FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH LAKE; CRYSTAL LAKE; KYLE PAHONA; RYAN WILSON; HEATHER WILSON; ASHLEY MOSELEY; TIMOTHY MOSELEY, *Plaintiffs-Appellants*, v. OHANA MILITARY COMMUNITIES, LLC; FOREST CITY RESIDENTIAL MANAGEMENT, INC., *Defendants-Appellees*.	No. 19-17340 D.C. No. 1:16-cv-00555-LEK-KJM OPINION

Appeal from the United States District Court
for the District of Hawaii
Leslie E. Kobayashi, District Judge, Presiding

Argued and Submitted February 3, 2021
Honolulu, Hawaii

Filed September 27, 2021

Before: Richard R. Clifton, Ryan D. Nelson, and Daniel P. Collins, Circuit Judges.

Opinion by Judge R. Nelson

COUNSEL

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OPINION

R. NELSON, Circuit Judge:

We are asked to decide whether federal subject matter jurisdiction exists and whether the district court properly denied Plaintiffs' motion to remand to state court. The district court held federal jurisdiction exists because Plaintiffs' state law claims implicated a federal interest in military housing. We reject the asserted grounds for federal jurisdiction and reverse, vacate, and order remand to state court.

I

Defendants-Appellees Ohana Military Communities, LLC ("Ohana") and Forest City Residential Management, Inc. (collectively, "Defendants") began a major housing construction project on Marine Corps Base Hawaii ("MCBH") in 2006. Because MCBH was allegedly widely contaminated with pesticides potentially impacting human health, Defendants developed and implemented a Pesticide Soil Management Plan ("Plan"). Defendants allegedly never informed residential tenants of the Plan, the decade-long remediation efforts,

or known pesticide contamination at MCBH. Plaintiffs-Appellants Kenneth Lake, Crystal Lake, and other military servicemember families (collectively, "Plaintiffs") filed an action in Hawaii state court alleging 11 different claims under state law. Defendants removed to federal court. The district court denied Plaintiffs' motion to remand, which we review on this appeal from the subsequent judgment on the merits.

We begin in 1959 when Hawaii was admitted as the 50th state. Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, 73 Stat. 4 (1959) ("Admission Act"). The United States reserved "the power of exclusive legislation, as provided by" the Enclave Clause of the U.S. Constitution,[1] over "tracts or parcels of land as, immediately prior to the admission of said State, are controlled or owned by the United States and held for Defense or Coast Guard purposes." *Id.* § 16(b); *see also id*. § 7(b) (providing for popular referendum approving, *inter alia*, Hawaii's consent to the U.S.'s reserved rights and powers); Proclamation 3309, 24 Fed. Reg. 6868 (Aug. 25, 1959) (affirming approval of referenda and declaring Hawaii's admission to the Union). Before Hawaii's admission, MCBH was both owned by the United States and used

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[1] The Enclave Clause states "Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings. . . ." U.S. Const. Art. 1, § 8, cl. 17. "Exclusive legislation" means exclusive legislative jurisdiction. *See Surplus Trading Co. v. Cook*, 281 U.S. 647, 652 (1930).

for military purposes. *See*, *e.g.*, John Gunther, *Our Pacific Frontier*, 18 Foreign Affairs 583, 595 (1940).

However, the Admission Act also granted Hawaii concurrent jurisdiction over these lands. Section 16(b) provided that the federal reservation of authority "shall not operate to prevent such lands from being a part of the State of Hawaii, or to prevent [Hawaii] from exercising over or upon such lands, concurrently with the United States, any jurisdiction whatsoever which it would have in the absence of such reservation of authority and which is consistent with the laws hereafter enacted by the Congress pursuant to such reservation of authority." Admission Act, § 16(b). Congress then added a second proviso "[t]hat the United States shall continue to have sole and exclusive jurisdiction over such military installations as have been heretofore or hereafter determined to be critical areas as delineated by the President of the United States and/or the Secretary of Defense." *Id.* § 16(b).

In 1996, Congress undertook the Military Housing Privatization Initiative ("MHPI") to privatize military housing, allowing private companies to own and manage housing on military installations. *See generally* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2801(a)(1), 110 Stat. 186, 544-51 (codified at 10 U.S.C. §§ 2871-85). Servicemembers such as Lake receive a Basic Allowance for Housing ("BAH") with which "they can choose to live in private sector housing" off base "or privatized housing" on base. *See*, *e.g.*, *Military Housing Privatization*, Off.

of the Assist. Sec'y of Def. for Sustainment, https://bit.ly/3iFbvv3.

In 2004, Hawai'i[2] Military Communities, LLC ("HMC") and the Navy formed Ohana Military Communities, LLC as a Public Private Venture ("PPV"). Ohana was assigned the rights and obligations to a 50-year Initial Ground Lease subject to an operating agreement and a property management agreement. The Navy retained fee title ownership of the land and conveyed ownership of the residential units and future improvements for the lease term to Ohana through HMC. The Operating Agreement between HMC and the Navy gives "sole and exclusive management and control" of Ohana to HMC as the "Managing Member."

Before its new construction, Ohana developed its Pesticide Soil Management Plan in 2006. The Plan mandated that "[w]ritten notifications will be provided where residents and contractors may contact soils impacted with pesticides." The Navy reviewed and commented on later versions of the Plan, beginning in 2008. Ohana engaged in systematic cleanup efforts while demolishing old homes and building new ones over the next decade.

Ohana allegedly never informed existing or potential tenants of the Plan, its remediation efforts, or known pesticide contamination at MCBH. Ohana's Community Handbook given to new residents stated "[f]amilies can safely work and play in their yards."

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[2] The entity name uses this spelling, but we spell Hawaii consistent with the Admission Act.

After lawsuits were filed, Ohana warned that children and pets should not be allowed to play and families should not grow fruits or vegetables in the yards near old house foundations.

In 2016, Plaintiffs filed an action in Hawaii state court alleging 11 different claims under state law, including contract, Hawaii Landlord Tenant Code, Hawaii Deceptive Acts or Practices ("UDAP"), negligence, intentional infliction of emotional distress, fraud and misrepresentation, unfair method of competition ("UMOC"), trespass, and nuisance claims. Defendants removed the action to the District of Hawaii based on federal question jurisdiction under 28 U.S.C. §§ 1331 and 1442(a)(1). Plaintiffs moved to remand to state court.

The district court denied Plaintiffs' motion to remand. The district court then granted Defendants' motion to dismiss the UDAP, UMOC, and trespass claims with prejudice. Plaintiffs amended their complaint for the remaining claims. After discovery, the district court granted Defendants' motion for summary judgment on all remaining claims except for some of Plaintiffs' nuisance claims regarding construction dust.[3] The parties stipulated to dismiss those latter claims and Plaintiffs appealed. We have appellate jurisdiction under 28 U.S.C. § 1291.

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[3] We do not reach Plaintiffs' arguments on the district court's rulings on the UMOC, deceit, and contract claims. The district court lacked jurisdiction to consider any of Plaintiffs' state law claims.

II

"We review questions of statutory construction and subject-matter jurisdiction de novo." *City of Oakland v. BP PLC*, 969 F.3d 895, 903 (9th Cir. 2020). Removal is proper when the district court has original jurisdiction. 28 U.S.C. § 1441. The parties agree there is no diversity jurisdiction under 28 U.S.C. § 1332. Thus, to fit within § 1441, the removed claims here must "aris[e] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331; *see Gunn v. Minton*, 568 U.S. 251, 257 (2013). To support removal under § 1442, the removing party "must show that (1) it is a 'person' within the meaning of the statute, (2) a causal nexus exists between plaintiffs' claims and the actions [it] took pursuant to a federal officer's direction, and (3) it has a 'colorable' federal defense to plaintiffs' claims." *Leite v. Crane Co.*, 749 F.3d 1117, 1120 (9th Cir. 2014) (citation omitted).

III

"A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock W., Inc. v. Confederated Tribes of the Colville Rsrv.*, 873 F.2d 1221, 1225 (9th Cir. 1989). "Removal and subject matter jurisdiction statutes are 'strictly construed. . . .'" *Hawaii ex rel. Louie v. HSBC Bank Nev., N.A.*, 761 F.3d 1027, 1034 (9th Cir. 2014) (quoting *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031, 1034 (9th Cir. 2008)).

Generally, a "defendant seeking removal has the burden to establish that removal is proper and any

doubt is resolved against removability." *Id.* (quoting *Luther*, 533 F.3d at 1034). Though the federal officer and agency removal statute, 28 U.S.C. § 1442, is read "broadly in favor of removal," *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006), Defendants still "bear[] the burden of proving by a preponderance of the evidence that the colorable federal defense and causal nexus requirements for removal jurisdiction" are factually supported. *Leite*, 749 F.3d at 1122. Defendants have not met their burden to show federal jurisdiction over Plaintiffs' state law claims based on their asserted grounds.

First, state law has not been assimilated into federal law, because Hawaii has concurrent legislative jurisdiction over MCBH. *See Pratt v. Kelly*, 585 F.2d 692, 695 (4th Cir. 1978). Second, the district court's novel ground for subject matter jurisdiction is unsupported. Third, there is no federal officer or agency jurisdiction because there is no causal nexus under 28 U.S.C. § 1442, *see Durham*, 445 F.3d at 1251, and Ohana is not a federal agency, *see In re Hoag Ranches*, 846 F.2d 1225, 1227-28 (9th Cir. 1988). Fourth, no federal issue was "necessarily raised." *Gunn*, 568 U.S. at 258. Thus, this case must be remanded to state court.

A

We first address whether Hawaii has concurrent legislative (also known as political) jurisdiction over MCBH. "Jurisdiction, it has been observed, is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (internal quotation

marks and citations omitted). It is important not to "confuse[ ] the *political* jurisdiction of a State with its *judicial* jurisdiction." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 482 (1981) (emphases added); *compare Territorial Jurisdiction*, *Black's Law Dictionary* 1642 (4th ed. 1951) ("Territory over which a government or subdivision thereof has jurisdiction."), *with Jurisdiction*, *Black's Law Dictionary* 991 (4th ed. 1951) ("[T]he authority by which courts and judicial officers take cognizance of and decide cases"). Federal courts generally have no judicial jurisdiction under 28 U.S.C. § 1331 to hear state law claims—even where there is concurrent state-federal legislative (*i.e.* political) jurisdiction—where the state claims do not arise under federal law. *See Gulf Offshore Co.*, 453 U.S. at 481.

