APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 28, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-1256

LENA CHILDS, AN INDIVIDUAL;
DONALD CHILDS, AN INDIVIDUAL;
T. CHILDS, A MINOR BY AND THROUGH HER GUARDIAN AD LITEM, LENA CHILDS; A. CHILDS, A MINOR BY AND THROUGH HER GUARDIAN AD LITEM, LENA CHILDS,

Plaintiffs-Appellees,

v.

SAN DIEGO FAMILY HOUSING, LLC,
A CALIFORNIA LIMITED LIABILITY CORPORATION; LINCOLN MILITARY PROPERTY MANAGEMENT LP,
A DELAWARE LIMITED PARTNERSHIP,

Defendants-Appellants,

and

INDEPTH CORPORATION,
A CALIFORNIA CORPORATION,

Defendant-Appellee.

Appendix A

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Argued and Submitted March 4, 2025
Pasadena, California

Filed August 28, 2025

Before: Mary H. Murguia, Chief Judge, and Gabriel P. Sanchez and Holly A. Thomas, Circuit Judges.

Opinion by Judge Sanchez

OPINION

SANCHEZ, Circuit Judge:

Plaintiffs Donald and Lena Childs rented military housing within the Naval Amphibious Base Coronado. During their lease, the Childs dealt with water-intrusion and mold contamination issues that allegedly damaged their personal property and impacted their health. According to Plaintiffs, Defendants San Diego Family Housing, a public-private venture created by federal statute, and Lincoln Military Property Management, the property manager, were aware of these issues and did not adequately remediate the problem. Plaintiffs filed the instant action in state court asserting negligence and other state law claims. Defendants removed the action to federal district court on the basis of federal enclave, federal agency, and federal officer jurisdiction. After

assessing each of these grounds for removal, the district court concluded that it lacked jurisdiction over the action and remanded to state court. We conclude that no basis for federal jurisdiction applies and affirm.

I.

A.

Defendant San Diego Family Housing ("SDFH") is a public-private venture between the Navy and Lincoln/Clark San Diego, LLC under the Military Housing Privatization Initiative ("MHPI"). *See* 10 U.S.C. §§ 2871–2885. SDFH contracted with Lincoln Military Property Management ("Lincoln") to provide property management services to the Silver Strand I housing community, which includes military housing on Naval Amphibious Base Coronado ("NAB Coronado"). In 2016, Plaintiffs Donald and Lena Childs, with their minor children, leased a home from SDFH at 1333 Saipan Road, Coronado, California ("the Saipan Property").

Soon after Plaintiffs moved into their home, the property began to suffer from repeated water-intrusion and related mold contamination. According to Plaintiffs, these problems caused damage to their personal property and eventually impacted the family's health, causing fatigue, shortness of breath, chronic headaches, and other symptoms. After reporting these issues to Defendants, Lincoln sent InDepth, a mold remediation company, to inspect the property. InDepth discovered visible mold in multiple areas of the home and allegedly told Plaintiffs

that there "[was] no reason to run any tests" because the mold was visible. InDepth informed Lincoln of its findings, and Lincoln provided temporary relocation assistance to the Childs while InDepth performed remediation services.

After Plaintiffs were told that the remediation service was successfully completed, Plaintiffs requested documentation verifying that the mold had been addressed, which Lincoln allegedly refused to provide. Upon their return to the property, Plaintiffs engaged their own mold testing service provider who ran tests that indicated heightened levels of hazardous mold. Plaintiffs told Lincoln and InDepth about the test results and allege that Defendants dismissed their concerns and insisted that the home was habitable. Plaintiffs refused to remain at the property, and, after rejecting alternative housing in the same community, Defendants immediately ceased paying the Childs' relocation costs. Defendants allegedly refused to acknowledge the presence of mold and took no further steps to properly remediate the property.

B.

In 2019, Plaintiffs brought suit in state court against SDFH, Lincoln, and InDepth, asserting claims for negligence, private nuisance, breach of contract, breach of the implied warranty of habitability, breach of the implied covenant of peaceful and quiet enjoyment, and constructive eviction. SDFH and Lincoln removed the action to federal court on the basis of federal enclave, federal officer, and federal agency jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1442(a)(1). Upon removal,

SDFH and Lincoln moved to dismiss the action under a claim of derivative sovereign immunity pursuant to the *Yearsley* doctrine. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 60 S. Ct. 413, 84 L. Ed. 554 (1940). The district court denied the motion, and Defendants appealed. We held that the district court's order rejecting dismissal was not an immediately appealable collateral order and dismissed the appeal. *See Childs v. San Diego Fam. Hous. LLC*, 22 F.4th 1092, 1099 (9th Cir. 2022).

Following remand, SDFH and Lincoln moved for summary judgment on the grounds that *Yearsley* provided them derivative sovereign immunity and that the legal effect of federal enclave jurisdiction precluded most of Plaintiffs' state law claims.[1] The United States then filed a Statement of Interest before the district court asserting that (1) *Yearsley* did not apply to Defendants, (2) the Saipan Property was not within a federal enclave, and (3) under this court's intervening precedent in *Lake v. Ohana Military Communities, LLC*, 14 F.4th 993 (9th Cir. 2021), the district court lacked federal officer or agency jurisdiction.

The district court ordered supplemental briefing and eventually rejected all of Defendants' proffered grounds for federal jurisdiction. Specifically, the district court found that Defendants failed to establish that the Saipan Property was within a federal enclave because there was no

1. SDFH and Lincoln also challenged Plaintiffs' settlement with InDepth. The district court did not address the propriety of that settlement in its remand order, and Defendants do not seek review of this issue on appeal.

evidence that the United States had retained or assented to exclusive federal jurisdiction over the property. Next, the district court concluded that Defendants failed to show the requisite causal nexus between the challenged actions and the federal government's involvement in Defendants' housing management to establish federal officer jurisdiction under 28 U.S.C. § 1442(a)(1). Finally, the district court concluded that Defendants were unable to establish federal agency jurisdiction under the six-factor test of *In re Hoag Ranches*, 846 F.2d 1225, 1227–28 (9th Cir. 1988). The district court remanded the case to state court.[2] Defendants timely appealed.

II.

Before reaching the merits of these claims, we must first assess our appellate jurisdiction to review the district court's remand order. Federal courts of appeals generally lack jurisdiction to review a district court's remand order based on lack of subject matter jurisdiction. *See* 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," subject to certain exceptions);

2. In its remand order, the district court also ruled on Defendants' evidentiary objections, sustaining their objection to an unauthenticated parcel map of NAB Coronado, thereby declining to take judicial notice of the parcel map. The district court also sustained, in part, Defendants' objections to the declaration of a senior land surveyor, Lonie Cyr, determining that legal conclusions as to whether the federal government exercises exclusive jurisdiction over the Saipan Property were improper witness testimony.

see also Yakama Indian Nation v. State of Wash. Dept. of Revenue, 176 F.3d 1241, 1248 (9th Cir. 1999) ("Remand orders based on a defect in removal procedure or lack of subject matter jurisdiction are immune from review even if the district court's order is erroneous."). Nonetheless, § 1447(d) provides for two exceptions to this bar. Under the statute, a remand order is reviewable for actions initially removed pursuant to the federal officer removal statute codified at § 1442. *See* 28 U.S.C. § 1447(d) ("[A]n order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise."). In their notice of removal, SDFH and Lincoln asserted federal enclave jurisdiction under § 1331 as well as federal officer and federal agency jurisdiction under § 1442(a)(1). Because one of the asserted grounds for removal was § 1442, we have jurisdiction to review the remand order in its entirety. *Id.* § 1447(d); *see also BP P.L.C. v. Mayor and City Council of Baltimore*, 593 U.S. 230, 238, 141 S. Ct. 1532, 209 L. Ed. 2d 631 (2021) (explaining that the scope of appellate jurisdiction extends to the "whole of [the district court's] order" when a defendant cites § 1442 as a ground for removal).

III.

We review de novo the district court's decision to remand a removed case and its determination that it lacks subject matter jurisdiction. *Lively v. Wild Oats Mkts., Inc.* 456 F.3d 933, 938 (9th Cir. 2006). The defendant bears the burden of proving that the requirements for removal jurisdiction have been met. *Leite v. Crane Co.*, 749 F.3d

1117, 1122 (9th Cir. 2014). On appeal, Defendants renew their contentions that subject matter jurisdiction exists under (1) 28 U.S.C. § 1331 because the Saipan Property is located within a federal enclave, (2) 28 U.S.C. § 1442 (federal officer removal statute) because SDFH and Lincoln operated under the Navy's oversight and control in dealing with the Childs' complaints, and (3) 28 U.S.C. § 1442 because SDFH qualifies as a federal agency. We consider each of these arguments in turn.

A.

Federal enclave jurisdiction is dependent on the federal government's exercise of exclusive legislative jurisdiction. *See Lake*, 14 F.4th at 1003–04; *Paul v. United States*, 371 U.S. 245, 263–64, 83 S. Ct. 426, 9 L. Ed. 2d 292 (1963); *United States v. Jenkins*, 734 F.2d 1322, 1325–26 (9th Cir. 1983). The Enclave Clause of the Constitution authorizes Congress to:

> [E]xercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority 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. I, § 8, cl. 17. Beyond the Enclave Clause's specified method of establishing exclusive federal

jurisdiction through the purchase of land with a state's consent, the Supreme Court has also recognized two other methods by which the federal government can acquire exclusive jurisdiction over land. First, Congress may condition the admission of a state to the Union on a cession of jurisdiction of land within that state. *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 526–27, 5 S. Ct. 995, 29 L. Ed. 264 (1885). And second, states themselves may cede legislative jurisdiction over land within their borders to the federal government. *Id.* at 540–42.

Defendants' arguments for enclave jurisdiction over the Saipan Property do not involve a straightforward application of any of these methods. Instead, Defendants rely on an intricate web of state and federal statutes to support their theory. Therefore, to determine whether federal enclave jurisdiction exists over the Saipan Property requires a brief historical detour.

In 1897, California passed a law ceding "to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes." 1897 Cal. Stat. ch. 56, § 1.[3] In 1940, Congress passed legislation

3. This state law also required the United States to provide "a sufficient description by metes and bounds" of the land and that "a map or plat of such lands" be filed in "the proper office of record in the county" in which the land is located. 1897 Cal. Stat. ch. 56, § 1. The statute was amended with minor modifications in 1943, *see* 1943 Cal. Stat. ch. 134 § 114, but was later repealed in 1947, *see* 1947 Cal. Stat. ch. 1532.

applying to land acquired thereafter which required the federal government's assent to exclusive or partial jurisdiction over federal property located within state boundaries. *See* 40 U.S.C. § 255 (1940) (re-codified at 40 U.S.C. § 3112); *Paul*, 371 U.S. at 264; *Adams v. United States*, 319 U.S. 312, 313, 63 S. Ct. 1122, 87 L. Ed. 1421 (1943). The 1940 Act provided that "it shall be conclusively presumed that no [exclusive or partial] jurisdiction has been accepted," "[u]nless and until the United States has accepted jurisdiction over lands hereafter to be acquired." 40 U.S.C. § 255 (1940). The 1940 Act mandated that the federal government indicate its acceptance of jurisdiction by "filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated." *Id.* Following re-codification, the statutory text makes clear that "[i]t is not required that the Federal Government obtain exclusive jurisdiction in the United States over land or an interest in land it acquires." 40 U.S.C. § 3112(a).

