State's law applies to those areas 'which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . ." *Gulf Offshore*, 453 U.S. at 485-486. The Court concluded that "[t]he statute thus contains an explicit choice-of-law provision." *Id.* at 486. Contrary to Newton's characterization, nothing written by the Supreme Court in *Gulf Offshore* elevates state law so that it applies "by default" under OCSLA.

B. The Regulations Interpreting the FLSA Should Be Treated as Part of Federal Law for Purposes of OCSLA

Newton argues that in determining whether the FLSA contains gaps regarding wage and hour law applicable under OCSLA on the outer Continental Shelf , the Court can only look to the federal statute itself and not the body of federal case law and federal regulations interpreting and applying the FLSA. Newton's argument is based on a strained reading of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and a fundamental misunderstanding of the nature of "federal common law." The case law and federal regulations interpreting the FLSA are part of the federal law applicable under OCSLA, and there are no significant gaps to be filled with state law as a surrogate.

In *Huson*, the Supreme Court held that when applying substantive state personal injury law to platforms subject to OCSLA, courts must use the applicable state statute of limitations rather than derive one from the admiralty doctrine of laches. *Huson*, 404 U.S. at 100-05. *Huson* held that the creation of a federal statute of limitations to govern an action where state law provides the substantive rule of decision "amounts to an inappropriate creation of federal common law." *Id.* at 104. Nowhere did *Huson* state or imply that cases interpreting federal *statutes* are "federal common law" and therefore not part of the body of federal law applicable to activity on the Outer Continental Shelf. Under *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), "[t]here is no federal general common law"

outside a few specific areas such as admiralty.[2] Unlike the conceptual federal common law repudiated by the court in *Erie R.R.*, the cases interpreting the FLSA are elucidations of what the text of the FLSA itself means, and are not some separate body of "federal common law."

Newton also claims that the Department of Labor ("DOL") regulations clarifying the meaning of the FLSA term "hours worked" are non-binding and thus not "federal laws" under 43 U.S.C. § 1333(a). Newton cites *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) for the proposition that the regulations are persuasive only. But *Skidmore* only held that agency interpretations found "in an interpretative bulletin and in informal rulings" are not entitled to controlling weight. *Id.* at 138. Under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) and *United States v. Mead Corp.*, 533 U.S. 218 (2001), statutory interpretations found in formal regulations issued by an agency pursuant to a Congressional delegation of law making power are binding to the extent that (1) Congress has not unambiguously addressed the question at issue; and (2) the regulations represent a reasonable construction of the statute. A number of federal courts have held that the DOL regulations interpreting the FLSA, including those

[2] *See Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 640-42 (U.S. 1981); *see also Merchant v. American S.S. Co.*, 860 F.2d 204, 209 fn. 6 (6th Cir. 1988).

defining hours worked, are entitled to conclusive deference under *Chevron*.[3] Others from this Circuit have found that the regulations defining hours worked are not entitled to *Chevron* deference, but these cases still accept and adopt the regulations as persuasive interpretations of the FLSA.[4] Thus, the DOL regulations defining hours worked cited below are federal law and applicable on the Outer Continental Shelf under 43 U.S.C. § 1333(a).

For these reasons, the case law interpreting the FLSA and its implementing regulations are, for OCSLA purposes, part of the "Federal laws" and "laws…of the United States" that govern activity on the outer Continental Shelf. 43 U.S.C. §§ 1333(a)(1) & 1333(a)(2)(A).

C. There Is No Significant Void or Gap in the FLSA's Coverage of Newton's Claims, so California Law Is Not "Surrogate" Federal Law Here

Applying these principles regarding the interpretation and application of OCSLA, the district court correctly found "there are no 'significant voids or gaps'

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[3] *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 161 (2007); *see also Falken v. Glynn County*, 197 F.3d 1341, 1346 (11th Cir. 1999); *see also Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 294 (2d Cir. 2008).