The Admission Act reserves the power of exclusive legislation under the Enclave Clause, but also permits Hawaii to exercise concurrent jurisdiction, while reserving the United States' right to exercise exclusive jurisdiction over areas it designates as critical. Because the United States has not designated MCBH as a critical area, Hawaii's concurrent legislative jurisdiction continues to apply here.

Defendants argue that any event occurring on a federal military installation presents a federal question. But Defendants' "locus" theory ignores Congress's express decision to allow Hawaii to exercise concurrent jurisdiction notwithstanding Congress's formal retention of "the power of exclusive legislation." Admission Act, § 16(b). Hawaii's concurrent legislative jurisdiction over MCBH means that the "locus" theory does not

apply. *See James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 100 (1940); *Pratt*, 585 F.2d at 695.

1

We first address Hawaii's concurrent legislative jurisdiction over MCBH. Subject to specified exceptions, the federal government ceded its land to Hawaii's new state government in the Admission Act. Admission Act, §§ 5(b), (c); *see also Hawaii v. Off. of Hawaiian Affs.*, 556 U.S. 163, 168 (2009). The United States reserved the power of exclusive legislation under the Enclave Clause over military areas including MCBH. Admission Act, § 16(b). The Act then permitted Hawaii to exercise any concurrent jurisdiction "which it would have in the absence of such reservation of [exclusive] authority," so long as it does so "consistent with the laws hereafter enacted by the Congress pursuant to such reservation of authority." *Id.* However, the President or Secretary of Defense could delineate a military area as "critical" to revoke Hawaii's concurrent jurisdiction. *Id.* This reading is supported by the statutory structure and text, relevant judicial precedent, and the federal government's own understanding of the Admission Act.

First, we read the Admission Act as a whole. *See Beecham v. United States*, 511 U.S. 368, 372 (1994). Considering the whole structure, we read the Admission Act in the order it was written: Congress reserved the power of legislative jurisdiction, but then permitted Hawaii to exercise concurrent jurisdiction, subject to future congressional control. But the President or

the Secretary of Defense may at any time reassert "sole and exclusive jurisdiction" over military installations by delineating them as "critical areas." *See* Admission Act, § 16(b).

Second, judicial precedent favors reading the Admission Act to grant Hawaii concurrent jurisdiction over non-critical areas. Three years before the Admission Act, the Supreme Court held that Congress may permit the States some measure of concurrent jurisdiction over federal lands held under Enclave Clause authority. *See Offutt Hous. Co. v. Sarpy Cnty.*, 351 U.S. 253, 260-61 (1956). We presume "that Congress . . . was aware of the settled judicial construction." *Shapiro v. United States*, 335 U.S. 1, 16 (1948). Congress, "in the exercise of this power" of exclusive legislation under the Enclave Clause, thus permitted Hawaii to exercise concurrent jurisdiction over MCBH. *See Offutt Hous. Co.*, 351 U.S. at 260-61. Congress did not "relinquish[] this power" of exclusive legislation by allowing Hawaii tort and contract law to apply here. *See id.* at 260. These military areas remain federal land, over which Congress has permitted Hawaii to exercise concurrent jurisdiction.

Third, the federal government recognized that it granted concurrent jurisdiction to Hawaii. For example, in 1969, the Department of Justice stated that "Navy properties in those States [of Hawaii and Alaska,] in accord with provisions of both statehood acts, are held in concurrent jurisdiction." U.S. Dep't of Just., *Federal Legislative Jurisdiction: Report Prepared for U.S. Public Land Law Review Commission*

117 (1969) ("1969 DOJ Report"). The federal government understood the Admission Act to permit Hawaii to exercise concurrent jurisdiction over these federal lands.

We have not found evidence that MCBH is such a designated "critical area." *Cf.* 1969 DOJ Report at 125 ("No Air Force installations [in Hawaii] have been delineated as critical areas. . . ."). A general designation of military installations as "critical infrastructure" is insufficient. *See*, *e.g.*, *Tharp v. Alutiiq Pac., LLC*, No. CV 18-00135 KJM, 2018 WL 6628945, at *8 (D. Haw. Sept. 10, 2018). There has been no "formal" pronouncement of the sort contemplated by the Act. *See Adams v. United States*, 319 U.S. 312, 314 (1943). As such, the United States allowed Hawaii to assert concurrent legislative power over MCBH when it became a state.

2

Where the United States acquires exclusive jurisdiction under the Enclave Clause and does not permit any exercise of state concurrent jurisdiction, the general rule is that those state-law "rules existing at the time of the surrender of sovereignty" to the United States will continue to "govern the rights of the occupants of the territory transferred." *James Stewart*, 309 U.S. at 99; *see also id*. at 100 ("Since only the law in effect at the time of the transfer of jurisdiction continues in force, future statutes of the state are not a part of the body of laws in the ceded area."); *see generally Chicago, Rock Island & Pac. Ry. Co. v. McGlinn*, 114 U.S. 542, 546-47 (1885). In such circumstances, "those

state laws which are effective within the enclave 'lose their character as laws of the state and become laws of the Union.'" *Celli v. Shoell*, 40 F.3d 324, 328 n.4 (10th Cir. 1994) (quoting *Stokes v. Adair*, 265 F.2d 662, 665 (4th Cir. 1959)). The question here is whether the same federalization of state law applies when Congress retains exclusive jurisdiction over an area under the Enclave Clause but then, in the exercise of that jurisdiction, allows current state law to be applied within that area. We conclude that it does not.

Because Hawaii maintained broad and ongoing concurrent legislative jurisdiction over MCBH, there is no reason to treat the resulting state laws as if they were assimilated into federal law. *See Pratt*, 585 F.2d at 695. The federalization of then-existing state-law rules upon the creation of a federal enclave rests on the premise that, precisely because Congress has excluded all exercise of state jurisdiction, the only laws that can apply are federal, and federal law will be deemed to incorporate existing state law in order to ensure "that no area however small will be left without a developed legal system for private rights." *James Stewart*, 309 U.S. at 100. This rationale has no application when, as here, Congress has expressly allowed concurrent state legislative jurisdiction subject to Congress's reservation of ultimate authority. Hawaii's concurrent jurisdiction means state law governing Plaintiffs' state claims is still Hawaii law—not federal law. Hawaii law has not been assimilated into federal law. Congress did not transmute Hawaii law into federal law by permitting Hawaii to exercise concurrent jurisdiction over

military installations. No one believed that Congress federalized Nebraska tax law by permitting state taxation of military housing while otherwise retaining Enclave Clause jurisdiction. *See Offutt Hous. Co.*, 351 U.S. at 260-61. Nor did Congress otherwise adopt the state law at issue as federal law, as it has for other laws. *See*, *e.g.*, 28 U.S.C. § 5001; 18 U.S.C. §§ 7(3), 13; 43 U.S.C. § 1333(a)(2)(A). Therefore, federal question jurisdiction is lacking on this basis.

3

The district court's decision below relied on *Federico v. Lincoln Military Housing*, 901 F. Supp. 2d 654 (E.D. Va. 2012), in finding a novel ground for subject matter jurisdiction. The district court essentially adopted *Federico*'s reasoning, which found federal jurisdiction "where concurrent jurisdiction over claims arising on a federal enclave exists, and matters involve substantial federal interests such that a federal question is presented." *Id.* at 675; *see also Lake v. Ohana Mil. Communities*, No. CV 16-00555 LEK, 2017 WL 11515424, at *10-13 (D. Haw. Mar. 15, 2017). *Federico* (and the district court by adoption), however, misread our precedent in *Durham*, 445 F.3d at 1250, and *Willis v. Craig*, 555 F.2d 724, 726 (9th Cir. 1977) (per curiam), to broadly apply "to cases of full concurrent jurisdiction as well." *Federico*, 901 F. Supp. 2d at 666. The district court here thus created a new rule: federal question jurisdiction exists where (1) federally owned or controlled land is involved—even if the state has full concurrent jurisdiction and state laws have not assimilated into federal law; and (2) a substantial federal

interest—not meeting any of the other *Gunn* factors—exists. *See Lake*, 2017 WL 11515424, at *11.

But the broad concurrent legislative jurisdiction over MCBH distinguishes this case from others dealing with exclusive federal jurisdiction. We have only found federal question jurisdiction in enclaves in which Congress has not permitted concurrent jurisdiction, and we have not extended that rule to federal land that is subject to broad state concurrent jurisdiction. *See Durham*, 445 F.3d at 1250; *Willis*, 555 F.2d at 726; *see also Macomber v. Bose*, 401 F.2d 545, 546 & n.2 (9th Cir. 1968).

Durham, for instance, dealt with a fully exclusive jurisdiction federal enclave. We stated, "[f]ederal courts have federal question jurisdiction over tort claims that arise on 'federal enclaves.'" 445 F.3d at 1250. This statement is generally true for federal enclaves where there is no state concurrent jurisdiction. Here, however, we deal with an enclave where Congress has explicitly permitted state concurrent jurisdiction. Thus, *Durham* does not apply; its statement is aptly read to only apply to exclusive jurisdiction federal enclaves with no concurrent state jurisdiction.

Likewise, the cases *Durham* cited also dealt with exclusive jurisdiction federal enclaves. The Navy base in *Willis* was either an exclusive jurisdiction federal enclave or not an enclave at all, depending on whether it had been purchased by the federal government and ceded by California. *See* 555 F.2d at 726. We remanded

to determine jurisdiction because "[n]either party discussed subject matter jurisdiction" and after a "thorough[] search[] [of] the record" there remained "unresolved and disputed facts surrounding this question." *Id.* In a footnote, we noted "no quarrel with the propriety of enclave jurisdiction in this case (if the facts support it), even though the state courts may have concurrent jurisdiction." *Id.* at 726 n.4. This dictum pertains to concurrent judicial jurisdiction—not concurrent legislative political jurisdiction at issue here. *See Gulf Offshore Co.*, 453 U.S. at 482.

Likewise, *Macomber* dealt with an area of "[s]ole and exclusive jurisdiction" where all state laws were assimilated in federal law. 401 F.2d at 546 & n.2.