From 1941 to 1976, the United States acquired the lands now comprising NAB Coronado, including the Saipan Property, in a series of land transactions as well as by dredging and filling portions of the San Diego Bay. The precise mode and date of the federal government's acquisition of the Saipan property, however, is contested by the parties.

The United States and Plaintiffs rely on a declaration by Lonie Cyr, a senior land surveyor for the Navy, who attests that the government did not acquire the lands where the Saipan Property is located until 1955 through

civil condemnation.[4] According to Plaintiffs and the United States, because the acquisition of land through civil condemnation occurred after the 1940 Act, federal enclave jurisdiction over the Saipan Property requires the federal government's assent to exclusive jurisdiction by "filing a notice of . . . acceptance with the Governor of [the] State or in such other manner as may be prescribed by the laws of the State where [the] lands are situated." 40 U.S.C. § 255 (1940). By this time, California had also enacted legislation conditioning any transfer of jurisdiction on, *inter alia*, the federal government's written assent and the State Lands Commission's declaration that the transfer was "in the interest of the State." 1951 Cal. Stat. ch. 875, § 1. Because Defendants have not offered any evidence that the federal government assented to exclusive federal jurisdiction over this property by filing notice or written consent, there can be no federal enclave jurisdiction under this theory.

Defendants respond that the 1940 Act (and its notice-filing requirement) does not apply to the Saipan Property because the relevant parcel was not "acquired" through civil condemnation in 1955; it was instead "made" by the United States by dredging and filling the San Diego Bay to create a seaplane base between 1941 and 1943. According to Defendants, the United States "has sole ownership over land created in this manner," and they rely on *United States v. F.E.B. Corp.*, 52 F.4th 916, 926–29 (11th Cir.

4. Defendants' claim that this proffered fact was excluded by the district court is incorrect. The district court expressly overruled Defendants' objections concerning the factual contentions in the Cyr Declaration, such as how the property came into the United States' ownership. *See supra* n. 2.

2022) to buttress their arguments.[5] But, as the 1940 Act clarified, the United States' acquisition and ownership of land does not require that the United States obtain exclusive jurisdiction over that land. *See* 40 U.S.C. § 255 (1940); 40 U.S.C. § 3112(a). Therefore, Defendants' claim of enclave jurisdiction requires two predicates: (1) a factual predicate that the Saipan Property originated from the United States' own dredging and filling operation from 1941 to 1943 and not the 1955 condemnation proceeding; and (2) a legal predicate that land created by the United States for its own use lies outside the scope of the 1940 Act because it was not "acquired" and instead passed exclusively to the United States based on California's 1897 ceding statute. We need not resolve the parties' dispute over the factual predicate because Defendants' arguments fail as to the legal predicate.

The 1940 Act does not itself define the term "acquire." *See generally*, 40 U.S.C. § 255 (1940); *see also* 40 U.S.C. §§ 3101–3177. "Where Congress does not furnish a definition of its own," courts "generally seek to afford a statutory term its ordinary or natural meaning." *HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n*, 594 U.S. 382, 388, 141 S. Ct. 2172, 210 L. Ed. 2d 547 (2021) (quotation and citation omitted). Under Black's Law Dictionary, the term "acquire" means "[t]o gain

5. That case involved a dispute about ownership of an island created by the Navy via dredging activities near Key West, Florida. The question presented was not about whether the United States held exclusive jurisdiction over the island, but whether the United States had a claim of ownership over the island pursuant to the Submerged Lands Act, 43 U.S.C. §§ 1301–1315.

possession or control of" or "to get or obtain" "by any means." *Acquire*, Black's Law Dictionary (12th ed. 2024); *see also Acquire*, Black's Law Dictionary (3d ed. 1933) ("[t]o become the owner of property; to make property one's own" "[t]o gain permanently"). Under both its contemporary and historical plain meanings, the term "acquire" contemplates the United States' acquisition of land created by dredging and filling operations and therefore the Saipan Property falls within the scope of the 1940 Act's requirements.

This plain meaning of the term "acquire" also accords with the purpose of the 1940 Act. The Act followed several Supreme Court decisions that addressed "controversies concerning the relation of federal and state powers over government property," and, specifically, whether the federal government's acquisition of property resulted in exclusive federal jurisdiction. *Adams*, 319 U.S. at 314 (collecting cases). Before enactment, federal government officials conducted a cooperative study which resulted in legislation "aimed at giving broad discretion to the various agencies in order that they might obtain only the necessary jurisdiction." *Id.* The 1940 Act achieved this goal by enshrining a presumption against federal jurisdiction in the absence of express federal assent. *See* 40 U.S.C. § 255 (1940).

Defendants rely on a definition of "acquire" from an inapplicable statute relating to timber resources on federal lands. *See* 16 U.S.C. § 620e (noting the definitions of § 620e apply only "[f]or purposes of sections 620 to 620j of this title [16 U.S.C. §§ 620–620j]"). And the relevant

chapter at issue, Title 40, Subtitle II, Chapter 31, does not contain any provision which would suggest that the term "acquire" should be limited to lands obtained via transaction as opposed to creation by the government itself. *See generally*, 40 U.S.C. §§ 3101–3177.

Even if we were to credit Defendants' contention that the land was created by the United States and therefore the 1940 Act does not apply because there was no "acquisition," the California 1897 statute does not save their argument. That statute provided for the transfer of exclusive jurisdiction only in lands "which may hereafter be ceded or conveyed to said United States for" military purposes or defense. 1897 Cal. Stat. ch. 56, § 1. If, under Defendants' theory, the land was created by the United States through dredging and filling, the land cannot have been ceded or conveyed *by* the State of California *to* the United States.

Finally, Defendants presented a different theory for exclusive jurisdiction before the district court that merits some discussion. Defendants earlier argued that the federal government retains exclusive jurisdiction over lands created by dredging and filling for the government's use under the Submerged Lands Act. *See* 43 U.S.C. § 1313(a). This, too, is incorrect. Although § 1313 carves out an exception to the Act's general transfer of federal title and claims to submerged lands within the territorial boundaries of states, nothing in the text of § 1313 suggests that it extinguished state jurisdiction over submerged lands within its territories. *Id.* Indeed, Congress' purpose in passing the Submerged Lands Act was "not for the

Federal Government to retain exclusive jurisdiction over navigation of the waters above the submerged lands, but for the Federal Government to retain concurrent jurisdiction over those waters." *Barber v. State of Hawai'i*, 42 F.3d 1185, 1191 (9th Cir. 1994).

Accordingly, regardless of the parties' competing versions of events as to how the Saipan Property came into the United States' *possession*, Defendants have failed to provide any evidence that the federal government has assented to exclusive *jurisdiction* over it so as to establish federal enclave jurisdiction.

B.

The district court did not err in determining that it lacked original jurisdiction under the federal officer removal statute. Under 28 U.S.C. § 1442(a), federal courts may exercise removal jurisdiction over actions commenced in state court against an "officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office." To satisfy federal officer removal jurisdiction under § 1442(a), defendants must demonstrate (1) that they are persons "within the meaning of the statute;"[6] (2) that "there is a causal nexus between [their] actions, taken pursuant to a federal officer's directions, and plaintiff's claims;" and (3) that they "can assert a colorable federal defense." *Durham*

6. It is undisputed that Defendants are "persons" for the purposes of § 1442(a).

v. Lockheed Martin Corp., 445 F.3d 1247, 1251 (9th Cir. 2006) (cleaned up).

The district court correctly determined that Defendants did not meet the causal nexus requirement. Under this requirement, a private defendant must show that they were "acting under a federal officer in performing some act under color of federal office" and "that such action is causally connected with the plaintiff's claims against it." *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 755 (9th Cir. 2022). Here, Plaintiffs' claims relate to SDFH and Lincoln's alleged failure to properly inspect, warn of, cure, and otherwise reasonably manage the water-intrusion and mold contamination issues that the Childs family experienced at the Saipan property.[7] In their Notice of Removal, Defendants asserted that they were acting under naval officers in "fulfill[ing] the governmental function of housing military service members and their families," and they further claimed that "the alleged bodily injuries and property damage arose from [SDFH] and [Lincoln's] performance of their duties to the Navy under the Operating Agreement and Property Management Agreement."

Although Defendants have proffered numerous pieces of evidence in support of their causal nexus theory, they fail to show how their challenged actions occurred "*because* of what they were asked to do by the Government." *Goncalves By & Through Goncalves v. Rady Children's*

7. Plaintiffs also assert that many of Defendants' actions were in violation of state housing laws, their lease agreements, and Defendants' own policies.

Hosp. San Diego, 865 F.3d 1237, 1245 (9th Cir. 2017) (quoting *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137 (2d Cir. 2008)); *see also Stirling v. Minasian*, 955 F.3d 795, 800 (9th Cir. 2020) (explaining that the "relationship between someone acting under a federal officer and the federal officer 'typically involves subjection, guidance, or control.'" (quoting *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1099 (9th Cir. 2018)). Rather, the agreements, policies, letters, and declarations offered by Defendants demonstrate, at most, only general federal oversight over Defendants' housing management efforts and compliance with applicable laws and regulations.

Our decision in *Lake v. Ohana Military Communities* is instructive to our analysis. There, the defendant was also a military housing public-private venture established under the MHPI. 14 F.4th at 999. In holding that the defendant failed to demonstrate a causal nexus between its alleged failure to warn of pesticide contamination on the premises and the Navy's oversight, we emphasized the "sole and exclusive management and control" afforded to the government's private counterpart and the defendant's inability to show that the Navy's involvement in other aspects of the housing arrangement amounted to anything more than mere "consent power over aspects of the housing arrangement." *Id.* at 1004–05. After determining that no federal officer had "directed" the defendant to take the challenged actions, we concluded that "the central issue" in the causal nexus analysis was "unmet." *Id.* at 1005.

As in *Lake*, the Operating Agreement here shows that the government's private counterpart, Lincoln/Clark San

Diego, LLC, enjoyed "exclusive management and control of the business of [SDFH]" as well as "full authority to take all actions necessary or appropriate to pursue the business and carry out the purpose of the Company." *See id.* at 1004–05. Defendants' reliance on other provisions of the Operating Agreement relating to income sharing and approval rights over matters like cash flow, contracts and capitalization, hiring, and other clerical duties does not demonstrate federal control or direction over the relevant actions at issue here—mold testing and remediation. *See id.* at 1004 ("It is not enough that the regulation is highly detailed and . . . the private firm's activities are highly supervised and monitored." (quotations and citation omitted)).

Defendants also point to their Ground Leases for evidence of federal control, but these agreements explicitly assigned responsibilities, costs, and liability over mold management during the applicable term to SDFH.[8] Moreover, we have previously explained that "the federal government's willingness to lease federal property . . . to a private entity for that entity's commercial purposes does not, without more, constitute the kind of assistance required to establish that the private entity is 'acting under' a federal officer." *Cnty. of San Mateo*, 32 F.4th at 760.

8. Although the Ground Leases assigned liability for injuries to third parties from *pre-existing* mold contamination to the government, they provide that SDFH is "responsible for any claims or liability for injury to persons to the extent resulting from . . . the disturbance of a Mold Condition during the applicable Term of [SDFH's] Lease."

Defendants rely on the Navy's input and consent over their Operation and Management Plan ("O&M Plan"), which included a Mold Management Plan that SDFH was required to prepare. But the O&M Plan reflects minimum standards under applicable laws, regulations, project requirements, and housing policies. Nothing in the O&M Plan's mold management guidance constrained Defendants' capacity to inspect premises for mold and water contamination,[9] prevented Defendants from further investigating mold-related complaints, or restricted Defendants' capacity to remediate mold-related issues within the premises.