[4] *Brigham v. Eugene Water & Elec. Bd.,* 357 F.3d 931, 940-43 (9th Cir. 2004) ("Although these interpretive rules are non-binding…we have nonetheless – along with our sister circuits – turned to these longstanding DOL regulations in resolving FLSA waiting time disputes."); *see also Leever v. City of Carson*, 360 F.3d 1014, 1019 fn. 4 (9th Cir. 2004) (holding that 29 C.F.R. § 785.23, is non-binding, but applying it as persuasive authority).

in the applicability of the governing federal law, the [FLSA], to the actions of which Plaintiff complains. Thus, it is not necessary to apply the law of the 'adjacent state,' which is California." ER 7. That is because the FLSA (Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq*.) is a comprehensive federal statute providing for the payment of minimum wages and overtime for hours worked, leaving no significant gaps to be filled by state law as applied to Newton's employment claims. *E.g.*, 29 U.S.C. § 206 (requiring payment of minimum wages); 29 U.S.C. § 207 (requiring payment of overtime wages); 29 U.S.C. § 211 (requiring employers to keep accurate records of hours worked and wages paid); *see Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1527 (2013) ("The FLSA establishes federal minimum-wage, maximum-hour, and overtime guarantees…).

Newton's causes of action are all premised, and derivative of, his claim that all of the time he and the putative class spend on an oil platform is compensable under California state wage and hour law because he cannot leave the platform between his scheduled 12-hour shifts. But federal law – the FLSA – addresses the precise questions presented in this case. It requires payment for all hours worked, and its comprehensive implementing regulations explain what hours are compensable when an employee resides on his employer's premises or is unable to leave. *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003) ("It is axiomatic,

under the FLSA, that employers must pay employees for all 'hours worked.'"). Because the FLSA covers the situation at issue in this case, there is no substantial gap or void to be filled by state law. Under Supreme Court law and its progeny, including *Continental Oil*, this means federal law governs even if state law might provide Newton with a "superior award" or "some gain or benefit or advantage not available if state law cannot be invoked." *LeSassier*, 776 F.2d at 508; *Continental Oil*, 417 F.2d at 1035.

The district court's assessment of the FLSA's coverage of Newton's claims shows there are no significant gaps in federal law.[5]

1. Newton's minimum wage, overtime, or double-time claims

Newton's first and sixth claims are for alleged minimum wage violations and failure to pay overtime and double-time premium wages under California Labor Code sections 510 (setting length of a day's work), and 1194 and 1197 (directing payment of minimum wage for all hours worked). ER 43-45. As the district court correctly found, the "'FLSA provides a comprehensive scheme providing for minimum wages and overtime pay.' ER 9, quoting Ann K. Wooster, J.D., *Validity, Construction, and Application of Fair Labor Standards Act—Supreme Court Cases*, 196 A.L.R. Fed. 507, § 2[a] (2004) and citing *Genesis*

[5] Because it was not necessary to apply state law, the district court had no need to address whether California's labor laws are inconsistent with federal law.

Healthcare Corp., 133 S. Ct. at 1527; 29 U.S.C. 206-207. As the court also found, "the FLSA defines 'hours worked' with regard to employees who are required to be on duty for twenty-four hours or more. 29 C.F.R. § 785.22." ER 9; *see also* 29 C.F.R. § 785.23 (explaining hours worked for employee who resides on the employer's premises); 29 C.F.R. § 785.19 (explaining when meal period time may be excluded from hours worked).

No "significant void or gap" in the FLSA's coverage of Newton's first and sixth claims for minimum wage, overtime or double time pay exists. There is no need to rely on California law as a surrogate.