The district court's theory is unsupported by *Durham*, *Willis*, and *Macomber*, as explained above. Hawaii exercises broad concurrent legislative jurisdiction over MCBH. Thus, neither the locus theory nor the district court's theory applies to provide federal subject matter jurisdiction here.

B

Federal officer or agency jurisdiction under 28 U.S.C. § 1442 does not exist either. We discuss it since § 1442 was raised by the parties but not reached by the district court. *See Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012); *see also Lake*, 2017 WL 11515424, at *13.

1

A civil action may be removed under § 1442 when the defendant shows: "(a) it is a 'person' within the

meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and plaintiff's claims; and (c) it can assert a 'colorable federal defense.'" *Durham*, 445 F.3d at 1251 (citation omitted). Neither party disputes the first prong. Defendants focus their argument on "the causal nexus requirement" for removal. We conclude that there is no causal nexus here, and thus Ohana is not a federal officer for purposes of federal jurisdiction.

Defendants assert that the Navy exercised significant control over Ohana's housing by: (1) restricting the type of people able to access MCBH and occupy its housing; (2) providing BAH to servicemembers; and (3) retaining the right to consent to financial restructuring and replacement of the Property Manager and Asset Manager. Defendants also note the Navy commented on the Plan.

Our causal nexus analysis "focuses on whether [the defendant] was involved in an effort to assist, or to help carry out, the duties or tasks of [a] federal superior." *Stirling v. Minasian*, 955 F.3d 795, 800 (9th Cir. 2020) (internal quotation marks and citation omitted). Thus, "[t]he relationship between someone acting under a federal officer and the federal officer typically involves subjection, guidance, or control." *Id.* (internal quotation marks and citation omitted). This relationship "must go beyond simply complying with the law." *Goncalves By & Through Goncalves v. Rady Child.'s Hosp. San Diego*, 865 F.3d 1237, 1245 (9th Cir. 2017). It is not enough that "the regulation is highly detailed and . . . the private firm's activities are highly

supervised and monitored." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 153 (2007). In sum, "§ 1442(a)(1) d[oes] not allow removal simply because a federal agency 'directs, supervises, and monitors a company's activities in considerable detail.'" *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1100 (9th Cir. 2018) (quoting *Watson*, 551 U.S. at 145).

No causal nexus exists. Defendants do not argue that the Navy had control over Ohana's decision whether to disclose the pesticide contamination. Indeed, HMC (not the Navy) has "sole and exclusive management and control" of Ohana. Thus, the "central issue" in the causal nexus analysis—whether a federal officer directed the defendant to take the action challenged—is unmet. *See Riggs v. Airbus Helicopters, Inc.*, 939 F.3d 981, 987 (9th Cir. 2019) (citing *Fidelitad*, 904 F.3d at 1099). The Navy's consent power over aspects of the housing arrangement does not change the result. Requiring federal agency consent on collateral points "fall[s] within the simple compliance with the law circumstance that does not meet the acting under standard." *Id.* at 989 (internal quotation marks and citations omitted).[4]

Defendants' alleged facts do not support federal officer removal. *See Watson*, 551 U.S. at 153; *Fidelitad*, 904 F.3d at 1100. Even though we "interpret section 1442 broadly in favor of removal," Defendants fail to

[4] Because no federal officer directed Ohana to take the challenged actions, we need not address Defendants' arguments that Ohana, by acting as a landlord, was performing acts delegated to it by the Navy.

meet at least one of the requirements for federal officer removal. *See Durham*, 445 F.3d at 1252.

2

Defendants additionally argue Ohana is a federal agency based on the Navy's partial ownership of Ohana. They assert removal was warranted under § 1442 authorizing "[t]he United States or any agency thereof" to remove actions to federal court.

We use a six-factor test for determining whether an entity falls within 28 U.S.C. § 451's definition of agency[5]:

> (1) the extent to which the alleged agency performs a governmental function; (2) the scope of government involvement in the organization's management; (3) whether its operations are financed by the government; (4) whether persons other than the government have a proprietary interest in the alleged agency and whether the government's interest is merely custodial or incidental; (5) whether the organization is referred to as an agency in other statutes; and (6) whether the organization is treated as an arm of the government for other purposes, such as amenability to suit under the Federal Tort Claims Act.

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[5] 28 U.S.C. § 451 defines "agency" as "any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense."

In re Hoag Ranches, 846 F.2d at 1227-28. None of the six *In re Hoag Ranches* factors support finding Ohana an "agency."

First, Ohana likely does not "perform[] a governmental function." *Id.* at 1227. Merely leasing housing to a servicemember cannot itself be a governmental function, since BAH can be used on or off a military base. Otherwise, every private housing (or other service) provider that leases to a servicemember would perform a governmental function.

Nor is leasing housing on a military installation under the MHPI necessarily a historically and exclusively governmental function. Congress enacted the MHPI to privatize military housing, allowing private companies to own and manage housing on military installations. *See* National Defense Authorization Act for Fiscal Year 1996, 110 Stat. at 544-52. And the Navy regards PPV housing as "owned by a private entity and governed by a business agreement in which the Navy has limited rights and responsibilities," where "[t]he private entity is entirely responsible for Construction[,] Renovation[, and] Maintenance." *See Privatized (PPV) Housing Program: Military Housing Privatization Initiative (MHPI)*, Commander, Navy Installations Command, https://bit.ly/2UKtAQz ("PPV Website").[6] Certainly, there may be situations where leasing housing on a military installation might perform a

[6] We take judicial notice that the Navy has made these representations. *See* Fed. R. Evid. 201(b); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010).

governmental function. But Defendants have not shown that Ohana performs a governmental function in this specific factual context. Even if military housing on MCBH once was considered an exclusively federal governmental function, it is no longer. *See In re Hoag Ranches*, 846 F.2d at 1228.

Second, the federal government's "involvement in the organization's management" is limited. *See id.* at 1227. HMC has "sole and exclusive management and control" of Ohana as the "Managing Member." The Navy, as the "Government Member," generally has no management or control. The Navy also states it "has limited rights and responsibilities" over PPVs. *See* PPV Website. The Navy has only limited control here—such as choosing to identify Preferred Referrals, replacing a defaulting or failing Property Manager, or consenting to certain items such as annual budgets, or additional debt. We have found no control where the government withdrew its supervisory authority and "was removed from participation in day-to-day management," even though the corporation remained subject to federal regulation. *See In re Hoag Ranches*, 846 F.2d at 1228. Here, the government only ever had limited control. At most, this factor does not weigh heavily in either direction.

Third, Defendants do not provide evidence that Ohana's "operations are financed by the government," even if the Navy at one point financially contributed to Ohana's creation. *See id.* at 1227. An initial financial contribution does not show ongoing operational financing.

Fourth, Ohana does not directly address whether "persons other than the government have a proprietary interest in the alleged agency, and whether the government's interest is merely custodial or incidental." *See In re Hoag Ranches*, 846 F.2d at 1227-28. To the extent it disputes the fourth *In re Hoag Ranches* factor, Ohana's arguments are unconvincing. It fails to note that HMC, a non-federal person that is the Managing Member, has a "proprietary interest in the alleged agency." *See id.* at 1227. It does not explain how the government's interest is not "merely custodial or incidental" in light of HMC's managing interest in the residential units and future improvements over 50 years. *See id.* at 1227-28.

Defendants do not address the fifth and sixth factors**,** and arguments on these factors are waived. *See Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986).[7] "In conclusion, . . . the balance tips toward treating" Ohana as a private entity, not as a federal agency. *See In re Hoag Ranches*, 846 F.2d at 1228-29 (finding a corporation was not a government agency

[7] Regardless, neither of these factors suggest Ohana is an agency. Ohana is not "referred to as an agency in other statutes." *See id.* at 1228. And Ohana is not "treated as an arm of the government for other purposes, such as amenability to suit under the Federal Tort Claims Act." *See id.* Indeed, Ohana's residential leases' Choice of Law provision requires that "the contractual relationship . . . shall be constructed exclusively in accordance with, and shall be exclusively governed by the substantive laws of the State of Hawaii." Ohana's Operating Agreement similarly states that Ohana would be incorporated and registered "under the laws of the State of Hawaii."

even though "some factors weigh[ed] in favor of finding agency status").

C

Finally, a "special and small category" of state law cases may be brought in federal court. *Gunn*, 568 U.S. at 257-58 (citation omitted). This "less frequently encountered" category of federal question cases includes state law claims meeting certain requirements. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005); *see also Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986). *Gunn* clarifies that "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." 568 U.S. at 258.

Defendants first argue that the *Gunn* test does not apply because federal jurisdiction requires only a substantial federal interest. But we have rejected this interpretation. *See California Shock Trauma Air Rescue v. State Comp. Ins. Fund*, 636 F.3d 538, 542 (9th Cir. 2011) ("[C]ontrary to [the party's] suggestion, *Grable* did not implicitly overturn the well-pleaded complaint rule . . . in favor of a new 'implicate[s] significant federal issues' test." (internal citations omitted)).

Defendants then argue that a federal issue is necessarily raised because Plaintiffs' causes of action turn on the safety of military housing. But we have held a federal issue is not necessarily raised where the

"actions are based entirely on [state] causes of action . . . , each of which does not, on its face, turn on a federal issue." *Id.* at 543. For jurisdiction to exist under the *Gunn* test, a "'right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.'" *Id.* at 541 (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936)); *see also Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.4 (2020) ("No element of the landowners' state common law claims necessarily raises a federal issue."). Defendants have failed to make that showing here. Instead, Defendants allege only that a policy interest—the safety of military housing—is implicated, and they point to no question of federal law. Because Defendants fail to satisfy the first *Gunn* prong, we need not address the other three.

IV

We reverse the district court's order denying the motion to remand, vacate all subsequent district court decisions for lack of jurisdiction, and remand with instructions to remand to state court.

REVERSED, VACATED, AND REMANDED.

[cited in Lake v. Ohana Military Communities
No. 19-17340 archived on September 22, 2021]

[SEAL]

Office of the Assistant Secretary of Defense for Sustainment

Housing

Congress established the Military Housing Privatization Initiative (MHPI) in 1996 as a tool to help the military improve the quality of life for its service members by improving the condition of their housing. The MHPI was designed and developed to attract private sector financing, expertise and innovation to provide necessary housing faster and more efficiently than traditional Military Construction processes would allow. The Office of the Secretary of Defense has delegated to the Military Services the MHPI and they are authorized to enter into agreements with private developers selected in a competitive process to own, maintain and operate family housing via a fifty-year lease.