Defendants' reliance on the Navy's Mold Policy is similarly unavailing as that policy also lacks any restraining or controlling language. Rather, the "policy"—if it can be called that—informs readers of pertinent facts about the hazards of mold, the efficacy of testing, and general recommendations by expert bodies. The same can be said of the Navy's periodic "letter directives" to MHPI-created entities, such as SDFH, as these letters largely describe only general guidelines for minimum housing standards or statutory requirements under 10 U.S.C. § 2891a. As the Supreme Court explains, "[a] private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase 'acting under' a federal 'official.'" *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142,

9. The testing guidance contained in the O&M Plan reflects only what maintenance technicians are required to *tell* residents when they request testing. The O&M Plan otherwise does not appear to explicitly limit additional testing.

153, 127 S. Ct. 2301, 168 L. Ed. 2d 42 (2007). In any event, these letters were sent in 2020 and therefore post-date the relevant time period. Accordingly, nothing in these letters suffices to demonstrate that Defendants acted pursuant to the Navy's instructions with regard to mold inspection and remediation.

Given the dearth of evidence suggesting federal involvement in or control over Defendants' mold management practices, the cases in which we have found a causal nexus are readily distinguishable. In *Leite v. Crane Co*, the plaintiffs brought suit based on the defendants' alleged failure to warn of potential asbestos exposure. 749 F.3d at 1119–20. There, the defendant-entity submitted evidence showing the Navy's knowledge of asbestos hazards, its participation in the procurement of hazardous equipment, and its "detailed specifications regulating the warnings that equipment manufacturers were required to provide." *Id.* at 1120. Similarly, in *Goncalves By and Through Goncalves v. Rady Children's Hosp. San Diego*, the challenged subrogation lien resulted directly from the government's delegation to the defendant-insurer its authority to pursue subrogation claims on behalf of the government. 865 F.3d at 1245.

Although we interpret the federal officer and agency removal statute "broadly in favor of removal," *Durham*, 445 F.3d at 1252, and "credit the defendant's theory of the case," Defendants "must allege facts, not mere legal conclusions, in compliance with the pleading standards established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and *Ashcroft*

v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)." *Leite*, 749 F.3d at 1121–22, 1124. As we have explained, Defendants' allegations suggest, at most, that the Navy "direct[ed], supervise[d], and monitor[ed]" their general housing activities, which does not plausibly meet their causal nexus burden with regard to their challenged conduct. *Lake*, 14 F.4th at 1004 (quoting *Fidelitad*, 904 F.3d at 1100). Because "the central issue in the causal nexus analysis . . . is unmet," *id.* at 1005 (quotation and citation omitted), Defendants have failed to establish federal officer jurisdiction.[10]

C.

Defendants further contend that the instant case is removable pursuant to 28 U.S.C. § 1442(a)(1) because SDFH is a federal agency.[11] To determine whether an entity is an "agency" under 28 U.S.C. § 451, this court considers the factors laid out in *In re Hoag Ranches*, 846

10. Because we conclude that no federal officer directed Defendants to take the challenged actions, we do not address Defendants' arguments that SDFH "was performing acts delegated to it by the Navy," *Lake*, 14 F.4th at 1005 n.4, nor do we reach the question of whether Defendants asserted a "colorable federal defense," *Durham*, 445 F.3d at 1251.

11. For purposes of § 1442(a)(1), a federal "agency" is defined 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." 28 U.S.C. § 451; *see also Lake*, 14 F.4th at 1005 (applying § 451 to § 1442(a)(1)).

F.2d at 1227–28. These factors are (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." *Id.*

Regarding the first factor, Defendants note that "SDFH took over operations for a significant volume of military housing that was affordable to Navy servicemembers within their [Basic Allowance for Housing ("BAH")] . . . something the Navy previously provided on its own." This argument, however, is foreclosed by *Lake*, where we explained that "leasing housing on a military installation under the MHPI" is not necessarily a "historically and exclusively governmental function" and "[m]erely leasing housing to a servicemember cannot itself be a governmental function" since "BAH can be used on or off a military base." 14 F.4th at 1005.

Under the second factor, the government's control over SDFH's housing operations is limited. As in *Lake*, the "exclusive management and control" conferred to SDFH's private managing member, Lincoln/Clark San Diego, LLC, coupled with the Navy's "limited rights and responsibilities," demonstrate that "the government

only ever had limited control." *Id.* at 1006. "At most, this factor does not weigh heavily in either direction" because an entity subject to federal regulation does not, by virtue of that regulation, become controlled by the federal government. *Id.* at 1006.

As to the third factor, which relates to government financing, Defendants highlight that the United States capitalized SDFH at a rate of nearly twice the private partner. But as we observed in *Lake*, "[a]n initial financial contribution does not show ongoing operational financing." *Id.* at 1006. And Defendants have not presented any evidence that the United States continued to finance SDFH's operations beyond its contributions during the development period.

Under the fourth factor, whether any person other than the government has a proprietary interest in the alleged agency, the answer is clearly yes. As noted above, Lincoln/Clark San Diego, LLC, retains "exclusive management and control of the business of [SDFH]." *See id.* at 1006. Defendants' reliance on *Acron Investments, Inc. v. Federal Savings & Loan Insurance Corp.*, is misplaced. In *Acron*, we concluded that the Federal Savings & Loan Insurance Corporation was a federal agency based on the government's proprietary interest in the defendant government corporation. 363 F.2d 236, 239–40 (9th Cir. 1966), *cert denied*, 385 U.S. 970, 87 S. Ct. 506, 17 L. Ed. 2d 434 (1966). *Acron*, however, is distinguishable because that case addressed the character of a government corporation in which the government had once owned all stock but had since retired it. *Id.* at 240. Here, the government has

never retained an equivalent interest in SDFH. Rather, any interest the government retains in SDFH is merely "custodial" or "incidental" in light of Lincoln/Clark San Diego, LLC's exclusive control over the venture's business. *Hoag Ranches*, 846 F.2d at 1228; *see also Lake*, 14 F.4th at 1006 (finding the government's interest in the defendant public-private venture insufficient to satisfy factor four).

With respect to the fifth factor, Defendants do not cite any statute that identifies SDFH or any public-private venture formed for the purpose of military housing as an agency. And Defendants concede that they do not satisfy factor six. Balancing these factors, we conclude that Defendants have not demonstrated that SDFH is a federal agency under 28 U.S.C. § 1442(a)(1).

IV.

In light of the foregoing, the district court correctly determined that Defendants have not carried their burden in demonstrating federal enclave jurisdiction under 28 U.S.C. § 1331 or federal officer or agency jurisdiction under 28 U.S.C. § 1442(a)(1).

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 8, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-1256
D.C. No.
3:19-cv-02329-JM-SBC
Southern District of California,
San Diego

LENA CHILDS, AN INDIVIDUAL;
DONALD CHILDS, AN INDIVIDUAL;
T. CHILDS, A MINOR BY AND THROUGH HER
GUARDIAN AD LITEM, LENA CHILDS; A.
CHILDS, A MINOR BY AND THROUGH HER
GUARDIAN AD LITEM, LENA CHILDS,

Plaintiffs-Appellees,

v.

SAN DIEGO FAMILY HOUSING, LLC,
A CALIFORNIA LIMITED LIABILITY
CORPORATION AND LINCOLN MILITARY
PROPERTY MANAGEMENT LP,
A DELAWARE LIMITED PARTNERSHIP,

Defendants-Appellants,

and

Appendix B

INDEPTH CORPORATION,
A CALIFORNIA CORPORATION,

Defendant-Appellee.

Before: MURGUIA, Chief Judge, and SANCHEZ and H.A. THOMAS, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on it. *See* Fed. R. App. P. 40. The petition for rehearing en banc (Dkt. 56) is therefore **DENIED.**

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, FILED FEBRUARY 1, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No.: 3:19-cv-2329-JM-SBC

LENA CHILDS, *et al.*,

Plaintiffs,

v.

SAN DIEGO FAMILY HOUSING LLC, *et al.*,

Defendants.

Filed February 1, 2024

ORDER RE: SUBJECT MATTER JURISDICTION

Presently before the court is the United States and Defendants San Diego Family Housing LLC and Lincoln Military Property Management LP's Supplemental Briefs on the question of whether the court possesses subject matter jurisdiction over this dispute. (Doc. Nos. 138; 140; 144; 146). Pursuant to Local Rule 7.1(d)(1), the court finds the matters presented appropriate for resolution without oral argument. For the reasons set forth below, the court finds it lacks subject matter jurisdiction and **REMANDS** this action to San Diego Superior Court.

Appendix C

BACKGROUND

The instant action arises from allegations of mold and other water-intrusion issues occurring on military housing property.

On August 8, 2016, Plaintiffs Donald and Lena Childs, with their minor children, leased a dwelling at 1333 Saipan Road, Coronado, CA ("the Saipan Property"). (Doc. Nos. 1-3 at ¶¶ 18–19, 21; 69 at 6; 128-4 at 2). The Saipan Property is located in Silver Strand I, within the boundaries of Naval Amphibious Base Coronado ("NAB Coronado"). (Doc. Nos. 1 at ¶ 9; 69 at 6; 128-4 at 2).

On or about August 1, 2001, the United States Navy ("Navy") and Lincoln/Clark San Diego, LLC entered into an Operating Agreement to form Defendant San Diego Family Housing LLC ("SDFH"). (Doc. No. 1 at ¶ 15). SDFH is a public-private venture ("PPV") formed under the Military Housing Privatization Initiative ("MHPI") that operates and manages the Saipan Property. (Doc. No. 128-3 at ¶ 2). Under the MHPI, branches of the Armed Forces can establish PPVs with private companies to operate and manage housing on military property. *Id.* at ¶ 3. SDFH, in turn, contracted with Defendant Lincoln Military Property Management ("LMPM") to provide property management services. (Doc. Nos. 1-3 at ¶ 9; 69 at 6; 128-3 at ¶ 7).

On May 2, 2019, Plaintiffs filed this suit in San Diego Superior Court. (Doc. No. 1-2). On December 5, 2019, SDFH and LMPM—with Defendant InDepth

Corporation's consent—removed the case to this court on the basis of federal enclave, federal agency, and federal officer jurisdiction. (Doc. No. 1 at ¶ 3). The Parties did not dispute, at the time of removal, that the court possessed subject matter jurisdiction over this case because the events alleged in Plaintiffs' Complaint allegedly occurred on a federal enclave. (Doc. No. 34 at 4).

On December 4, 2023, after the case had already progressed for several years, the United States, a non-party, filed a Statement of Interest contending for the first time that the Saipan Property was not within a federal enclave and that the court, therefore, lacked subject matter jurisdiction over this case. (Doc. No. 138 at 4). On December 8, 2023, Defendants SDFH and LMPM filed a response to the United States' Statement. (Doc. No. 140).

On December 13, 2023, the United States filed an *ex parte* application for leave to file a second supplemental brief on the issue of whether the Saipan Property was located within a federal enclave. (Doc. No. 141). As it was critically important for the court to resolve this question, the court granted the United States' *ex parte* application—over SDFH and LMPM's objection. (Doc. Nos. 142, 143). Per the court's order, the United States filed a second supplemental brief on December 18, 2023. (Doc. No. 144). On January 5, 2024, SDFH and LMPH filed a response. (Doc. No. 146).