2. Newton's claim for failure to provide lawful meal periods

Newton brings his fifth claim for failure to provide lawful meal periods under California Labor Code sections 226.7 (setting compensation for meal period violation) and 512 (providing employee is entitled to at least a 30-minute meal period for a work period of more than five hours). ER 49-50. Like California law, the purpose of the FLSA compensation provisions is to ensure that employers provide their employees with meal and rest breaks. *See Cal. Dairies, Inc. v. RSUI Indem. Co.*, 617 F. Supp. 2d 1023, 1043 (E.D. Cal. 2009) (noting that even though the meal and rest benefits of the FLSA and California Labor Code are not identical, both provide some form of meal and rest benefits to be paid by the employer, even if the amounts are calculated differently); *see also* 29 C.F.R. § 785.19 (defining

bona fide meal periods as non-worktime periods during which an employee "must be completely relieved from duty for the purposes of eating regular meals," and requiring compensation for non-bona fide meal periods); 29 C.F.R. § 207(a)(1) (overtime wages must be paid for all "hours worked," including non-bona fide meal periods, in excess of 40 hours per week).

Again, there is no "significant void or gap" in the FLSA's coverage of Newton's fifth claim for meal period violations, and no need for California law to act as a surrogate.

3. Newton's unfair competition claim

Newton's third claim for unfair competition in violation of California Business and Professions Code section 17200, *et seq.* (the "UCL") is based on the same alleged wrongful acts as in Newton's wage and meal period claims. ER 47, ¶ 33. Because California law does not apply to Newton's wage and meal period claims, it also does not apply to Newton's UCL claim based on the same predicate acts. *See Mersnick v. USProtect Corp.*, 2006 WL 3734396, at *10 (N.D. Cal. 2006); *see also* 29 U.S.C. § 216 (FLSA provides penalties for an employer's violation of the minimum wage, maximum hours, overtime, and meal provisions).

No surrogate state law is needed where no there is no "significant void or gap" in the FLSA's coverage of Newton's third claim.

4. Newton's pay stub violations claim

Newton's second claim is for pay stub violations under California Labor Code section 226 (designating certain information that must be included on an employee's pay stubs). ER 45-46. The FLSA regulates this issue differently but to the same end, by requiring employers to keep accurate records of hours worked and wages paid to employees, among other information. *See* 29 U.S.C. § 211(c), 29 C.F.R. 516.2. The FLSA also prescribes penalties for failing to comply with these record-keeping requirements. *Id.*

No "significant void or gap" in the FLSA's coverage of Newton's second claim exists, and there is no need to rely on California law as a surrogate.

5. Newton's failure to pay timely wages claim

Newton brings his fourth claim for failure to timely pay final wages under Labor Code sections 201 and 202. ER 48-49. These provisions address the timing of payment for wages earned and unpaid upon termination and after an employee voluntarily quits his employment. Again, the FLSA regulates the timing of payment of wages a bit differently but to the same end. *See Mersnick*, 2005 WL 3734396, at *8 (the FLSA "'delineates administrative procedures by which covered worktime must be compensated' under federal law") (quoting 5 C.F.R. § 551.101(a)). The FLSA penalizes an employer who fails to pay minimum wages or overtime wages in an amount equal to the unpaid compensation. 29 U.S.C. §

216(b). Further, wages are considered "unpaid unless they are paid on the employees' regular payday." *Biggs v. Wilson*, 1 F.3d 1537, 1538 (9th Cir. 1993), *cert. denied*, 510 U.S. 1081 (1994); *see also Davis v. Maxima Integrated Products*, 57 F. Supp. 2d 1056, 1058 (D. Or. 1999) (holding issuance of a terminated employee's final paycheck on the regularly scheduled payday, which was several days after the employee left the job, comported with the FLSA).

No "significant void or gap" in the FLSA's coverage of Newton's fourth claim exists, and California law regarding payment upon termination is inapplicable.

6. The district court correctly found Newton's civil penalties claim failed to state a claim upon which relief can be granted

Newton brought his seventh claim for relief under the Private Attorneys General Act of 2004, California Labor Code section 2698, *et seq.* ("PAGA"), which allows employees to recover state civil penalties for violations of the California Labor Code. ER 36-39. Because California law does not apply to Newton's claims, there are no violations of the California Labor Code and no civil penalties for Newton to collect under PAGA. The district court correctly found Newton's PAGA claim failed to state a claim upon which relief could be granted.