MHPI addresses two significant problems concerning housing for military Service members and their families: (1) the poor condition of DoD owned housing, and (2) a shortage of quality affordable private housing. Under the MHPI authorities, DoD works with the private sector to revitalize our military family housing through a variety of financial tools-direct loans, loan guarantees, equity investments, conveyance or leasing of land and/or housing/and other facilities. Military Service members receive a Basic Allowance where they

can choose to live in private sector housing, or privatized housing.

On February 11, 1996, President Clinton signed into law the National Defense Authorization Act for Fiscal Year 1996, Public Law 104-106 (110, Stat 186, Section 2801), containing authorities for the Military Housing Privatization Initiative (MHPI). This act includes a series of authorities that allow DoD to work with the private sector to build, renovate and sustain military housing. The goals are to:

- obtain private capital to leverage government dollars,
- make efficient use of limited resources, and
- use a variety of private-sector approaches to build and renovate military housing faster and cheaper for American taxpayers.

[cited in Lake v. Ohana Military Communities No. 19-17340 archived on September 22, 2021]

[Navy Housing]

Privatized (PPV) Housing Program

Military Housing Privatization Initiative (MHPI)

If you have issues with privatized housing you can contact Navy Housing Headquarters at Navy HousingHQ@navy.mil.

The Military Housing Privatization Initiative (MHPI) was enacted on February 10, 1996, as part of the National Defense Authorization Act for fiscal year 1996. Under the MHPI authorities, DoD has been working with the private sector to revitalize our military housing and has successfully privatized about 97% of Navy Family Housing CONUS. This has resulted in many benefits to the Housing program, including many newly constructed homes, renovated homes, demolition or divestiture of inadequate homes, and teaming with professional property management companies to provide homes, services and amenities that were simply not feasible through traditional Military Construction and Housing Management.

- Direct loans
- Loan guarantees
- Equity investments
- Conveyance or leasing of property or facilities
- Rental guarantees

Public Private Venture (PPV) privatized housing is owned by a private entity and governed by a business agreement in which the Navy has limited rights and responsibilities. The private entity is entirely responsible for:

- Construction
- Renovation
- Maintenance

Public Private Venture (PPV) Projects

For a listing of Navy Public Private Venture (PPV) projects for family and unaccompanied housing see the Navy Awarded PPV Projects.

For Marine Corps Family Housing PPV Projects see the Marine Corps Project listing (The Marine Corps currently does not have any unaccompanied housing projects.)

[SEAL]

This is an Official US Navy Website

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KENNETH LAKE, CRYSTAL LAKE, HAROLD BEAN, MELINDA BEAN, KYLE PAHONA, ESTEL PAHONA, TIMOTHY MOSELEY, and ASHLEY MOSELEY, Plaintiffs, vs. OHANA MILITARY COMMUNITIES, LLC, FOREST CITY RESIDENTIAL MANAGEMENT, INC.; and DOE DEFENDANTS 1-10, Defendants.	CIVIL 16-00555 LEK

ORDER DENYING DEFENDANTS' MOTION TO DISQUALIFY COUNSEL AND/OR FOR SANCTIONS AND DENYING PLAINTIFFS' MOTION FOR REMAND

(Filed Mar. 15, 2017)

On October 28, 2016, Defendants Ohana Military Communities, LLC ("Ohana") and Forest City Residential Management, LLC ("Forest City" and collectively, "Defendants") filed their Motion to Disqualify Counsel and/or for Sanctions ("Motion to Disqualify").[1] [Dkt. no.

[1] Defendants state that Forest City Residential Management, LLC is the successor by conversion to Forest City Residential

12.] On November 10, 2016, Plaintiffs Kenneth Lake, Crystal Lake, Harold Bean, Melinda Bean, Kyle Pahona, Estel Pahona, Timothy Moseley, and Ashley Moseley, for themselves and on behalf of all others similarly situated ("Plaintiffs"), filed their Motion for Remand. [Dkt. no. 25.] Plaintiffs filed their memorandum in opposition to the Motion to Disqualify ("Disqualification Opposition") on November 15, 2016, and Defendants filed their reply ("Disqualification Reply") on November 22, 2016. [Dkt. nos. 32, 36.] Defendants filed their memorandum in opposition to the Motion to Remand ("Remand Opposition") on November 21, 2016, and Plaintiffs filed their reply ("Remand Reply") on November 28, 2016. [Dkt. nos. 34, 39.]

These matters came on for hearing on December 12, 2016. On February 28, 2017, this Court issued an entering order stating that both motions were denied ("2/28/17 EO Ruling"). [Dkt. no. 48.] The instant Order supersedes the 2/28/17 EO Ruling. After careful consideration of the motions, supporting and opposing memoranda, the arguments of counsel, and the relevant legal authority, Defendants' Motion to Disqualify and Plaintiffs' Motion for Remand are both HEREBY DENIED for the reasons set forth below. The denial of the Motion to Disqualify is WITHOUT PREJUDICE.

Management, Inc. [Motion to Disqualify at 2.] Forest City Residential Management, Inc. is the entity named in the Complaint and reflected in the case caption.

BACKGROUND

Plaintiffs filed their Complaint in the State of Hawai'i First Circuit Court ("state court") on September 14, 2016. Defendants filed its Notice of Removal on October 13, 2016. [Dkt. no. 1.] Defendants asserted the following grounds for removal: federal question jurisdiction, pursuant to 28 U.S.C. § 1331, because the claims arose on a federal enclave; and jurisdiction under 28 U.S.C. § 1442(a)(1) because either Ohana was acting as a United States agency or "Defendants were 'person[s] acting under [a federal] officer.'" [Notice of Removal at ¶ 5 (alterations in Notice) (quoting § 1442(a)(1)).]

The Complaint alleges that Plaintiffs leased housing on the Kaneohe Marine Corp Base Hawaii ("MCBH") from Defendants after 2006. They had various lease terms, the earliest starting in August 2008. Plaintiffs Kyle and Estel Pahona are current residents, and all of the other Plaintiffs are former residents, the latest of them leaving MCBH in December 2015. [Notice of Removal, Decl. of Christine A. Terada, Exh. 1 (Complaint) at ¶¶ 149-54.]

Plaintiffs allege that Defendants are "engaged in the joint-enterprise of developing privatized military housing at MCBH, marketing and sales of residential leases, sales of renter's insurance policies, providing property management and maintenance services." [Id. at ¶ 157.] Plaintiffs note that, in 1996, the Military Housing Privatization Initiative ("MHPI") "authorized legislation to privatize military housing whereby

private companies were allowed to own and manage housing on military bases." [Id. at ¶ 159.] Among other things, the MHPI provides a Basic Allowance for Housing ("BAH") for service members who do not receive government housing. A service member can use the BAH to pay for private housing, either on the military base or off-base. [Id. at ¶ 161.e.]

According to the Complaint, Ohana "was created to renovate and construct new housing at" MCBH, [id. at 1 160,] and Forest City is Ohana's agent that "manage[s] residential housing at MCBH on Ohana's behalf under the term of Ohana's lease with military families." [Id. at ¶ 161.] Ohana, through Forest City, "provides services to military families at MCBH related to the marketing, sale, and management of residential leases, sale of renter's insurance policies, and provision of property management and maintenance programs." [Id. at ¶ 161.b.] The terms of the MCBH leases require Ohana to "provide safe and habitable housing." [Id. at ¶ 164.b & n.6 (citing Ohana's Exemplar Lease Agreement at 5, ¶ 12).]

Ohana began leasing new and previously constructed housing on MCBH to military families in approximately 2006. Plaintiffs allege that the "older residential housing at MCBH contained asbestos, lead-based paint, extensive mold infestation, and other toxins." [Id. at 1 165.] Ohana also began demolition of older housing units to build new units for future lease, and – according to the Complaint – the demolition work was continuing at the time Plaintiffs filed the Complaint. [Id.] Plaintiffs allege that, even before

Ohana assumed control of the MCBH housing, Ohana was warned by a contractor that had previously been hired to perform the same work "that MCBH soils had been found that were contaminated with pesticides including chlordane, heptachlor, and heptachlor epoxide, and that all contaminated topsoil should be removed in addition to other measures."[2] [Id. at ¶ 166 (emphasis

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[2] These chemicals are referred to as organo-chlorinated pesticides ("OCPs"). As background about the use of OCPs on Oahu, Defendants state:

> OCPs are common termiticides that were widely used for termite control throughout the United States from the mid-1940s to the late 1980s. See DOH, Past Use of Chlordane at 1 (Sept. 2011) available at http://eha-web.doh.hawaii.gov/ehacma/Downloads/HEER/termiticidefactsheetfinalsept2011.pdf. Because OCPs were designed to break down slowly over time, they are still present around homes throughout Hawai'i. See id. As the United States Department of Health and Human Services has noted, "chlordane use extended from the lower New England States south and west to California. . . . Over 50 million persons have lived in chlordane-treated homes." U.S. Dept. of Health, Toxicological Profile for Chlordane at 3-4 (May 1994) available at https://www.atsdr.cdc.gov/toxprofiles/tp31.pdf.
>
> DOH has established a two-tiered system for analyzing sites with OCPs when they are redeveloped. Tier 1 [environmental action levels ("EALs")] are screening levels that are so low that sites with OCPs at these levels are considered safe for all circumstances without any further analysis or remediation. See DOH, Evaluation of Environmental Hazards, Vol. 1, §§ 2.1, 2.4.1 (Fall 2011; rev. Jan. 2012) available at http://eha-web.doh.hawaii.gov/ehacma/documents/8935e423-25fb-46b9-adaa-fc0a207d5518. Because the Tier 1 EALs are designed to be rapid evaluation criteria, "[e]xceeding the Tier 1 EAL for a specific chemical does not necessarily indicate that the contamination

omitted).] Defendants were also aware of contamination from aldrin, dieldrin, and endrin. [Id. at ¶ 171.] The pesticide levels "were many times higher than the [Environmental Protection Agency's ('EPA')] Tier 1 environmental action levels ('EAL')" and Tier 2 EALs. [Id. at ¶¶ 167, 171.] Defendants, however did not disclose the contaminated soils in marketing, leasing, managing, and maintaining the residential units. [Id. at ¶¶ 168, 171.]