Appendix C

LEGAL STANDARD

"At the core of the federal judicial system is the principle that the federal courts are courts of limited jurisdiction." *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979); *Gunn v. Minton*, 568 U.S. 251, 256, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013) ("Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute.") (internal quotation marks omitted). Under 28 U.S.C. § 1441(a), a party may remove a claim originating in state court to federal court, only when the claim could have initially been brought in federal court. *See* 28 U.S.C. § 1441(a) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

"The removal statute is strictly construed against removal jurisdiction[.]" *Calif. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock W., Inc. v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). "Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). "[T]he burden of establishing federal jurisdiction falls to the party invoking the

statute." *Calif. ex rel. Lockyer*, 375 F.3d at 838; *see also Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996) ("A party invoking the federal court's jurisdiction has the burden of proving the actual existence of subject matter jurisdiction.").

A federal court must have subject matter jurisdiction to properly adjudicate a dispute. If a court determines it lacks subject matter jurisdiction over a removed action at any stage of the proceedings, it must remand the action. *See Bruns v. NCUA*, 122 F.3d 1251, 1257 (9th Cir. 1997) (holding that remand for lack of subject matter jurisdiction "is mandatory, not discretionary."); *see* 28 U.S.C.S. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

ANALYSIS

I. Evidentiary Objections

At the outset, the court first addresses the various objections SDFH and LMPM lodged to evidence submitted by the United States.

A. Declaration of Lonie K. Cyr

In support of its second supplemental brief, the United States submits the declaration of Lonie K. Cyr, a Senior Land Surveyor at Naval Facilities Engineering Systems Command, Southwest ("NAVFAC Southwest"). Declaration of Lonie K. Cyr in Support of the United

States' Second Statement of Interest ("Cyr Decl.," Doc. No. 144-1). SDFH and LMPM object to various portions of Mr. Cyr's declaration as being speculative and conclusory, for lack of foundation and personal knowledge, and for making improper legal conclusions. (Doc. No. 146-3 at 2–7). SDFH and LMPM's objections are **OVERRULED-IN-PART** and **SUSTAINED-IN-PART**.

"Personal knowledge may be inferred from declarations that concern areas within the declarant's job responsibilities." *Silva v. AvalonBay Cmtys., Inc.*, No. LA CV15-04157 JAK (PLAx), 2015 U.S. Dist. LEXIS 140673, at *10 n.1 (C.D. Cal. Oct. 8, 2015). Here, Mr. Cyr avers he currently serves as a Senior Land Surveyor at NAVFAC Southwest and has worked at the Cadastral Department at NAVFAC Southwest for seventeen years. Cyr Decl., at ¶ 1. In his current position, Mr. Cyr states he has the "authority and responsibility for managing United States Navy and Marine Corps land interests." *Id.* Mr. Cyr further avers he reviewed "United States Navy and California State Lands Commission documents" in preparation for his declaration. *Id.* The above is sufficient to lay a proper foundation and for the court to infer Mr. Cyr possesses relevant personal knowledge as to the United States' acquisition of the various parcels of land comprising NAB Coronado. SDFH and LMPM's objections on these grounds are, therefore, **OVERRULED**.

To the extent, however, that Mr. Cyr's declaration sets forth legal conclusions as to whether the United States exercises exclusive jurisdiction over the parcel of land on which the Saipan Property now sits, SDFH and LMPM's

objections are **SUSTAINED.** "[A] lay witness cannot offer testimony to establish a legal conclusion." *Lee v. City of Madera*, No. CIV F 04-5607 AWI DLB, 2008 U.S. Dist. LEXIS 95438, at *10 (E.D. Cal. Nov. 20, 2008); *see e.g., Roosevelt Irrigation Dist. v. United States*, No. CV-15-00448-PHX-JJT, 2019 U.S. Dist. LEXIS 36530, at *13–14 (D. Ariz. Mar. 7, 2019) (precluding witness from testifying as to the legal conclusion of whether the United States possessed a legal interest in certain property).

B. Parcel Map

In support of its second supplemental brief, the United States also submits a map of NAB Coronado allegedly identifying the boundaries of various parcels of land acquired by the United States—relative to the location of the Saipan Property. (Doc. No. 144-2). As SDFH and LMPM correctly note, the Government provides no indication of this map's origin. (Doc. No. 146-3 at 7–8). Because the court cannot readily determine the accuracy of the information contained in this map—and cannot simply assume this information to be true—it **SUSTAINS** SDFH and LMPM's objections. *See e.g., Malheur Forest Fairness Coal. v. Iron Triangle, Ltd. Liab. Co.*, No. 2:22-cv-01396-HZ, 2023 U.S. Dist. LEXIS 185203, at *11 (D. Or. Oct. 13, 2023) (declining to take judicial notice of map where court could not assume accuracy of information contained within it).

II. Federal Subject Matter Jurisdiction

The court next turns to the question of whether it possesses subject matter jurisdiction over this case. In

their Notice of Removal, SDFH and LMPM invoked the court's federal subject matter jurisdiction on two bases. (Doc. No. 1 at ¶ 3). First, SDFH and LMPM contend Plaintiffs' suit is removable pursuant to 28 U.S.C. § 1331, because the events alleged in Plaintiffs' Complaint occurred on a federal enclave. *Id.* Second, SDFH and LMPM contend Plaintiffs' suit is removable pursuant to 28 U.S.C. § 1442, because SDFH and LMPM were, at all relevant times, acting under a federal officer, and because SDFH is a federal agency. *Id.* The court considers each of these alleged bases for subject matter jurisdiction, in turn, below.

A. Federal Enclave Jurisdiction under 28 U.S.C. § 1331

The court first considers whether the Saipan Property is located within the boundaries of a federal enclave, such that the court has federal enclave jurisdiction over this matter. This question, in turn, requires an understanding of the nature of federal jurisdiction over lands acquired by the United States.

i. Overview of Federal Enclave Jurisdiction

A federal enclave is land over which the federal government exercises exclusive legislative jurisdiction. *See Paul v. United States*, 371 U.S. 245, 263–64, 83 S. Ct. 426, 9 L. Ed. 2d 292 (1963); *United States v. Jenkins*, 734 F.2d 1322, 1326 (9th Cir. 1983); *see also, e.g., Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1236–37 (10th Cir. 2012); *Cabrales v. BAE Sys. San Diego Ship Repair,*

Inc., No. 21-cv-02122-AJB-DDL, 2023 U.S. Dist. LEXIS 217240, at *15 (S.D. Cal. Dec. 6, 2023); *Hillman v. Leixcon Consulting, Inc.*, No. LA-16-CV-001186, 2016 U.S. Dist. LEXIS 200818, at *9 (C.D. Cal. July 27, 2016). The federal enclave doctrine stems from the Enclave Clause of the Constitution, which grants the federal government power "[t]o exercise exclusive Legislation . . . 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. I, § 8, cl. 17. "'Exclusive' jurisdiction for Enclave Clause purposes is equivalent to the sweeping power that Congress exerts over the District of Columbia, the first subject of the clause." *Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1151 n.6 (9th Cir. 2020). It "assumes the absence of any interference with the exercise of the functions of the Federal Government . . . so as to debar the State from exercising any legislative authority[.]" *Silas Mason Co. v. Tax Com. of Wash.*, 302 U.S. 186, 197, 58 S. Ct. 233, 82 L. Ed. 187 (1937).

In contrast to having exclusive jurisdiction, "the United States may have only a proprietary interest in land." *Coso Energy Developers v. Cty. of Inyo*, 122 Cal. App. 4th 1512, 1520, 19 Cal. Rptr. 3d 669 (2004). "The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals." *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525, 531, 5 S. Ct. 995, 29 L. Ed. 264 (1885).

In general, there are two methods by which the federal government may acquire exclusive jurisdiction

over lands within a state: "by consensual acquisition of land, or by nonconsensual acquisition followed by the State's subsequent cession of legislative authority over the land." *Kleppe v. New Mexico*, 426 U.S. 529, 542, 96 S. Ct. 2285, 49 L. Ed. 2d 34 (1976); *see also Silas*, 302 U.S. at 197. "Significantly, under either method, the state must agree to the transfer of jurisdiction for it to be valid." *United States v. Davis*, 726 F.3d 357, 363 (2d Cir. 2013).

In addition, for land acquired by the United States after 1940, the Act of October 9, 1940, 40 U.S.C. § 255 (re-codified as 40 U.S.C. § 3112) applies. *See Doe v. Camp Pendleton & Quantico Hous. Ltd. Liab. Co.*, No. 20-cv-224-GPC-AHG, 2020 U.S. Dist. LEXIS 67104, at *9 (S.D. Cal. Apr. 16, 2020). Under the Act, "United States agencies and authorities may accept exclusive or partial jurisdiction over lands acquired by the United States by filing a notice with the Governor of the state in which the land is located or by taking other similar appropriate action." *Adams v. United States*, 319 U.S. 312, 313, 63 S. Ct. 1122, 87 L. Ed. 1421 (1943); *United States v. Cassidy*, 571 F.2d 534, 536 (10th Cir. 1978) ("As to lands acquired by the United States *after* 1940, it has been held that the United States does not acquire jurisdiction over lands acquired by it unless it gives notice of acceptance.").

Even after the United States accepts exclusive jurisdiction over state land, the federal government may subsequently take steps to reestablish state jurisdiction. *Swords v. Kemp*, 423 F. Supp. 2d 1031, 1035 (N.D. Cal. 2005) (citing *Cal. Gov.* Code § 113). Under California Government Code Section 113, the United States does so

by first requesting that the state accept such a retrocession in writing. *Id.* The State Lands Commission must then hold a hearing to determine "whether acceptance of the retrocession is in the best interest of the state" and "certified copies of the Commissions orders or resolutions must be recorded in the office of the county recorder." *Id.*

ii. Jurisdictional Status of the Saipan Property

With the above principles in mind, the court turns to the question of whether there is sufficient evidence the Saipan Property is located within the boundaries of a federal enclave.

According to the Government, NAB Coronado comprises several different parcels of land acquired between 1941 through 1976. Cyr Decl. at ¶ 3. In 1941, the United States acquired various parcels of land that make up NAB Coronado—Parcels A through E—in a Civil Condemnation Proceeding, Case No. 120-SD. Cyr. Decl. at ¶ 4; 144-4 at 43–53, 81 (identifying Parcels A through E). Based on the evidence on the record, the United States retroceded any exclusive jurisdiction it may have possessed over Parcels A through E in 1973. (Doc. No. 138-1).

According to the Government, the United States then acquired additional parcels of land making up NAB Coronado—including land where the Saipan Property is now located—in 1955, in a second Civil Condemnation proceeding, Case No. 1802-SD. Cyr. Decl. at ¶ 6. The action

further consolidated this newly acquired land with Parcels A through E to create Parcel G. *Id.* There is no evidence on the record that the United States accepted exclusive jurisdiction of these additional parcels of land by filing a notice of acceptance or taking other similar appropriate action. *Id.* at ¶¶ 6, 8. For these reasons, the Government contends the United States possesses only a proprietary interest in the land upon which the Saipan Property sits. (Doc. No. 144 at 6–7).

According to SDFH and LMPM, in 1941, the Saipan Property was located in what was referred in the 1941 Civil Condemnation Proceeding as Parcel F. (Doc. Nos. 146 at 6–7; 144-4 at 81 (identifying Parcel F)). Land was allegedly then created in Parcel F by dredging and filling a portion of San Diego Bay. (Doc. Nos. 146 at 6–7). SDFH and LMPM contend the United States has sole ownership and exercises exclusive jurisdiction over land created in this manner. *Id.* at 7–8.