D. California Law Is Not Made Applicable by the FLSA Savings Clause

Newton points to the "savings clause" in the FLSA as "evidence that there is no clear and manifest purpose of Congress to supersede state overtime and

minimum wage requirements." AOB at 29. Parker Drilling agrees. But as the district court correctly held, that does not mean that the savings clause allows California law to govern concurrently with the FLSA in claims governed by OCSLA. *See* ER 8.

The FLSA's savings clause provides, in relevant part: "No provision of [the FLSA] excuse[s] noncompliance with any Federal or State law . . . establishing a minimum wage higher than the minimum wage established under [the FLSA] or a maximum workweek lower than the maximum workweek established under [the FLSA]." 29 U.S.C. § 218(a). As the district court found, "[t]he Ninth Circuit has interpreted this clause as evidence that Congress did not intend the FLSA to preempt state wage-and-hour law." ER 8, citing *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1151 (9th Cir. 2000); *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990).

But OCSLA does not raise preemption issues. The two Ninth Circuit cases relied on by Newton for this argument – *Aubry* and *Williamson*, are not OCSLA cases and are not subject to its mandate that federal law is to be exclusively applied. In fact, *Williamson* does not involve the interplay between the FLSA and California wage and hour law at all, but rather raised the issue of whether the plaintiff's *fraud* claim was preempted by the FLSA. *Williamson*, 208 F.3d at 1151

(court found fraud claim was not preempted, even though "the FLSA may be a comprehensive remedy").

Aubry involved seamen working on vessels in territorial waters and high seas off the California coast, which are not subject to OCSLA. *See Aubrey*, 918 F.2d at 415. Thus, the court in *Aubry* did not interpret the FLSA under OCSLA's requirement that exclusively federal law apply unless the adoption of state law is necessary to fill a "significant void or gap" in federal law. Instead, using general preemption analysis, the court said "[t]o decide whether a federal statute preempts state law, 'our sole task is to ascertain the intent of Congress.'" *Id.* at 1415. Applying that standard, the court found California's overtime pay laws are not preempted by the Shipping Act, the FLSA, or by general admiralty law.

The standard is different under OCSLA, however, and *Aubry* does not control the analysis here. *See Mersnick*, 2006 WL 3734396, at *7 (holding that under OCSLA, "the standard for whether state law applies is necessarily more stringent [than general preemption principles] given the exclusivity of federal jurisdiction."). The intent of Congress in enacting OCSLA is different than in a preemption analysis.

Mersnick and *LeSassier,* 776 F.2d 506, are both instructive on this point. In *Mersnick*, the plaintiff had argued that "a state law is not barred under the Federal Enclave Doctrine if it does not prevent the employer from complying with

both federal and state laws" and that "where the state law offers greater protections than the federal law, it is not 'inconsistent' with the federal law." *Mersnick*, 2006 WL 3734396 at *21. The *Mersnick* court rejected the plaintiff's theory, finding that the question of whether state law is generally preempted by an analogous federal statute is distinct from whether state law is applicable in a federal enclave. *Id.* at *21-22. The court held that in a federal enclave "the standard for whether state law applies is necessarily more stringent given the exclusivity of federal jurisdiction." *Id.* at 22. Given the close relationship between the Outer Continental Shelf and inland federal enclaves, the standard for whether state law is adopted as federal law under OCSLA is also necessarily more stringent than the general preemption analysis performed by the courts in *Pacific Merchant* and *Williamson*.