Ohana confirmed the pervasive soil contamination through additional testing until it "concluded that all neighborhoods at MCBH should be assumed to contain pesticide impacted soils beneath all existing foundations and all surrounding perimeters." [Id. at ¶ 170 (emphasis omitted).] Defendants therefore created a Pesticide Soils Management Plan ("Soil Plan"), with input from the State of Hawai'i Department of Health ("DOH"). [Id. at ¶ 172.] The Soil Plan included Tier 2 EALs for the pesticides at issue in this case that were "above the Tier 1 EALs . . . based on the flawed assumption that military families would not live at MCBH longer than 6 years." [Id. at ¶ 172.a.] Plaintiffs

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> poses significant environmental concerns, only that additional evaluation is warranted." Id. at vii (emphasis added). If a site has a Tier 1 exceedance, DOH requires a site-specific evaluation to determine whether there are environmental hazards and whether any action is necessary. See id., §§ 1.6, 3. As part of this evaluation, DOH and the site owner often create new Tier 2 EALs as an alternative to DOH's generic Tier 1 EALs. See id.

[Mem. in Supp. of Motion to Disqualify at 6-7 (some alterations Defendants').]

emphasize that this means "that military families are exposed to higher excess cancer/non-cancer risks of at least 'one in one-hundred thousand' (10-5) rather than the regular Tier 1 level of less than a 'one-in-a-million' excess risk." [Id. at ¶ 172.b.] The Soil Plan also included:

– recommended remediation practices to address the contaminated soils, for example, "confirming that 'no visible dust' should occur during demolition and construction"; [id. at 1 173.c;]

– a statement that maps showing where contaminated soils had been found and addressed would be maintained and made available to the Department of the Navy ("the Navy"), the MCBH management, and the DOH; [id. at 1 173.d;] and

– a statement that residents would receive written notice anywhere contaminated soils may be present [id. at ¶ 173.e].

Plaintiffs allege that Defendants assumed existing leases and entered into new leases without disclosing the soil contamination, the Soil Plan, or the fact that the contamination increased cancer risks for MCBH residents. Plaintiffs also allege that Defendants failed to follow the Soil Plan. [Id. at ¶¶ 175-76.c.]

When Plaintiffs discovered Defendants' failure to disclose the soil contamination, Plaintiffs made a demand for mediation under the terms of their leases to address the failure to disclose the contamination and the failure to provide safe and habitable housing from 2005 to the present. [Id. at ¶¶ 178-79.]

The Complaint alleges the following claims: breach of contract against Ohana ("Count I");[3] breach of the implied warranty of habitability against Ohana ("Count II"); a claim against Defendants for violation of the Landlord Tenant Code, Haw. Rev. Stat. Chapter 521 ("Count III"); an unfair and deceptive trade practices ("UDAP") claim against Defendants pursuant to Haw. Rev. Stat. § 480-2 ("Count IV"); a negligent failure to warn claim against Defendants ("Count V"); a claim for negligent infliction of emotional distress ("NIED") and intentional infliction of emotional distress ("IIED") against Defendants ("Count VI"); a fraud claim against Defendants ("Count VII"); a negligent misrepresentation claim against Defendants ("Count VIII"); an unfair competition claim against Defendants pursuant to § 480-2(a) ("Count IX"); a trespass claim against Defendants ("Count X"); and a nuisance claim against Defendants ("Count XI").

The Complaint prays for the following relief: general, special, treble, consequential, and punitive damages; reasonable attorneys' fees and costs; disgorgement of profits based on unjust enrichment; prejudgment interest; and any other appropriate relief. [Id. at pg. 31.]

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[3] In addition to the two issues for which Plaintiffs demanded mediation, their breach of contract claim also alleges that Ohana breached their leases by failing to comply with the Soil Plan. [Complaint at ¶ 184.c.]

I. Background Relevant to the Motion to Disqualify

In the Motion to Disqualify, Defendants ask this Court to disqualify Lynch Hopper Smith LLP – which is now two separate law firms, Smith Law and Revere & Associates, LLLC (collectively "Smith/Revere") – from representing Plaintiffs "and all other current and former residents of military housing who have submitted mediation demands against Defendants since May 1, 2016." [Motion to Disqualify at 2.] Defendants assert that Smith/Revere "have unwaivable conflicts of interest and . . . violated [Haw. R. Prof'l Cond.] rules related to improper solicitation." [Id. at 3.] The Motion to Disqualify arises from an allegedly "defamatory social media campaign" against Defendants by Smith/Revere and Cara Barber, the lead plaintiff in Barber, et al. v. Ohana Military Communities, LLC, et al., CV 1400217 HG-KSC, a putative class action that alleged claims which were virtually identical to the claims in the instant case.[4] [Mem. in Supp. of Motion to Disqualify at 1.] Defendants assert that the purpose of the campaign was to attract more current and former MCBH residents as clients for Smith/Revere. [Id.] In addition – or in the alternative – to disqualification, Defendants seek appropriate sanctions. [Motion to Disqualify at 2.] Defendants bring the Motion to Disqualify pursuant to this Court's inherent powers and Section III of the Order Granting, in Part, Defendants' Motion for

[4] Ohana and Forest City were also the defendants in Barber. For the sake of clarity, in its discussion of Barber, this Court will refer to Ohana and Forest City as the "Barber Defendants."

Preliminary Injunction, filed under seal in Barber on August 26, 2016 ("Barber Order").[5] [Id. at 3.]

On July 19, 2015, while Barber was pending, Cara Barber posted a "Confidential MCBH Resident Survey" on her Facebook page titled "MCBH and Pearl Harbor Housing Issues" ("Survey"). [Id. at 9; Motion to Disqualify, Decl. of Randall C. Whattoff ("Whattoff Decl."), Exh. 7 (screen shot of Facebook page).] Defendants argue that the questions were "highly biased," and the Survey did not contain any indication that: attorneys were involved in the drafting of the Survey; the responses would be shared with attorneys; or persons who responded to the Survey might be contacted in the future. [Mem. in Supp. of Motion to Disqualify at 9; Whattoff Decl., Exh. 9 (Survey).]

Barber settled in February 2016. [Mem. in Supp. of Motion to Disqualify at 9.] Defendants assert that, soon thereafter, Cara Barber and Smith/Revere launched a campaign to recruit new clients to bring claims against Defendants. The campaign involved Smith/Revere sending a letter to people who responded to the Survey and Cara Barber "launch[ing] an all-out smear campaign encouraging individuals to respond" to the letter. [Id. at 10.] Smith/Revere issued a letter, dated May 9, 2016, regarding "Notice of Settlement & Potential Claim Deadline/Statute of Limitation" and

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[5] The Barber Order related to the Barber Defendants' Motion for a Preliminary Injunction and Order to Show Cause Re: Violations of the Parties' Settlement Agreement on June 15, 2016 ("Barber Motion"). [Barber, dkt. nos. 278 (Barber Motion), 341 (Barber Order).]

the Barber case ("Solicitation Letter").[6] [Whattoff Decl., Exh. 11 (Solicitation Letter).] The Solicitation Letter states: "We are writing you because you previously contacted our office or our clients to request information about the class action lawsuit brought by our firm against [the Barber Defendants] related to pesticide contamination at" MCBH. [Id. at 1.] Defendants argue that this is a false statement because Smith/Revere sent the Solicitation Letter to people who responded to Cara Barber's Survey. [Mem. in Supp. of Motion to Disqualify at 10; Whattoff Decl., Exh. 13 (Barber, 8/5/16 Hrg. Trans.) at 16-19.] The Solicitation Letter stated: "We believe that military families living at MCBH from 2006 to at least 2014 have valid legal claims for return of their BAH" because of the failure to disclose the soil contamination. [Solicitation Letter at 2.] It advised "you may need to act quickly to preserve any legal claims you wish to bring against Forest City related to pesticide contamination at MCBH." [Id. at 1.]

Cara Barber's website had more than 1,5000 followers by early May 2016, and the number later grew to 1,800. [Whattoff Decl., Exh. 13 (Barber, 8/5/16 Hrg. Trans.) at 38.] She made frequent posts about "what she called 'some of the most hazardous chemicals known to man.'" [Mem. in Supp. of Motion to Disqualify at 12

[6] This Court acknowledges that Plaintiffs challenge the characterization of the letter as solicitation. However, the Court will refer to the letter as the "Solicitation Letter" throughout the instant Order for the sake of simplicity. This Court emphasizes that it makes no findings or conclusions at this time as to whether or not the letter constituted solicitation.

(quoting Whattoff Decl., Exh. 18 at 5).] Cara Barber also communicated with followers through comments and private messages. [Whattoff Decl., Exhs. 18-23.] She encouraged the filing of new lawsuits against the Barber Defendants. See, e.g., Whattoff Decl., Exh. 19 at 1-2, 5; Exh. 21 at 2-3. In addition to her Facebook page, Cara Barber had a blog, a separate website, and an hour-long You Tube video about MCBH. The video encouraged people to contact Smith/Revere. [Mem. in Supp. of Motion to Disqualify at 12 (citing Whattoff Decl., Exhs. 24-25; id., Exh. 13 (Barber, 8/5/16 Hrg. Trans.) at 38-43).]

At the evidentiary hearing on the Barber Motion, Cara Barber testified that she did not coordinate her social media efforts with the Solicitation Letter; she claimed the timing was a coincidence. [Whattoff Decl., Exh. 13 (Barber, 8/5/16 Hrg. Trans.) at 29-30, 42-43.] Defendants argue that the correspondence between Cara Barber and Smith/Revere proves they coordinated their efforts leading up to the Solicitation Letter. [Mem. in Supp. of Motion to Disqualify at 13-14 (citing Whattoff Decl., Exhs. 25-30).] Defendants also emphasize that Cara Barber stopped making entries on her public blog after the settlement agreement in January 2016, until she re-launched the blog six days before the Solicitation Letter went out. [Id. at 14 (citing Whattoff Decl., Exh. 24 at 49-55, 57-78).] Defendants point out that, two days after the Solicitation Letter went out, Cara Barber posted an annotated version of the letter

on her blog and Facebook page.[7] [Id. at 14-15 (citing Whattoff Decl.,

Exh. 21 at 1-2; id., Exh. 24 at 45-47).] Cara Barber expressly encouraged followers to contact Smith/Revere in her posts and in her responses to followers' comments and questions. [Id. at 15 (citing Whattoff Decl., Exh. 11; id., Exh. 13 (Barber, 8/5/16 Hrg. Trans.) at 43; id., Exh. 20; id., Exh. 21 at 1-2; id., Exh. 24 at 45-47).] Defendants argue that the evidence shows that Cara Barber's social media campaign was coordinated with Smith/Revere's efforts. [Id. at 16.]