Here, even if the court were to credit SDFH and LMPM's version of how the United States acquired the land upon which the Saipan Property now sits, SDFH and LMPM have still not provided sufficient evidence to show the Saipan Property exists within the boundaries of a federal enclave.

Although not entirely clear, SDFH and LMPM appear to present two theories as to how the United States possesses exclusive jurisdiction over the Saipan Property. First, SDFH and LMPM contend land created by dredging and filling navigable coastal waters are

automatically under the federal government's exclusive jurisdiction. *Id.* at 8. SDFH and LMPM infer this must be true because the United States exercises jurisdiction over the navigable waters of the United States. *Id.*

SDFH and LMPM's first theory fails to differentiate between when the United States exercises jurisdiction and when it exercises *exclusive* jurisdiction. *See Allison*, 689 F.3d at 1237 ("The central principle of federal enclave doctrine is that Congress has exclusive legislative authority over these enclaves."). SDFH and LMPM have not cited any legal authority holding the United States possesses *exclusive* jurisdiction over state coastal waters. Indeed, SDFH and LMPM's suggestion state coastal waters are under the federal government's *exclusive* jurisdiction is contrary to law.

The Ninth Circuit's decision in *Beveridge v. Lewis*, 939 F.2d 859 (9th Cir. 1991) case is instructive. In *Beveridge*, plaintiffs challenged the City of Santa Barbara's municipal ordinance forbidding the mooring and anchoring of vessels to the east of Stearns Wharf. *Id.* at 861. Specifically, plaintiffs contended the federal government had exclusive jurisdiction over the coastal waters of the United States and the city ordinance was, therefore, an invalid attempt by the local government to regulate an area preempted by the federal government. *Id.* The Ninth Circuit rejected this argument, noting it had found previously there was congressional intent for there to be "joint federal/ state regulation of ocean waters within three miles of shore." *Id.*; *see also, e.g., Barber v. Hawaii*, 42 F.3d 1185, 1191 (9th Cir. 1994) ("[T]he purpose of the [Submerged

Lands Act] was not for the Federal Government to retain exclusive jurisdiction over navigation of the waters above the submerged lands, but for the Federal Government to retain *concurrent* jurisdiction over those waters.") (emphasis added).

SDFH and LMPM have also not identified—nor has the court been able to locate—any binding or persuasive authority supporting an argument that coastal land the United States "creates" is automatically subject to the exclusive jurisdiction of the federal government. The *United States v. F.E.B. Corp.*, 52 F.4th 916 (11th Cir. 2022) decision—relied upon heavily by SDFH and LMPM—is not on point. (Doc. No. 146 at 8). The question in *F.E.B. Corp.* was whether the United States held *title* to an island created by the United States—not whether the United States possessed exclusive jurisdiction over it. *F.E.B. Corp.*, 52 F.4th at 919.

SDFH and LMPM's citation to the Submerged Lands Act, 43 U.S.C. §§ 1311 *et seq.* is equally unpersuasive. (Doc. No. 146 at 8). The Submerged Lands Act is directed to *title*—not jurisdiction. *Doucette v. San Diego Unified Port Dist.*, No. 95-56126, 1997 U.S. App. LEXIS 28476, at *3 (9th Cir. Oct. 10, 1997) ("In passing the Submerged Lands Act, however, Congress merely dictated that lands beneath navigable waters within three miles of state boundaries belong to the respective states.").[1] Again,

1. Indeed, in *Doucette*, albeit in an unpublished memorandum disposition, the Ninth Circuit stated California held the authority to regulate San Diego Bay. 1997 U.S. App. LEXIS 28476, at *9 ("[W]e conclude that [California] holds the authority to regulate the Bay[.]").

ownership and exclusive jurisdiction are two distinct concepts. *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650, 50 S. Ct. 455, 74 L. Ed. 1091 (1930) ("[I]t is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State.").

As an alternative theory, SDFH and LMPM contend California ceded exclusive jurisdiction of the land where the Saipan Property now sits to the United States. (Doc. No. 146 at 8–9).[2] Specifically, in their Notice of Removal, SDFH and LMPM contend the United States acquired the land on which the Saipan Property is located—along with the lands that comprise present-day California—in 1848, from Mexico, in the Treaty of Guadalupe Hidalgo. (Doc. No. 1 at ¶ 9); *see Thompson v. Doaksum*, 68 Cal. 593, 596, 10 P. 199 (1886) ("The lands within the territorial limits of the state of California were ceded to our general government by the republic of Mexico under the treaty of Guadalupe Hidalgo of February 2, 1848.").

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2. The court notes that while SDFH and LMPM appear to conflate these two theories, this alternative theory as to how the United States possesses exclusive jurisdiction over the Saipan Property is fundamentally inconsistent with SDFH and LMPM's contention the United States has *always* had exclusive jurisdiction over this "United States made" land. This is because SDFH and LMPM's second theory presumes California, at some point, held exclusive jurisdiction over the land underlying the Saipan Property. Otherwise, it would be unnecessary for California to have ceded jurisdiction over this land in order for the United States to possess exclusive jurisdiction over it.

Appendix C

In 1850, the United States admitted California to the Union. *See An Act for the Admission of the State of California into the Union*, 9 Stat. 452 (Sept. 9, 1850). However, "when the United States admitted California into the Union, it did not reserve exclusive jurisdiction over the federal lands within the state, and therefore retained only the rights of an ordinary proprietor." *Graupner v. Lewis Ltd. Consultants, LLC*, No. ED CV 12-1388-JFW (OPx), 2012 U.S. Dist. LEXIS 194116, at *5 (C.D. Cal. Oct. 26, 2012); *see also Hillman v. Leixcon Consulting, Inc.*, No. LA-16-CV-001186, 2016 U.S. Dist. LEXIS 200818, at *8 (C.D. Cal. July 27, 2016) ("In 1850, when the United States admitted California to the Union, it did not reserve exclusive jurisdiction over federal lands within California.").

SDFH and LMPM contend the land upon which the Saipan Property sits was then ceded to the United States under California's 1897 cession statute, which states:

> The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to the United States for such purposes; provided that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated[.]

(Doc. Nos. 1 at ¶ 9; 1-6 at 15–16; 146 at 8–9).

Under the explicit terms of the 1897 statute, cession occurs if at least two specific requirements are met: (1) if the United States provides a sufficient description of the metes and bounds of this land; and (2) a map or plat of such lands is filed in the proper office of record in the county in which the land is located. *See Gillespie v. Centerra Servs. Int'l, Inc.*, No. EDCV 21-2028 JGB (SHKx), 2022 U.S. Dist. LEXIS 211071, at *46 (C.D. Cal. Sep. 7, 2022); *Hillman*, 2016 U.S. Dist. LEXIS 200818, at *14.[3]

SDFH and LMPM contend the above two requirements were met because a map outlining Parcel F was attached in Civil Condemnation Proceeding No. 1802-SD and "appears" to bear a County map stamp. (Doc. No. 146 at 8–9). The court does not agree. Even if a map of Parcel F may have been filed, there is no evidence in the record that the United States also provided a metes and boundary description of Parcel F. Instead, as SDFH and LMPM themselves note, Parcel F is not mentioned in the condemnation documents. *Id.* at 9.

Regardless, SDFH and LMPM have also not provided evidence the United States accepted jurisdiction of this land from California as required under the Act of October 9, 1940. Indeed, Mr. Cyr's declaration explicitly indicates

3. "In 1943, California codified that statute as Government Code § 114." *Jackson v. Mission Essential Pers., LLC*, No. CV 11-1444-R, 2012 U.S. Dist. LEXIS 199920, at *3 (C.D. Cal. Apr. 13, 2012). The 1984 version of the statute still provides that: "[a] sufficient description by metes and bounds and a map or plat of the lands shall first be filed in the proper office of record in the county in which the lands are situated." (Doc. No. 146-1 at 11–12).

the Navy has no record of such an acceptance. Cyr. Decl. at ¶ 8. "[I]n the absence of an explicit acceptance of jurisdiction by the federal government, the federal government's possession is 'simply that of an ordinary proprietor' and does not give rise to federal subject matter jurisdiction[.]" *Cmty. Hous. P'ship v. Byrd*, No. 13-3031 JSC, 2013 U.S. Dist. LEXIS 164661, at *12 (N.D. Cal. Nov. 19, 2013); *see Adams*, 319 U.S. at 313 ("Since the government had not accepted jurisdiction in the manner required by the Act, the federal court had no jurisdiction of this proceeding."); *United States v. Stone*, No. CR12-0072-JCC, 2013 U.S. Dist. LEXIS 168336, at *6 (E.D. Cal. Nov. 26, 2013) ("[T]he United States government does not have exclusive or concurrent jurisdiction over land acquired from a state after 1940 unless it explicitly accepts jurisdiction by filing notice with the state.").[4]

For the reasons stated above, the court concludes there is insufficient evidence the Saipan Property is located within the boundaries of a federal enclave.

4. For the same reasons, if the court were to credit the Government's version of how the United States acquired the land upon which the Saipan Property now sits, there would still be insufficient evidence that the federal government possesses exclusive jurisdiction over this land. Absent evidence on the record the United States accepted exclusive jurisdiction of the additional parcels of land acquired in Civil Condemnation Proceeding No. Case No. 1802-SD, the court cannot conclude this land is a federal enclave.

III. Whether the Court has Federal Officer/Federal Agency Jurisdiction under 28 U.S.C. § 1442

The court next looks to whether it has federal officer or federal agency jurisdiction over this case under 28 U.S.C. § 1442(a)(1).

A. Federal Officer Jurisdiction

In their Notice of Removal, SDFH and LMPM contend this action is also removable because, at all relevant times, SDFH and LMPM were acting under officers of the Navy "to fulfill the governmental function of housing military service members and their families." (Doc. No. 1 at ¶¶ 3, 30).

The federal officer removal statute permits removal of a state-court action against an "officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). "To invoke § 1442(a)(1) removal, a defendant in a state court action 'must demonstrate that (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.'" *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1099 (9th Cir. 2018) (quoting *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006)).

Here, the court finds SDFH and LMPM have not satisfied their burden of proving the "causal nexus"

requirement for removal jurisdiction is factually supported. *See Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679, 684 (9th Cir. 2022) ("[D]efendants seeking removal still bear the burden of proving by a preponderance of the evidence that the . . . causal nexus requirement[] for removal jurisdiction [is] factually supported.") (internal quotation marks omitted).

"To demonstrate a causal nexus, the private person must show: (1) that the person was 'acting under' a federal officer in performing some 'act under color of federal office,' and (2) that such action is causally connected with the plaintiff's claims against it." *Cty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 755 (9th Cir. 2022). The causal nexus inquiry "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." *Lake v. Ohana Military Cmtys., LLC*, 14 F.4th 993, 1004 (9th Cir. 2021) (internal quotation marks omitted).

Here, SDFH and LMPM do not contend they were acting directly under the instructions of a federal officer. SDFH and LMPM have not pointed to any evidence in the record of communications between SDFH, LMPM, and a federal officer about Plaintiffs' complaints. *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1099–1100 (9th Cir. 2018) (noting lack of evidence of any communication between defendant and federal officer regarding actions taken by defendant against plaintiff).