In *LeSassier,* the court held that a state law retaliatory discharge claim could not be pursued by a worker who claimed benefits under the LHWCA for an injury sustained on a platform subject to OCSLA, because the LHWCA had its own provisions relating to retaliation. *LeSassier*, 776 F.2d at 509 (holding there was no "gap" in federal law, and thus no authority permitting state law). *LeSassier* distinguished the Supreme Court case *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980), which had held that the LHWCA does not preempt state law providing for more generous benefits, on the ground that *Sun Ship* did not involve an OCSLA

situs. *LeSassier*, 776 F.2d at 509 ("*Sun Ship*, however, did not involve an OCSLA-based compensation claim"). Because the claims fell under OCSLA, the *LeSassier* court held that state law applied only if it satisfied the "necessity" test of *Continental Oil*. *Id.* at 509 ("This Court has consistently held that '"applicable" must be read in terms of necessity – necessity to fill a significant void or gap.'") (*quoting Nations v. Morris*, 483 F.2d at 585). *LeSassier*'s treatment of *Sun Ship* demonstrates that preemption principles and the FLSA's savings clause do not govern disputes arising under OCSLA.

E. California Law Also Does Not Apply Because It Conflicts with the FLSA

Even if there were a void in federal law in some respect (there is not), California law would not apply because it conflicts with the FLSA in several important respects. *See* § 1333(a)(2)(A) (requiring that surrogate state law be "not inconsistent" with federal law). The first amended complaint cites the California Supreme Court's decision in *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833 (2015) for the proposition that all of the time spent on the oil platforms, including sleeping time, is part of Newton's hours worked. But *Mendiola* held that the FLSA regulations governing the hours worked of an employee who resides at his or her employer's premises and the exclusion of sleep time (29 C.F.R. § 785.22 and 29 C.F.R. § 785.23) are not in accord with California wage and hour law.

Mendiola, 60 Cal. 4th at 842-844 & 848-849. The very case Newton relies on holds that the decision is inconsistent with federal law.[6]

Similarly, in *Seymore v. Metson Marine, Inc.*, 194 Cal. App. 4th 361 (2011) the California Court of Appeal declined to follow federal authority holding that a requirement that employees sleep on their employer's premises does not automatically convert the entire time an employee is on the premises into hours worked. *Id.* at 378-380; *compare with Allen v. Atlantic Richfield Co.*, 724 F.2d 1131, 1137 (5th Cir. 1984) and *Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1247-1249 (5th Cir. 1986) (under the FLSA, employees in the oil extraction industry who are required to remain on barges for 14 days at a time are not entitled to compensation of the entire time spent on the barges). Moreover, *Bono Enterprises, Inc. v. Bradshaw*, 32 Cal. App. 4th 968, 976-977 (1995) holds that an employee is considered on-duty under California law during a meal break in which he or she cannot leave his or her employer's premises, notwithstanding 29 C.F.R. § 785.19(b), which provides that under the FLSA: "It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed

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[6] In *Brigham v. Eugene Water & Electric Bd.*, 357 F.3d 931, 940-41 (9th Cir. 2004), the Ninth Circuit relied on 29 C.F.R. § 785.23 – the same regulation the California Supreme Court specifically declined to incorporate into California law in *Mendiola* – in support of its holding that employees working and residing on their employer's premises in national forest were not required to be paid for 24 hours each day under federal law.

from duties during [a bona-fide] meal period." And the California Court of Appeal in *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314 (2005) held that unlike the FLSA, California law does not permit an employer to average an employee's wages earned in a week across all hours worked in that week to determine whether the employee has been paid the minimum wage for each hour worked. *Id.* at 323 ("[T]he minimum wage provisions of the FLSA differ significantly from California's minimum wage law.").

The decision in *Mersnick,* 2006 WL 3734396 is closely on point. In *Mersnick*, the court held that a hodgepodge of California state wage and hour claims similar to those presented here were inapplicable in a federal enclave, because the claims were inconsistent with the FLSA. *Id.* at *5-11. *Mersnick* is analogous to this case because OCSLA declares that the Outer Continental Shelf and the platforms attached to it are to be treated as though they were federal enclaves. 43 U.S.C. § 1333(a)(1) (federal law is extended to the Outer Continental Shelf "to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State"); *see also Rodrigue*, 395 U.S. at 361 ("The legislative history of [OCSLA] makes it clear that these structures [drilling platforms] were to be treated as island or as federal enclaves within a landlocked State . . ."); *see* AOB at 10 (agreeing that fixed structures on the outer Continental Shelf are treated as federal enclaves). And as is the case with the

Outer Continental Shelf, federal law is generally exclusive in an inland federal enclave, although state law may be enforced in some limited circumstances. *See Paul v. United States*, 371 U.S. 245, 268 (1963) (subject to certain exceptions "a State may not legislate with respect to a federal enclave").