Defendants assert that Cara Barber's social media campaign had false and misleading statements about MCBH.

According to Defendants:

> Two of the most egregious claims are that (1) Defendants refused to remove 18 inches of contaminated top soil from MCBH because doing so was too expensive; and (2) the current soils at MCBH contain OCP levels that are 20 times higher than EPA safety recommendations. The purpose of these claims was to spread false information and fear related to MCBH housing in an attempt to drive new clients to Smith/Revere.

[Id.]

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[7] The version of the Solicitation Letter that Defendants submitted as Exhibit 11 appears to be Cara Barber's annotated version.

As described by Defendants, the settlement agreement in Barber ("Barber Agreement") "had a comprehensive confidentiality provision that prohibited Ms. Barber and Smith/Revere from publicizing the terms of the [Barber] Agreement." [Mem. in Supp. of Motion to Disqualify at 18.] In the Barber Order, the district judge concluded that the Barber Defendants established that they were likely to succeed on the merits of their claim that Cara Barber violated the confidentiality provision of the Barber Agreement. [Barber Order at 25-26, 29-30.] In addition, the district judge stated that, before the hearing on the order to show cause regarding the alleged violations of the Barber Agreement could go forward, a review of the possible violation of Haw. R. Prof'l Cond. 1.7 was required. The district judge ultimately granted the Barber Motion in part and denied it in part. The district judge issued a preliminary injunction that was to remain in effect until an adjudication on the merits of the order to show cause, or until the district judge ordered otherwise. [Id. at 40-41.] The portion of the Barber Motion regarding the order to show cause remains pending because the Barber Plaintiffs have appealed the Barber Order. The district judge has held all pending motions in abeyance in light of the appeal. [Barber, dkt. nos. 368 (Notice of Appeal), 381 (entering order pending motions).]

Defendants argue there is a current conflict of interest between Plaintiffs and the other post-Barber claimants on one side and Cara Barber and Smith/Revere on the other. Defendants argue that, although Cara Barber made false contentions in her social

media campaign, Smith/Revere must take the position that her statements were accurate and defend her statements in the on-going litigation of the Barber Motion. Smith/Revere must defend her statements because they are her counsel and because they used her statements in their solicitation efforts. According to Defendants, "[t]his creates a conflict of interest because it prevents Smith/Revere from providing unbiased advice to Plaintiffs and other [post-Barber] Claimants related to the risks of litigation." [Mem. in Supp. of Motion to Disqualify at 21.] In addition, Defendants argue that Smith/Revere violated Haw. R. Prof'l Cond. 8.4 because: Cara Barber's social media campaign is attributable to Smith/Revere; the campaign violated the confidentiality provision of the Barber Agreement; and Cara Barber acted as a direct referral service for Smith/Revere. Similarly, Defendants argue that Smith/Revere's use of false and misleading statements in the social media campaign warrants disqualification by itself. Finally, Defendants argue that the Solicitation Letter and the Survey violated Haw. R. Prof'l Cond. 7.1, and the Solicitation Letter violated Haw. R. Prof'l Cond. 7.3. Defendants assert that the immediate disqualification of Smith/Revere is the only appropriate remedy under the circumstances of this case.

II. Background Relevant to the Motion for Remand

Plaintiffs point out that their leases contain the following provision:

> Choice of Law: For all Residents, this Lease and the contractual relationship between the parties shall be construed exclusively in accordance with, and shall be exclusively governed by the substantive laws of the State of Hawaii, including but not limited to Hawaii State Revised Statutes, chapter 521, and the common law interpreting those statutes.

[Mem. in Supp. of Motion for Remand at 2 (emphases omitted) (quoting Ohana Military Communities Lease, 1 35).[8]] Plaintiffs argue that their relationship with Defendants "is exclusively governed by the substantive law of the State of Hawaii." [Id. at 3 (emphasis omitted).]

Plaintiffs argue that the Notice of Removal:

1) incorrectly suggests that the mere fact that a claim arises from events that occurred on a federal enclave creates federal enclave jurisdiction; and 2) relies on Federico v. Lincoln Military Housing, 901 F. Supp. 2d 654 (E.D. Va. 2012), which was rejected by this district court in Ching v. Aila, Civ. No. 14-00253 JMS-RLP, 2014 WL 4216051 (D. Hawai'i Aug. 22, 2014). Plaintiffs

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[8] An example lease is attached to the Motion for Remand as Exhibit 1. Plaintiffs have redacted the names of the residents, but it was signed by one of the residents and someone from Forest City on October 16, 2013.

urge this Court to follow the analysis in Ching. Further, they argue that this Court should not exercise federal question jurisdiction based on the fact that events at issue occurred on a federal enclave because "none of Plaintiffs [sic] claims necessarily depend upon resolution of a substantial question of federal law to justify usurping Hawaii's broad concurrent jurisdiction over MCBH." [Mem. in Supp of Motion for Remand at 3.]

As to federal officer or agent removal, Plaintiffs argue that Defendants have not met the requirements of 28 U.S.C. § 1442(a)(1) because they have not established a sufficient causal nexus between their conduct under color of a federal office and Plaintiffs' claims. Plaintiffs also argue that Defendants have not established a colorable defense because the derivative sovereign immunity defense that Defendants have invoked is not available to them for Plaintiffs' claims. Plaintiffs urge this Court to remand the case to the state court.

DISCUSSION

I. Motion to Disqualify

A. Applicable Standards

The Ninth Circuit has stated:

> Federal courts have inherent powers to manage their own proceedings and to control the conduct of those who appear before them. Chambers v. NASCO, Inc., 501 U.S. 32, 43, 111 S. Ct. 2123, 2132, 115 L. Ed. 2d 27 (1991). By invoking the inherent power to punish bad faith conduct which abuses the judicial

> process, a court must exercise discretion in fashioning an appropriate sanction. Id. at 44-45, 111 S. Ct. at 2132-33.
>
> District judges have an arsenal of sanctions they can impose for unethical behavior. These sanctions include monetary sanctions, contempt, and the disqualification of counsel. In Gas-A-Tron of Ariz. v. Union Oil Co., 534 F.2d 1322 (9th Cir.), *cert. denied sub nom.* Shell Oil Co. v. Gas-A-Tron of Ariz., 429 U.S. 861, 97 S. Ct. 164, 50 L. Ed. 2d 139 (1976), this court recognized that a district court has the primary responsibility for controlling the conduct of the attorneys who practice before it. Id. at 1325. . . .

Erickson v. Newmar Corp., 87 F.3d 298, 303 (9th Cir. 1996). This district court has stated:

> Motions to disqualify counsel are "subjected to particularly strict judicial scrutiny." Optyl Eyewear Fashion Int'l Corp. v. Style Cos., 760 F.2d 1045, 1050 (9th Cir. 1985) (quotations omitted). Disqualification is a "drastic measure which courts should hesitate to impose except when absolutely necessary." Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983).
>
> The party seeking disqualification "carries a heavy burden and must satisfy a high standard of proof because of the potential for abuse." In re Marvel, 251 B.R. 869, 871 (N.D. Cal. 2000). A motion for disqualification "should not be decided on the basis of general and conclusory allegations." Chuck v. St. Paul Fire &

> Marine Ins. Co., 606 P.2d 1320, 1325 (Haw. 1980). A court's factual findings for disqualification must be "supported by substantial evidence." Visa U.S.A. v. First Data Corp., 241 F. Supp. 2d 1100, 1104 (N.D. Cal. 2003).
>
> The Hawaii Rules of Professional Conduct govern Plaintiff's conflict of interest arguments. . . .[9]

White v. Time Warner Cable, Civ. No. 12-00406 JMS-BMK, 2013 WL 772848, at *1 (D. Hawaii Feb. 27, 2013).

B. Analysis

As a threshold matter, Plaintiffs argue that Defendants lack standing to seek the disqualification of Smith/Revere based on the alleged conflict between counsel and Plaintiffs. Even if this Court concludes that Defendants have standing, Plaintiffs argue that Defendants have not carried their heavy burden of proving that disqualification is necessary.

Plaintiffs emphasize that Barber was filed as a class action, although there was no final ruling on class certification.[10] Before the settlement, "hundreds

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[9] Local Rule 83.3 states: "Every member of the bar of this court and any attorney permitted to practice in this court pursuant to LR83.1(d) or (e) shall be governed by and shall observe the standards of professional and ethical conduct required of members of the Hawaii State Bar."

[10] The Barber Plaintiffs filed their Renewed Motion for Class Certification of Non-UDAP Claims on August 14, 2015, and the magistrate judge issued his findings and recommendation to deny the motion ("Barber F&R") on November 20, 2015. [Barber, dkt. nos. 211, 253.] On December 4, 2015, the Barber Plaintiffs filed

of military families had contacted either" Smith/Revere or the lead Barber Plaintiffs. Of those, approximately 600 people gave contact information so that they could receive updates about Barber. [Disqualification Opp., Decl. of Patrick Kyle Smith ("Smith Disqualification Decl.") at ¶ 10.] Plaintiffs state that the commencement of a class action suspends the statute of limitations for all members of the putative class until certification is denied. At that point, the people that would have been part of the class must decide whether to file their own actions or to intervene as members of the attempted class action. Thus, when Barber settled without a final decision on the Barber F&R, the statutes of limitations on the putative class members' claims were no longer tolled. Plaintiffs represent that Smith/Revere only contacted families who provided information prior to the Barber settlement, and they argue that Smith/Revere had an ethical obligation to inform those families about the settlement. According to Plaintiffs, what Defendants call the "Solicitation Letter" was actually a notice to the potential Barber class members informing them about how their rights may be affected by the settlement. The letter advised the potential class members to contact **any** attorney to

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objections to the Barber F&R. [Id., dkt. no. 258.] The district judge never ruled on the objections to the Barber F&R because the case settled. [Id., Minutes, filed 1/5/16 (dkt. no. 265) (noting that the settlement was placed on the record and the Barber F&R and the objections were terminated).] Plaintiffs emphasize that the magistrate judge found that all of the Fed. R. Civ. P. 23(a) requirements were satisfied and that the superiority prong of Rule 23(b)(3) was satisfied. [Disqualification Opp. at 6-7.]

ensure that their rights were protected, i.e. it did not urge them to contact Smith/Revere in particular.