In the absence of such an explicit directive, SDFH and LMPM contend they were acting pursuant to the

instructions of the Navy because of their adherence to a Mold Management Plan ("O&M Plan"). (Doc. No. 146 at 14). The O&M Plan is an "internal policy for the management of water-intrusion and mold-related conditions" in LMPM-managed military family housing. (Doc. No. 130-4 at 1). It sets forth certain "procedures and policies" LMPM employees must follow "when addressing potential water intrusion and mold conditions." *Id.* According to SDFH and LMPM, the O&M Plan was developed "with the Navy's input and approval[.]" (Doc. No. 128-3 at ¶ 19).

As the Ninth Circuit recently noted in *Lake v. Ohana Military Communities, LLC*, however, "§ 1442(a)(1) does not allow removal simply because a federal agency directs, supervises, and monitors a company's activities in considerable detail." 14 F.4th at 1004 (internal quotation marks omitted). The *Lake* decision is particularly instructive here. In *Lake*, the Ninth Circuit considered whether federal officer jurisdiction existed over a case originally filed in state court directed to the alleged failures of Ohana Military Communities, LLC ("Ohana")—a PPV formed under the MHPI—to inform residents about pesticide contamination in military housing property. *Id.* at 998.

The Ninth Circuit held federal officer jurisdiction did not exist because the "'central issue' in the causal nexus analysis—whether a federal officer directed the defendant to take the action challenged—[was] unmet." *Id.* at 1005. The Ninth Circuit based its decision on the fact that: (1) defendants had not argued that the Navy had control over Ohana's decision to disclose pesticide contamination;

(2) the Navy disclaimed management and control over Ohana; (3) and the Navy's consent power over certain aspects of this arrangement did not meet casual nexus standard. *Id.* at 10045.

Although the *Lake* decision would appear to be strikingly similar, SDFH and LMPM contend *Lake* is nonetheless distinguishable because Ohana's relationship with the Navy was far more tenuous than SDFH and LMPM's, and because unlike in *Lake*, SDFH and LMPM were *required* to follow the O&M Plan. (Doc. No. 146 at 14).

The evidence on the record does not support SDFH and LMPM's arguments the challenged actions (or omissions) in this case were controlled by the Navy. Like in *Lake*, the Operating Agreement between the Navy and Lincoln/Clark San Diego, LLC disclaims Navy responsibility over management and control decisions, stating Lincoln/Clark San Diego, LLC—and not the Navy—has "exclusive management and control" over SDFH, including "full authority to take all actions necessary or appropriate to pursue the business and carry out" SDFH's purpose. (Doc. No. 130 at 20); *see also Lethgo v. CP IV Waterfront, LLC*, No. 22-00052 JAO-WRP, 2022 U.S. Dist. LEXIS 107381, at *10 (D. Haw. June 16, 2022) (finding lack of causal nexus where, among other things, agreement between private corporation and Navy disclaimed Navy responsibility). As the Ninth Circuit noted, the Navy itself regards PPV housing as "owned by a private entity and governed by a business agreement in which the Navy has limited rights and responsibilities[.]" *Lake*, 14 F.4th at 1004–05 (internal quotation marks omitted).

The fact that the Navy reviewed and approved the O&M Plan is also insufficient to show SDFH and LMPM's actions were controlled by the Navy. As the Ninth Circuit held in *Lake*, "[t]he Navy's consent power over aspects of the housing arrangement" does not satisfy the causal nexus requirement. 14 F.4th at 1005. Instead, "[r]equiring federal agency consent on collateral points 'fall[s] within the simple compliance with the law circumstance[.]'" *Id.* (quoting *Riggs v. Airbus Helicopters, Inc.*, 939 F.3d 981, 989 (9th Cir. 2019)); *see Cty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 757 (9th Cir. 2022) ("[A] person's *compliance* with the law (or *acquiescence* to an order)" does not "amount to 'acting under' a federal official who is giving an order or enforcing the law.") (internal quotation marks omitted); *Early v. Northrop Grumman Corp.*, No. 2:13-cv-3130-ODW(MRWx), 2013 U.S. Dist. LEXIS 104628, at *13 (C.D. Cal. July 24, 2013) (rejecting defendant's arguments it acted under a federal officer because it was required by agreement to comply with certain Air Force standards); *see also Clover v. Camp Pendleton & Quantico Hous. LLC*, 525 F. Supp. 3d 1140, 1144 (S.D. Cal. 2021) ("Although Defendants have pointed to a Navy-approved mold management plan and other Navy guidance on how to manage the property, there is nothing to suggest that the government was exercising its discretion and that Defendants were merely following orders as given.").

Finally, SDFH and LMPM's specific allegations as to how decisions they made were directed by the Navy is contrary to evidence. *See Early*, 2013 U.S. Dist. LEXIS 104628, at *13 (a defendant "has the burden to exclude the

possibility that whatever acts it took or did not take were not justified by federal direction."). For example, SDFH and LMPM contend LMPM was prevented from testing Plaintiffs' home for mold without a recommendation from a third-party consultant, as doing so "would have gone against the Navy's mold testing policy." (Doc. No. 146 at 14). This is not, however, what the O&M Plan actually provides. Instead, the O&M Plan states if a resident requests mold testing, maintenance technicians must inform the resident that LMPM "follows EPA and industry guidelines that call for mold testing only if that testing is recommended by a third-party inspector in their professional judgment." (Doc. No. 130-4 at 9). The O&M Plan further states that if the resident insists, the requests should be brought to the District Manager or Maintenance Supervisor. *Id.* Nowhere does the O&M Plan dictate mold testing is *prohibited* without a recommendation from a third-party consultant. Although SDFH and LMPM additionally claim the Navy audits their mold remediation decisions, there is no evidence LMPM submitted a work order request to address Plaintiffs' complaints that was denied by the Navy.

As another example, SDFH and LMPM contend the Navy provides SDFH with periodic "letter directives." (Doc. Nos. 128-4 at 110–131; 146 at 13). SDFH and LMPM do not, however, contend any of these letter directives affected their decisions in this case. Further, the majority of these "directives" appear to merely describe legal regulations the Navy expects entities created under the MHPI to follow. (Doc. No. 128-4 at 115 (describing requirement codified in 10 USC § 2891a(d)(i) and relaying

expectation by Navy that entities created under MHPI comply with this statutory requirement)). These directives are insufficient to show SDFH and LMPM were "acting under" the Navy in this case. In order for a private person to be "acting under" a federal officer, the relationship "must go beyond simply complying with the law, even if the laws are highly detailed[.]" *Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1245 (9th Cir. 2017) (internal quotation marks omitted).

For the reasons stated above, the court finds SDFH and LMPM have failed to establish at least the causal nexus requirement for federal officer jurisdiction.

B. Federal Agency Jurisdiction

As a final ground for federal subject matter jurisdiction in their Notice of Removal, SDFH and LMPM contend this case is removable pursuant to 28 U.S.C. § 1442(a)(1), because SDFH is a federal agency. (Doc. No. 1 at ¶ 3).

28 U.S.C. § 1442(a)(1) also permits removal of a state-court action against "[t]he United States or any agency thereof." As used in § 1442(a)(1), a "federal agency" is defined 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." 28 U.S.C. § 451; *see Lake*, 14 F.4th at 1005 n.5 (citing 28 U.S.C. § 451 in determining whether action was removable under federal agency jurisdiction); *Carney*

v. City of San Diego, No. 21cv392 DMS (MDD), 2021 U.S. Dist. LEXIS 128439, at *4 (S.D. Cal. July 9, 2021) (explaining that "28 U.S.C. § 451 defines 'agency' for the purposes of Title 28[.]").

The Ninth Circuit has set forth a six-factor test for determining whether an entity falls within 28 U.S.C. § 451's definition of "federal agency":

> (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.

Lake, 14 F.4th at 1005 (quoting *In re Hoag Ranches*, 846 F.2d 1225, 1227–28 (9th Cir. 1988)).

The Ninth Circuit's *Lake* decision is, again, instructive. In *Lake*, the Ninth Circuit found none of the *In re Hoag* factors supported finding Ohana—a PPV created pursuant to the MHPI—to be a "federal agency." *Id.* In a similar vein, none of the six *In re Hoag* factors support finding

SDFH to be an "agency" here. Indeed, as the court notes below, although SDFH and LMPM contend the *Lake* decision is distinguishable, many of the arguments SDFH and LMPM raise as to why SDFH is a "federal agency" are the same as those already considered and rejected by the Ninth Circuit.

With respect to the first *In re Hoag* factor—whether SDFH performs a governmental function—the Ninth Circuit already found in *Lake* that "[m]erely leasing housing to a servicemember cannot itself be a governmental function" as a service member's Basic Allowance for Housing ("BAH") "can be used on or off a military base." 14 F.4th at 1005. "Otherwise, every private housing (or other service) provider that leases to a servicemember would perform a governmental function." *Id.*

In an attempt to distinguish *Lake*, SDFH and LMPM contend SDFH performs a government function because unlike private landlords, SDFH is required to ensure a military service member's BAH is sufficient to cover the cost of housing. (Doc. No. 146 at 20). While SDFH and LMPM argue this is a "key difference," the court is unclear as to its significance. Even private landlords may be subject to government regulations limiting the amounts they can charge for rent. *See Peace Ranch LLC v. Newsom*, No. 2:21-cv-01651-JAM-AC, 2022 U.S. Dist. LEXIS 22842, at *3 (E.D. Cal. Feb. 7, 2022) ("Since 2019, California state law limits the amount an owner of residential property can increase rent."). This does not mean all such landlords are performing a government function. For these reasons, the court finds the first *In*

re Hoag factor does not support finding SDFH to be a "federal agency."

Moving to the second *In re Hoag* factor, "the scope of government involvement" in SDFH's management also does not support finding SDFH to be a "federal agency." Here, SDFH and LMPM contend the degree of control the Navy exercises over SDFH is far more significant than the PPV at issue in *Lake*. (Doc. No. 146 at 12–13, 20). The court does not agree.

Like the MHPI PPV in *Lake*, the federal government's involvement in SDFH's management is limited. The Operating Agreement entered into between the Navy and Lincoln/Clark San Diego, LLC specifically disclaims Navy responsibility over SDFH's management. (Doc. No. 130 at 20). Instead, the Operating Agreement explicitly grants Lincoln/Clark San Diego, LLC—and not the Navy—the authority to perform a host of managerial responsibilities including: (1) to "expend the capital and revenues" of SDFH; (2) to "employ, compensate, and dismiss . . . employees, agents, independent contractors, attorneys, and accountants"; (3) to enter into agreements it deems "necessary or appropriate to accomplish" SDFH's purpose; (4) to borrow money; (5) to purchase insurance; (6) to deposit and maintain SDFH's funds—and other such managerial responsibilities. *Id.* at 20–21. In contrast, the Navy possesses only limited consent power—such as the authority to request that a failing property manager be replaced, to consent to mergers, or to consent to whether to encumber additional debt. *Id.* at 59–64. As the Ninth Circuit noted in *Lake*, the government does not

"control" an agency where the government is "removed from participation in day-to-day management," even if a corporation remains subject to federal regulation. 14 F.4th at 1006 (internal quotation marks omitted). At most, as in *Lake*, in light of the limited extent of the federal government's involvement in SDFH's management, this factor "does not weigh heavily in either direction." *Id.*

With respect to the third *In re Hoag* factor, there is no evidence SDFH's "operations are financed by the government." While the United States may have made an initial contribution to capitalize SDFH, "[a]n initial financial contribution does not show ongoing operational financing." *Lake*, 14 F.4th at 1006. Absent evidence the Navy is continuing to finance SDFH's operations, the Navy's initial financial contribution, alone, does not support finding SDFH to be a "federal agency."