One such exception to the general rule is that state law in existence at the time the land comprising the federal enclave was ceded to the United States may continue to be enforced, so long as it is not abrogated by Congress, and so long as it is not inconsistent with federal law. *Mersnick* **6 & 9 ("state laws existing at the time the United States accepts jurisdiction remain enforceable unless 'abrogated' by federal law… state law in existence at the time the land is ceded continues unless abrogated by federal law or unless otherwise inconsistent with the purposes of the federal functions."). *Mersnick* held that although several of the plaintiff's state law claims were based on sections of the California Labor Code that existed at the time of the transfer of the relevant land to the federal government, they nevertheless could not be enforced because they created obligations inconsistent with the FLSA. *Id.* at **8-9.[7]

[7] The *Mersnick* court specifically found that claims based on California Labor Code §§ 201-203 (Newton's fourth cause of action) were inconsistent with the FLSA, and also dismissed a claim based on California Business and Professions Code §17200 (Newton's third cause of action) on federal enclave preemption grounds. *Mersnick* at *7-8, & 10.

Like in *Mersnick*, Newton's state causes of action in the FAC can only be enforced to the extent they are "not inconsistent" with federal law. Because the FLSA creates a scheme inconsistent with California wage and hour law, that law cannot apply in either an inland federal enclave, like in *Mersnick*, or on a platform subject to OCSLA, as is the case here. *See also George v. UXB Int'l, Inc.*, 1996 U.S. Dist. LEXIS 22292, 1996 WL 241624 at *3 (N.D. Cal. 1996) (holding that a California wage order governing overtime "conflicts with the federal Fair Labor Standards Act" and cannot be enforced in a federal enclave).

F. Newton Waived Any Argument Regarding Leave to Amend His Complaint

Newton claims the district court erred in not allowing him leave to amend his complaint. However, Newton has given no indication, either in the district court or on appeal, of how he could amend his complaint to correct its deficiencies. *See* AER 27:25-26; AOB 1-49; *see also Macklin v. Deutsche Bank Nat'l Tr. Co. (In re Macklin)*, Nos. 10-44610-E-7, 11-2024, JLM-1, 2015 Bankr. LEXIS 1186, at *75 (U.S. Bankr. E.D. Cal. Apr. 8, 2015) ("In situations where Plaintiffs' causes of actions have been dismissed without leave to amend, the Plaintiff bears the burden of proving there is a reasonable possibility of amendment."). By failing to squarely address the district court's denial of leave to amend, Newton has waived any issue of error with regard to that issue. *See Hargis v. Foster*, 312 F.3d at 408; *Milne v. Hillblom*, 165 F.3d at 736-737 n. 6. In any event, where Newton fails to

state how he would amend the FAC if given leave, amendment would be futile. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051-1052 (9th Cir. 2008).

CONCLUSION

For all of the foregoing reasons, the district court did not err in finding California law should not be adopted as surrogate law under OCSLA, where there are no significant gaps in federal law as to Newton's claims. Because Newton brought his claims solely under California law, his first amended complaint lacks a cognizable legal theory and therefore fails to state claims upon which relief can be granted. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). The judgment on the pleadings in favor of Parker Drilling should be affirmed.

Dated: August 30, 2016 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached answering brief is proportionately spaced, has a typeface of 14 points, and contains 8,789 words, according to the counter of the word processing program with which it was prepared.

Dated: August 30, 2016

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STATEMENT OF RELATED CASES

Appellee is unaware of any related cases within the meaning of Ninth Circuit Rule 28-2.6.

Dated: August 30, 2016

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