Plaintiffs acknowledge that the Solicitation Letter states Smith/Revere believed the proposed class members' claims for recovery of their BAH were viable, but they emphasize that the letter did not mention any specific recovery amount. Further, they assert that this assessment was accurate because the Barber Plaintiffs prevailed on the motion to dismiss and the motion for summary judgment.[11] According to Plaintiffs, Cara Barber testified during the hearing on the Barber Motion that she posted the "Solicitation Letter" on her own, because of the inquiries she was receiving, and that Smith/Revere never asked her to post anything on social media.

1. Standing

In discussing the district courts' responsibility to control attorney conduct, the Ninth Circuit has stated:

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[11] The Barber Defendants filed their Motion to Dismiss Plaintiffs' Class Action Complaint for Damages on May 13, 2014, and the district judge granted the motion in part and denied it in part on July 15, 2014. [Barber, dkt. nos. 8, 24.] The Barber Plaintiffs filed their First Amended Class Action Complaint for Damages & Injunctive Relief on August 29, 2014. [Id., dkt. no. 25.] Pursuant to a stipulation and order filed on January 16, 2015, the Barber Plaintiffs filed their Second Amended Class Action Complaint for Damages & Injunctive Relief on January 19, 2015. [Id., dkt. nos. 73, 75.] On June 1, 2015, the Barber Defendants filed their Motion for Summary Judgment on All Remaining Counts of the Second Amended Complaint. The district judge denied the motion on July 9, 2015. [Id., dkt. nos. 109, 192.]

> **Whenever an allegation is made that an attorney has violated his moral and ethical responsibility,** an important question of professional ethics is raised. It is the duty of the district court to examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar. **The courts,** as well as the bar, **have a responsibility to maintain public confidence in the legal profession.** This means that a court may disqualify an attorney for not only acting improperly but also for failing to avoid the appearance of impropriety.

Erickson, 87 F.3d at 303 (emphases added). In light of this Court's duties to the members of the district court's bar and the general public, this Court concludes that it has an obligation to address the issues raised in the Motion to Disqualify even assuming that Defendants do not meet the traditional standing requirements. This Court acknowledges that "a motion to disqualify is often tactically motivated, and can be disruptive to the litigation process." Certain Underwriters at Lloyd's London v. Argonaut Ins. Co., 264 F. Supp. 2d 914, 918 (N.D. Cal. 2003). However, the evidence Defendants have presented about purported attorney misconduct in support of the Motion to Disqualify is very troubling, and there is no evidence that the Motion to Disqualify was brought for improper purposes. This Court therefore REJECTS Plaintiffs' argument that this Court should not consider the merits of the Motion to Disqualify because Defendants lack standing.

2. Merits

The parties have already submitted and/or relied upon extensive materials from Barber, including the Barber Motion and the Barber Order. As previously stated, the Barber Order is on appeal, and there are motions pending in Barber – including portions of the Barber Motion – that have been held in abeyance in light of the appeal. The vast majority of the issues currently before this Court in the Motion to Disqualify are squarely, and more directly, presented in Barber. This Court therefore CONCLUDES that it cannot rule upon the merits of the issues in the Motion to Disqualify until there has been a final resolution of the corresponding issues in Barber. The Motion to Disqualify is therefore DENIED.[12] The denial is WITHOUT PREJUDICE to the filing of a new motion to disqualify based on either a final resolution of the corresponding issues in Barber or changed circumstances in the instant case that are not dependent upon the outstanding proceedings in Barber.

Although this Court has not made a ruling on the merits regarding the alleged conflict, this Court recognizes that, if a conflict exists, it may have an impact on the litigation of the instant case. However, the potential impact on of the conflict – if one is proven to exist – is outweighed by the disruption to the litigation

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[12] In light of the grounds for this Court's denial of the Motion to Disqualify, Plaintiffs' request for an award of attorneys' fees and costs they incurred in responding to the Motion to Disqualify is DENIED, but also without prejudice and may be sough depending upon the outcome of Barber.

process and the undue delay that would result if this Court held this case in abeyance. This Court therefore declines to stay or otherwise limit the proceedings in the instant case pending the resolution of the corresponding issues in Barber.

II. Motion for Remand

A. Judicial Notice

On November 21, 2016, Defendants filed a request for judicial notice in support of the Remand Opposition ("RJN"). [Dkt. no. 35.] Defendants ask this Court to take judicial notice of the following: excerpts from the docket sheet for Holliday, et al. v. Extex, et al., CV 05-00194 DAE-LK; the complaints filed in state court prior to removal to this district court in Butler, et al. v. Ohana Military Communities, LLC, et al., CV 16-00626 JMS-RLP, Dix, et al. v. Ohana Military Communities, LLC, et al., CV 16-00627 DKW-RLP, Ochoa, et al. v. Ohana Military Communities, LLC, et al., CV 16-00629 KJM, and Manaea, et al v. Ohana Military Communities, LLC, et al., CV 16-00628 HG-RLP; the Notice of Removal and memoranda regarding the motion to remand filed in Ching; and Cara Barber's response to Ohana's request for answers to interrogatories in Barber.

A court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c)(2). "The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot

reasonably be questioned." Rule 201(b)(2). "A court may . . . 'properly take judicial notice of court records.'" Fields v. Nationstar Mortg. LLC, CIVIL No. 15-00015 LEK-KJM, 2016 WL 7840170, at *1 (D. Hawai'i Dec. 30, 2016) (some citations omitted) (quoting Negrete v. Petsmart, Inc., No. 2:13-CV-01218- MCE-AC, 2013 WL 4853995, at *1 (E.D. Cal. Sept. 10, 2013)), *report and recommendation adopted*, 2017 WL 214178 (Jan. 18, 2017). This Court therefore GRANTS Defendants' RJN.

B. Applicable Standards

"Removal and subject matter jurisdiction statutes are 'strictly construed,' and a 'defendant seeking removal has the burden to establish that removal is proper and any doubt is resolved against removability.'" Hawaii ex rel. Louie v. HSBC Bank Nev., N.A., 761 F.3d 1027, 1034 (9th Cir. 2014) (quoting Luther v. Countrywide Home Loans Servicing LP, 533 F.3d 1031, 1034 (9th Cir. 2008)). Thus, "[i]t is to be presumed that a cause lies outside [the] limited jurisdiction [of the federal courts] and the burden of establishing the contrary rests upon the party asserting jurisdiction.'" Hunter v. Philip Morris USA, 582 F.3d 1039, 1042 (9th Cir. 2009) (quoting Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 684 (9th Cir. 2006)) (alterations in original). This "'strong presumption against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper,' and that the court resolves all ambiguity in favor of remand to state court." Id. (quoting Gaus v.

> Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992) (per curiam)).

U.S. Bank, Nat'l Ass'n v. Mizukami, CIVIL NO. 15-00523 JMS-BMK, 2016 WL 632195, at *2 (D. Hawai'i Feb. 17, 2016) (alterations in U.S. Bank).

As a general rule, the existence of removal jurisdiction is determined at the time the removal petition is filed, irrespective of subsequent events. See, e.g., Allen v. F.D.I.C., 710 F.3d 978, 984 (9th Cir. 2013). The Ninth Circuit has stated:

> Challenges to the existence of removal jurisdiction should be resolved within th[e] same framework [as a motion to dismiss for lack of subject matter jurisdiction], given the parallel nature of the inquiry. The statute governing removal of civil actions tracks the language of Rule 8(a)(1), requiring the defendant to provide "a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). Like plaintiffs pleading subject-matter jurisdiction under Rule 8(a)(1), a defendant seeking to remove an action may not offer mere legal conclusions; it must allege the underlying facts supporting each of the requirements for removal jurisdiction. Gaus v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992) (per curiam). A plaintiff who contests the existence of removal jurisdiction may file a motion to remand, see 28 U.S.C. § 1447(c), the functional equivalent of a defendant's motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1). As under Rule 12(b)(1), a plaintiff's motion to remand may raise either a

> facial attack or a factual attack on the defendant's jurisdictional allegations, triggering application of the rules discussed above for resolving such challenges.

Leite v. Crane Co., 749 F.3d 1117, 1122 (9th Cir. 2014).

B. Federal Enclave Jurisdiction

28 U.S.C. § 1331 states that: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Further, in pertinent part, the Enclave Clause of the United States Constitution gives Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." U.S. Const. Art. 1, § 8, cl. 17.

> However, as recognized by the Supreme Court, the Enclave Clause is not the sole authority for the acquisition of federal enclave jurisdiction and jurisdiction less than exclusive may be granted to the United States. Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 528 (1938) ("The States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, cooperatively adjust problems flowing from our dual system of government. Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. It

> is a matter of arrangement. These arrangements the courts will recognize and respect."); see also Kelly v. Lockheed Martin Servs. Grp., 25 F. Supp. 2d 1, 3 (D.P.R. 1998) (stating that federal enclave jurisdiction can be obtained when "the federal government reserves jurisdiction over portions of a state when the state enters the Union").

Ching v. Aila, Civil No. 14-00253 JMS-RLP, 2014 WL 4215880, at *3 (D. Hawai'i July 22, 2014).[13] The State of Hawaii and the federal government have concurrent jurisdiction over MCBH pursuant to the Admission Act. See, e.g., Kalaka Nui v. Actus Lend Lease, LLC, Civ. No. 08-00308 SOM/LEK, 2009 WL 1227892, at *5 (D. Hawai'i May 5, 2009) ("The Admission Act clearly provides that Hawaii has concurrent jurisdiction over such military bases so long as state jurisdiction is consistent with post-Admission Act laws enacted by the United States Congress.").