Continuing to the fourth *In re Hoag* factor, it is indisputable "persons other than the government" have a proprietary interest in SDFH. Specifically, the Operating Agreement indicates Lincoln/Clark San Diego, LLC also made a capital contribution and possesses a "Membership Interest" in SDFH. (Doc. No. 130 at 11, 54–55). This factor, therefore, also does not support finding SDFH to be a "federal agency."

With respect to the fifth *In re Hoag* factor, SDFH and LMPM contend SDFH could qualify as an "agency" pursuant to other statutes—but provides no legal authority actually supporting this statement. Contrary to SDFH and LMPM's argument, the question is not whether

SDFH *could* qualify as an agency pursuant to other federal statutes. Instead, the court must consider whether there is evidence SDFH *is* considered a federal agency under other federal statutes. *See Waldron v. FDIC*, 935 F.3d 844, 848 (9th Cir. 2019) (finding FDIC to be a "federal agency" where there was legal authority supporting the fact that it was considered a federal agency under other statutes, including the Federal Tort Claims Act). Absent such evidence or legal authority, this factor also does not support finding SDFH to be a "federal agency."

Finally, SDFH and LMPM do not address the sixth factor—whether SDFH is treated as an arm of the government for other purposes. Any arguments this factor supports finding SDFH to be a "federal agency" are, therefore, waived. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (the court reviews only "issues which are argued specifically and distinctly" by the parties); *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (courts "will not manufacture arguments for [either party], and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review.").

Based on the above, the court concludes the balance of factors "tips towards treating" SDFH as a private entity, not a federal agency. *Lake*, 14 F.4th at 1006. As such, SDFH and LMPM have not established that the court has federal agency jurisdiction over this dispute.

Appendix C

CONCLUSION

For the reasons set forth above, the court **REMANDS** this action to San Diego Superior Court for lack of subject matter jurisdiction. LMPM and SDFH's Motion for Summary Judgment (Doc. No. 128) and Motion to Seal (Doc. No. 129) are additionally **DENIED WITHOUT PREJUDICE** as moot.

The Clerk of Court is **DIRECTED** to close the case.

IT IS SO ORDERED.

DATED: February 1, 2024 /s/ Jeffrey T. Miller
JEFFREY T. MILLER
United States District Judge

APPENDIX D — RELEVANT STATUTORY PROVISION

28 U.S.C. §1442

a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the

United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

(c) Solely for purposes of determining the propriety of removal under subsection (a), a law enforcement officer, who is the defendant in a criminal prosecution, shall be deemed to have been acting under the color of his office if the officer --

(1) protected an individual in the presence of the officer from a crime of violence;

(2) provided immediate assistance to an individual who suffered, or who was threatened with, bodily harm; or

(3) prevented the escape of any individual who the officer reasonably believed to have committed, or was about to commit, in the presence of the officer, a crime of violence that resulted in, or was likely to result in, death or serious bodily injury.

(d) In this section, the following definitions apply:

(1) The terms "civil action" and "criminal prosecution" include any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order, including a subpoena for testimony or documents, is sought or issued. If removal is sought for a proceeding described in the previous sentence, and there

is no other basis for removal, only that proceeding may be removed to the district court.

(2) The term "crime of violence" has the meaning given that term in section 16 of title 18.

(3) The term "law enforcement officer" means any employee described in subparagraph (A), (B), or (C) of section 8401(17) of title 5 and any special agent in the Diplomatic Security Service of the Department of State.

(4) The term "serious bodily injury" has the meaning given that term in section 1365 of title 18.

(5) The term "State" includes the District of Columbia, United States territories and insular possessions, and Indian country (as defined in section 1151 of title 18).

(6) The term "State court" includes the Superior Court of the District of Columbia, a court of a United States territory or insular possession, and a tribal court.

APPENDIX E — DECLARATION OF PHILIP RIZZO OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, FILED OCTOBER 26, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 3:19-cv-2329-JM-SBC

LENA CHILDS, *et al.*,

Plaintiffs,

vs.

SAN DIEGO FAMILY HOUSING LLC, *et al.*,

Defendants.

[F.R.C.P. 56]
Date: November 27, 2023
Time: 10:00 a.m.
Judge: Hon Jeffrey T. Miller
Courtroom: 15B

DECLARATION OF PHILIP RIZZO IN SUPPORT OF DEFENDANTS SAN DIEGO FAMILY HOUSING LLC'S AND LINCOLN MILITARY PROPERTY MANAGEMENT LP'S MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY, PARTIAL SUMMARY JUDGMENT

I, Philip Rizzo, declare as follows:

Appendix E

1. I am a Vice President of LMH San Diego Property Management GP, Inc., the general partner of Lincoln Military Property Management LP ("LMPM"). Lincoln Property Company No. 2179, LP is one of the two sole members of Lincoln/Clark San Diego, LLC, which is one of the two members of San Diego Family Housing, LLC ("SDFH"). The other member of SDFH, is the United States of America, Department of the Navy. I have worked for various companies operating under the "Lincoln" or "Lincoln Military Housing" names since 2012. Since October 2021, I have worked for various companies operating under the "Liberty" or "Liberty Military Housing" names; October 2021 is when an Employee Stock Option Plan was formed and the trade/brand name of "Lincoln Military Housing" switched to "Liberty Military Housing." I have intimate knowledge regarding all "Lincoln Military Housing" and "Liberty Military Housing" related companies and affiliates including those defendants named in this case, SDFH and LMPM, and the military housing communities with which they are affiliated, as well as regarding the contracts and contractual relationships between these entities and the United States Navy relating to such housing. I am also intimately familiar with the policies which have been created by SDFH and LMPM, with the input of the United States Navy, which relate to such military housing. The facts stated herein are of my own personal knowledge, and if called as a witness, I could and would competently testify thereto. As to matters alleged on information and belief, I believe them to be true.

2. Plaintiffs were tenants at the property located at 1333 Saipan Road, Coronado, California ("the Property"),

from on or about August 2016 to December 2017. The Property is located in the Silver Strand I neighborhood, a military housing community within the jurisdictional boundaries of Naval Amphibious Base Coronado, which is part of the larger Naval Base Coronado military installation. Plaintiffs leased the Property, which is military housing, from SanDiego Family Housing, LLC ("SDFH"), which is a public-private venture ("PPV") between the United States Navy and Lincoln/Clark San Diego, LLC, which was formed under the Military Housing Privatization Initiative (10 U.S.C. §§2871-85) through the Congress' 1996 Defense Authorization Act. The property manager of the Property is and was at all relevant times, Defendant Lincoln Military Property Management, LP ("LMPM"). A true and correct copy of the Plaintiffs' Lease for the Property (with all addenda thereto) is attached to my declaration as Exhibit A. I note that this Lease template for SDFH is used for all SDFH properties, some of which are under exclusive federal jurisdiction like those within Naval Amphibious Base Coronado or Marine Corps Air Station Miramar, as well as those which are on property that is under concurrent jurisdiction with the state of California, like Murphy Canyon.

3. Under the Military Housing Private Initiative ("MHPI"), which was adopted by Congress to improve the quality of service members' housing, various branches of the Armed Forces established public-private ventures ("PPVs") to own, develop and manage military housing, taking the day to day duties of military housing management over from the U.S. military branches, but

maintaining U.S. military oversight and involvement. Typically, the military leases land to a private entity selected through a competitive bidding process and the entity then enters into a PPV agreement with a branch of the Armed Forces to develop and manage the military housing on it. Service members who reside in the housing, which is based on their military pay grade and the geographical location in which they serve, receive a tax-free Basic Allowance for Housing from Armed Forces to pay their rent for the housing, which also includes utilities and community amenities.

4. The PPV at issue for this Property is SDFH. The United States Department of the Navy is a member of SDFH. Following a rigorous vetting process and contract negotiations, the due diligence for which included inspection of a portion of the military housing inventory, on or about August 1, 2001, the Navy and Lincoln/Clark San Diego, LLC entered into an Operating Agreement "Operating Agreement") to form SDFH. The United States Department of the Navy made a capital contribution to this LLC which was greater than that made by the other member and has various duties, oversight responsibilities, and approval responsibilities relating to the military housing in question under the terms of the Agreement. A true and correct copy of excerpts from the Third Amended and Restated Limited Liability Operating Agreement of San Diego Family Housing LLC are filed under seal as Exhibit B to my declaration. This Agreement was that in effect at the time of the Plaintifs' tenancy, and was prepared jointly by both the U.S. Navy and Lincoln/Clark San Diego LLC, the two members of SDFH.

5. SDFH, the PPV, has primary responsibility for managing the military housing in its jurisdiction. SDFH includes the U.S. Navy as the "government partner"—or the "public" member—of the PPV. SDFH is not solely a private entity or private contractor; the U.S. Navy is a member of SDFH itself. Further, the U.S. Navy owns the fee to the property on which the housing is located, which in this case, includes the Silver Strand I neighborhood at which Plaintiffs lived, and other base housing communities at and within the geographical footprint of Naval Base Coronado and Naval Ampibious Base Coronado, and is specifically within the Silver Strand Training Complex-North portion of Naval Amphibious Base Coronado.

6. There are other key agreements at issue that involve the United States Navy, SDFH, LMPM, and the Property. On or about August 1, 2001, the United States Navy and SDFH entered a fifty-year ground lease (the "Ground Lease") for the Silver Strand I neighborhood and certain other military housing communities at Naval Base Coronado/Naval Amphibious Base Coronado and in the San Diego area. As stated above and per the Ground Lease, the U.S. Navy remains the fee owner of this property at all times. A true and correct copy of excerpts from the Third Amended and Restated Real Estate Ground Lease, that which was in effect during the March 2017-December 2017 portion of Plaintiffs' tenancy at the Property, are filed under seal as Exhibit C to my declaration. This Ground Lease was prepared jointly by both the U.S. Navy and SDFH, which, again, itself includes the U.S. Navy as a member. Excerpts from the Second Amended and Restated Real Estate Ground Lease, which

was in effect during the August 2016 to March 2017 portion of Plaintiffs' tenancy, are filed under seal as Exhibit D to my declaration.

7. Pursuant to the Operating Agreement, PPV SDFH (again, which includes the U.S. Navy as a partner/member) entered into a property management agreement ("Property Management Agreement") with Defendant LMPM, relating to the Silver Strand I community which encompasses the Property, as well as other housing communities at Naval Base Coronado/Naval Amphibious Base Coronado. The Property Management Agreement was prepared jointly by SDFH and LMPM, with the U.S. Navy's specific involvement in preparing, reviewing and approving the Agreement. SDFH was directed to enter into this Property Management Agreement with LMPM by the terms of the Operating Agreement. A true and correct copy of excerpts from the Third Amended and Restated Property Management Agreement is filed under seal as Exhibit E to my declaration. Under the terms of the Property Management Agreement, LMPM acts as an agent of the PPV SDFH in performing certain property management functions, such as property leasing and maintenance. The Property Management Agreement also includes a Maintenance Plan which discusses general maintenance items for the housing including service request procedures and priorities, routine maintenance, make ready maintenance, annual maintenance and preventative maintenance.