Defendants urge this Court to adopt the analysis in Federico v. Lincoln Military Housing, 901 F. Supp. 2d 654 (E.D. Va. 2012), which involved claims brought by a family that lived in military housing against private entities that allegedly owned, managed, and operated the housing under the MHPI. The

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[13] 2014 WL 4215880 is the magistrate judge's Findings and Recommendation to Deny Plaintiffs' Motion to Remand, which the district court rejected. 2014 WL 4216051 (Aug. 22, 2014). However, the quoted portion of 2014 WL 4215880 was part of the analysis supporting the magistrate judge's finding that the land at issue was a federal enclave. The district court adopted that finding. 2014 WL 4216051, at *4-5.

Federicos alleged that they suffered personal and property injuries because they were exposed to "excessive moisture and mold conditions" in the military housing. 901 F. Supp. 2d at 656. Like Plaintiffs in the instant case, the Federicos alleged breach of contract claims, negligence claims, and violations of Virginia landlord-tenant laws. Id. The Federicos filed their complaint in state court, the defendants removed the case, and the Federicos moved to remand. Id. at 662. The main issue presented in the motion for remand was whether there was subject matter jurisdiction because the Federicos' claims arose from events that occurred on a federal enclave. Id. at 663. The district court ultimately concluded that, "where concurrent jurisdiction over claims arising on a federal enclave exists, and matters involve substantial federal interests such that a federal question is presented, federal jurisdiction over the state law claims is proper." Id. at 675.

In the instant case, Plaintiffs counter that this Court should adopt Ching, which rejected Federico. In Ching, this district court stated:

> Federico rejected the traditional "substantial question of federal law" inquiry in determining subject matter jurisdiction, and instead held that "there should be a federal forum in which to litigate controversies arising on federal enclaves – even when there is concurrent jurisdiction, the complaint involves state law claims, and a state forum also exists – in order to prevent state judicial interference with 'matters likely to involve substantial federal interests." [Federico, 901 F. Supp. 2d] at 672

> (citing Akin v. Big Three Indus., Inc., 851 F. Supp. 819, 822 (E.D. Tex. 1994) (exercising federal enclave jurisdiction over toxic tort case on Air Force base)). . . .
>
> The court rejects Federico because it fails to follow the federal question inquiry and impermissibly replaces it with a subjective analysis of what may or may not be a "federal interest." The test is not whether a case implicates, in a generic sense, a particular federal interest, but rather whether the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law. Gunn [v. Minton], 133 S. Ct. [1059,] 1065 [(2013)]. Federico therefore finds no support in federal question jurisdiction jurisprudence.

Ching, 2014 WL 4216051, at *8. Thus, the district court applied the traditional analysis for determining whether "the removed claims 'aris[e] under the Constitution, laws, or treaties of the United States.' " Id. at *3 (alteration in Ching) (quoting 28 U.S.C. § 1331).

This Court acknowledges that the statement in Federico regarding the prevention of state judicial interference where there are substantial federal interests arguably could be interpreted as adopting a rule that there is federal enclave jurisdiction where a claim involves substantial federal **interests**, even though there are no federal **questions**. However, this Court respectfully disagrees with the interpretation of Federico in Ching. As previously noted, the ultimate conclusion in Federico was that there is concurrent federal jurisdiction over state law claims arising on a federal

enclave where the case "involve[s] substantial federal interests **such that a federal question is presented**." See Federico 901 F. Supp. 2d at 675 (emphasis added). Federico does not eliminate the requirement that federal question be present.

Further, this Court does not interpret the controlling case law regarding federal enclave jurisdiction as requiring that the federal questions which must be present meet all of the requirements necessary to establish federal question jurisdiction. In other words, federal enclave jurisdiction does not necessarily require that the plaintiff's claims would trigger federal question jurisdiction even if the claims had not arisen from events which occurred on a federal enclave. Were that the case, the federal enclave doctrine would be unnecessary because the federal courts would have jurisdiction directly under § 1331 in every instance that the federal enclave doctrine applied. This Court therefore declines to follow Ching and adopts the ultimate conclusion in Federico.

In the instant case, Plaintiffs' state law claims, while not directly challenging public-private ventures ("PPVs") entered into pursuant to the MHPI, implicate issues regarding the federal government's responsibilities regarding PPVs. In Federico, the district court stated:

> [A]lthough both parties have addressed the fact that the Navy still owns the homes even after conveying them, it is important to note in this context that Mid-Atlantic cannot sell these homes, and the homes, and all

> improvements, revert back to the Navy. There has been no deed actually giving title to the real estate to Mid-Atlantic. Mid-Atlantic has a limited grant from the Navy, and the homes and land are not taxable by the City of Norfolk as they belong to the federal government. . . .

901 F. Supp. 2d at 675. Similarly, in the instant case,

> The purpose of the Ground Lease and Operating Agreement[14] was to allow Ohana, a PPV under the MHPI, to "lease, design, finance, demolish, develop, construct, renovate, own, manage, acquire, operate and maintain residential units and related improvements comprising the Project in support of Navy Operations located in the Navy Region Hawaii and in support of Marine Corps Operations located at the Marine Corps Base Hawaii[.]" Operating Agreement at § 2.03. Many of the acts that Plaintiffs complain of – including the alleged overcharging of rent – were performed by

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[14] The Notice of Removal states:

> Effective May 1, 2004, the following transactions occurred, among others: (1) [Hawaii Military Communities, LLC ("HMC")] and the Navy entered into a 50-year Initial Ground Lease; (2) HMC assigned its right, title, interest and obligations to and under the Initial Ground Lease to Ohana; (3) HMC and the Navy entered into an Initial Operating Agreement creating Ohana; and (4) Ohana and Forest City entered into an Original Property Management Agreement. Thereafter, the parties executed amended and restated ground leases, operating agreements, and property management agreements. The operative versions of these documents are hereinafter referred to as the "Ground Lease," the "Operating Agreement," and the "Property Management Agreement."

[Notice of Removal at ¶ 18.]

> Defendants in accordance with the Ground Lease, Operating Agreement, and Property Management Agreement. .

[Notice of Removal at ¶ 33.] As with the mold in the Navy housing at issue in Federico, the soil contamination at the MCBH housing in the instant case implicates the Navy's reversionary interest in the housing currently operated by Defendants. This is illustrated by the fact the Soil Plan requires that detailed maps of MCBH sites where soil contamination was found be made available to, *inter alia*, the Navy. Plaintiffs appear to question Defendants' compliance with those requirements because they state that such maps were not provided until Plaintiffs brought complaints. [Complaint at 911 173.d, 176.c.] Further, Plaintiffs' claims may implicate the Navy's potential liability related to the original discovery of the soil contamination. See id. at 1 166 ("Before taking control of MCBH housing, Defendants were warned by Metcalf Construction, which was **the contractor originally hired by the Department of the Navy** to carry out demolition and construction of military housing at MCBH, that MCBH soils had been found that were contaminated with pesticides." (emphasis added, other emphasis omitted)). Finally, Plaintiffs' claimed damages are based on the overpayment of rent for the allegedly sub-standard housing they actually received. The BAH and the standard of housing that it is intended to pay for will be a significant component of Plaintiffs' damages, and this implicates federal interests because

Defendants assert that the Navy controls the amount of the BAH.

This Court therefore CONCLUDES that: Plaintiffs' state law claims involve substantial federal interests, such that the claims present federal questions; and there is federal enclave jurisdiction over Plaintiffs' state law claims in this case. This Court DENIES Plaintiffs' Motion for Remand.

B. Federal Officer or Agent Removal

In light of its ruling that it has federal enclave jurisdiction over the instant case, this Court does not need to reach the issue of whether Defendants properly removed this case pursuant to 28 U.S.C. § 1442(a)(1).

CONCLUSION

On the basis of the foregoing, Defendants' Motion to Disqualify Counsel and/or for Sanctions, filed October 28, 2016, is HEREBY DENIED WITHOUT PREJUDICE, and Plaintiffs' Motion for Remand, filed November 10, 2016, is HEREBY DENIED.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, March 15, 2017.

/s/ Leslie E. Kobayashi
[SEAL] Leslie E. Kobayashi
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH LAKE; CRYSTAL LAKE; KYLE PAHONA; RYAN WILSON; HEATHER WILSON; ASHLEY MOSELEY; TIMOTHY MOSELEY, Plaintiffs-Appellants, v. OHANA MILITARY COMMUNITIES, LLC; FOREST CITY RESIDENTIAL MANAGEMENT, INC., Defendants-Appellees.	No. 19-17340 D.C. No. 1:16-cv-00555-LEK-KJM District of Hawaii, Honolulu ORDER (Filed Dec. 7, 2021)

Before: CLIFTON, R. NELSON, and COLLINS, Circuit Judges.

Judge R. Nelson and Judge Collins have voted to deny Appellees' petition for rehearing en banc, and Judge Clifton has so recommended.

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 rehearing en banc is DENIED.

An Act to Provide for the Admission of the State of Hawaii Into the Union, Pub. L. No. 86-3, 73 Stat. 4 at 11-12 (1959)

"Notwithstanding the admission of the State of Hawaii into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by the Congress of the United States of the power of exclusive legislation, as provided by article I, section 8, clause 17, of the Constitution of the United States, in all cases whatsoever over such tracts or parcels of land as, immediately prior to the admission of said State, are controlled or owned by the United States and held for Defense or Coast Guard purposes, whether such lands were acquired by cession and transfer to the United States by the Republic of Hawaii and set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Hawaii for the use of the United States, or were acquired by the United States by purchase, condemnation, donation, exchange, or otherwise: Provided, (i) That the State of Hawaii shall always have the right to serve civil or criminal process within the said tracts or parcels of land in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed within the said State but outside of the said tracts or parcels of land; (ii) that the reservation of authority in the United States for the exercise by the Congress of the United States of the power of exclusive legislation over the lands aforesaid shall not operate to prevent such lands from being a part of the State of Hawaii, or to prevent the said State from

exercising over or upon such lands, concurrently with the United States, any jurisdiction whatsoever which it would have in the absence of such reservation of authority and which is consistent with the laws hereafter enacted by Congress pursuant to such reservation of authority; and (iii) that such power of exclusive legislation shall vest and remain in the United States only so long as the particular tract or parcel of land involved is controlled or owned by the United States and used for Defense or Coast Guard purposes: Provided, however, That the United States shall continue to have sole and exclusive jurisdiction over such military installations as have been heretofore or hereafter determined to be critical areas as delineated by the President of the United States and/or the Secretary of Defense."