8. One of the documents which was created as part of the Ground Lease, referenced therein in Section 11,

is entitled "Standard Procedures for Operations and Maintenance of Fungi-Containing Materials" ("O&M Plan"). It is referenced within the Ground Lease as the "Mold Management Plan." A true and correct copy of the O&M Plan is filed under seal as Exhibit F to my declaration. The O&M Plan was developed by SDFH in consultation with the United States Navy, following the due diligence in the negotiations that led to SDFH's formation, and environmental assessments on a subset of the homes which would be covered by the SDFH agreements.

9. The O&M Plan's purpose is to "help assure that consistent and highest quality operations and management systems are in place and functioning sufficiently to address water intrusion and mold related conditions" and "verify compliance with applicable laws, regulations, project-related requirements and LMH policies." (O&M Plan at p.1). It also outlines how SDFH and LMPM will address future water intrusion and mold issues and the roles of others, including its property managers, in this process. The O&M Plan has been updated on several occasions over the years. Notably, the O&M Plan is based in part on U.S. Navy documents and policies, and language contained in the O&M Plan has been carried over from specific past and current housing policies of the U.S. Navy.

10. The O&M Plan outlines a general plan, certain criteria that must be met, options and considerations for response based on what is discovered at a property, and directions for responding to tenant complaints and service orders for a property (and specifically those as

to mold and water intrusion in the O&M Plan). These include, *inter alia*, timing of inspections or contact after a service request (which vary depending on level of urgency, but which levels of urgency and the timeframes for response therein were originally dictated by the U.S. Navy), frequency of periodic inspections, water intrusion/ mold procedures, remediation of mold, use of third party contractors, testing/reports (although testing would only be done by a third party vendor if they believed it needed, as the U.S. Navy does not 27 recommend any sampling for mold)[11]. Further, all third party contractors that can be used with the military housing are vetted and approved in advance by the U.S. Navy; SDFH and LMPM are not allowed to use any non-Navy approved third party contractors on the housing.

11. SDFH and LMPM are required to follow the perameters and directives of the Property Management Agreement's Maintenance Plan and the Mold O&M Plan, specifically, with respect to reports of mold, moisture or water intrusion at a property. Defendants track and log all service requests for a property through the Yardi system,

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1. See Exhibit G to my declaration, which is a true and correct copy of the Navy and Marine Corps Facts about Home Mold Testing policy documents which were in effect at the time of the Childs' lease. These documents set forth the U.S. Navy's position on mold sampling, including specifically with its military housing. Plaintiffs complain in this lawsuit that Defendants did not test for mold at the Property adequately, but Defendants were not authorized to do so by the U.S. Navy unless directed by a third party vendor to do so, because such would be against the U.S. Navy's stated policy.

both in work orders, and tenant memos, to document all requests and responses. This was done with respect to Plaintiffs' tenancy as well. See Management Plan, 3rd Amended Property Management Agreement, Ex. E hereto, Ex. F, Mold O&M Plan). The Mold O&M Plan and general Maintenance Plan consider mold and water intrusions requests as "emergencies," (Ex. E, 3rd Amd. Property Management Agreement, Maintenance Plan, p. 3rd Amended Property Management Agreement, p.40; Ex. F, Mold O&M Plan, p.3/10). If mold is found, it must be remediated; if small (less than 10 square feet), it can be approved by the O&M Coordinator to be done in house; if large (more than 30 square feet) or deemed by the O&M Coordinator to require an outside vendor, a contractor is required. (Id. at 3/10-7/10). If water intrusion is found that impacts cellulose materials, three follow up visits and a letter to the tenant following mitigating the intrusion is required to ensure the issue is remedied; otherwise, two visits are required. (Id. at 5/10.) Testing is not permitted unless a third party vendor recommends it. (Id. at 8/10). Claimed mold on a tenant's personal property that is not tied to a water intrusion, and routine mildew on caulk/ grout or tub enclosures, is not subject to the O&M Plan. (Id. at 1/10). For each instance of a reported maintenance issue by Plaintiffs during their tenancy at the Property, Defendants responded per the plans, including specifically with respect to reported water intrusion issues. (See Decl. of Gail Miller, previously submitted with Defendants' Motion to Dismiss. [ECF No. 19-3])

12. Various persons and departments within the U.S. Navy were and are involved in an ongoing basis with

the military housing with which SDFH and LMPM are involved. The primary contact point with the government partner is a Navy Business Agreements Manager ("BAM") from the Naval Facilities Engineering Command ("NAVFAC"). The BAM acts like an asset manager, managing their asset of military housing. Their duties involve budget review, evaluation of various metrics (including, number and types of work order, maintenance issues, mold/water intrusion events at properties), review of work orders and tenancy notes for the properties (they have direct access to these), inspections of the properties, and general oversight of the military housing. They can and do send inquiries to SDFH and LMPM regularly based on their reviews of their asset and the documentation they review. There are weekly and monthly meetings SDFH and LMPM have with NAVFAC personnel, often the BAM, to discuss the various properties (sometimes called the "projects"). There are also quarterly walk-throughs of certain inventory (the housing) to view and evaluate them. SDFH and LMPM are required to report on certain metrics to the U.S. Navy bimonthly and monthly, including on mold and water intrusion events at the properties. If an issue arises with the housing which the U.S. Navy wants to become more involved, the BAM or other Navy Housing or NAVFAC personnel have the ability become involved with the servicemember (tenant) directly, and/or conduct their own inspection of the specific property at issue. If there is a health issue reported by a tenant, or remediation is required at a property, the U.S. Navy is informed of this (typically the BAM). NAVFAC and the BAM oversee the implementation of the O&M Plan.

13. NAVFAC frequently provides directives to SDFH and LMPM on all aspects of the military housing which is the subject of the Operating Agreement, Ground Lease and Property Management Agreement (including the O&M Plan).

14. Attached to my declaration as Exhibit H, is correspondence from United States Department of the Navy to Defendants, dated 26 May 2020, providing specific directions and oversight to them with respect to the National Defense Authorization Act and sharing health, environmental and safety inspection and testing results as to the military housing which is the subject of the contracts submitted as Exhibits B-E with my declaration. This correspondence was received by Defendants in the ordinary course of their business and is retained by Defendants in the ordinary course of their business.

15. Attached to my declaration as Exhibit I, is correspondence from United States Department of the Navy to Defendants, dated 1 May 2020, providing specific directions and oversight to them with respect to the National Defense Authorization Act and government access to the privatized military housing which is the subject of the contracts submitted as Exhibits B-E with my declaration. This correspondence was received by Defendants in the ordinary course of their business and is retained by Defendants in the ordinary course of their business.

16. Attached to my declaration as Exhibit J, is correspondence from United States Department of

the Navy to Defendants, dated 3 April 2020, providing specific directions and oversight to them with respect to work order systems for maintenance and repair work as to the military housing which is the subject of the contracts submitted as Exhibits B-E with my declaration. This correspondence was received by Defendants in the ordinary course of their business and is retained by Defendants in the ordinary course of their business.

17. Attached to my declaration as Exhibit K, is correspondence from United States Department of the Navy to Defendants, dated 14 August 2020, providing specific directions and oversight to them with respect to the National Defense Authorization Act and relocation costs in the event of the need for tenant relocation, which attached two further documents relating to tenant displacement dated 30 April 2020, as to the military housing which is the subject of the contracts submitted as Exhibits B-E with my declaration. This correspondence was received by Defendants in the ordinary course of their business and is retained by Defendants in the ordinary course of their business.

18. Exhibits H through K are but a few examples of the directives and oversight that Defendants SDFH and LMPM receive from the United States Navy with respect to the military housing that is the subject of the contracts.

19. In the O&M Plan, the U.S. Navy, SDFH and LMPM developed a plan for addressing mold and moisture conditions in the military housing asset on an ongoing basis. The O&M Plan took into account various

public policy considerations, including financial (cost of inspections, repairs, budget and fiscal restraints); staffing (availability of employees/third party contractors to perform inspections and repairs); housing factors (ability to invade tenancies to inspect/repair); and military (maintaining housing stock and morale of forces re: housing opportunities and housing generally). The development of the Plan was actually based on policy analysis, and so is its execution. A main factor is cost. Neither SDFH, LMPM nor the U.S. Navy can inspect every home in their inventory daily, weekly or monthly; it would be too costly as too many staff or personnel would have to be retained and it would further disturb tenancies and quiet enjoyment. A plan was hence developed with the Navy's input and approval, to allow annual inspections and prompt responses to service requests which would allow the issues to be identified quickly and remedied, and then confirmed by follow ups to have been fixed. The Plan was further designed, and executed, to allow minimal intrusion to the service member's and their families' tenancies for repairs, and for prompt responses to remedy the issues to keep up service member morale. Various options for response depending on the situation were created by the U.S. Navy, SDFH and LMPM, so that each issue could be individually assessed and addressed depending on the situation, allowing for flexibility on cost considerations and staffing or contracting for the performance of the repairs, and for the convenience and morale of the military family in their tenancy.

20. Under the terms of the Ground Lease and Operating Agreement relating to the Property, the United

States Navy retains ownership of the land on which the Silver Strand I community (including the Property) is located and conveyed ownership of the improvements located on the land to the lessee (SDFH, of which the U.S. Navy is a member) under the Ground Lease for the term of the Ground Lease. Upon termination of the Ground Lease, all improvements on the land will be abandoned in place and become the property of the United States Navy as the fee owner of the land.

21. The Operating Agreement and Ground Lease relating to the Property specify that the land and housing units on it must be used for the governmental purpose of housing military service members and their families. The PPV SDFH and LMPM, as the property manager, must offer the housing units first to military service members and their families, and then to Preferred Referrals who work for the Department of Defense, before allowing any civilian to lease a housing unit. The U.S. Navy must further approve each occupant of each property at Naval Base 27 Coronado/Naval Amphibious Base Coronado. Mr. Childs, at the time of this lease for the Property, was active duty in the U.S. Navy.

22. Each of the four agreements and the O&M Plan which Defendants seek to have sealed for submission in support of this motion for summary judgment or partial summary judgment, are confidential and proprietary business documents involving the Federal government. The United States Navy is implicated in each of the documents, as are the confidential terms of agreements with or involving the Federal government, and/or

confidential business and proprietary information and financial information. On the cover page of the the Third Amended Operating Agreement, and Second and Third Amended Ground Lease, the documents have been expressly deemed "Confidential" by the contracting parties, which include the United States of America, in an "all capitals" paragraph discussing the Confidentiality. The Third Amended Ground Lease is further identified on each page in all capitals as "CONTROLLED UNCLASSIFIED INFORMATION/FOR OFFICIAL USE ONLY/ PROPRIETARY BUSINESS INFORMATION/FOIA EXCEPTIONS 4, 5, & 6." The confidential and proprietary content in these agreements discuss, inter alia, capital contributions, financial information, business structures, financial arrangements, tax issues, operating expenses, and various management plans. These documents in essence disclose how these businesses are structured and run, and how they are financed, and how they execute on their government contracts. Moreover, three of the agreements directly involve the United States Navy as a party, and the fourth and fifth involve a company in which the United States Navy has a proprietary interest. SDFH and LMPM are required to protect these documents, and limit their disclosure. Beyond certain persons affiliated with the Federal government, only certain SDFH and LMPM employees and officers have access to such documents. When said documents are disclosed in the context of litigation, it is always under an executed Protective Order, which exists in this case. If these documents are disclosed freely to the public at large, then it would allow a competitor PPV or military property management company to obtain a significant

advantage over SDFH and LMPM which would cause damage to their businesses. The Federal government also has a proprietary interest in these documents and would not want the agreements in which they are implicated and/or signatories, exposed to the public at large.

I swear under penalty of perjury of the laws of the United States and the State of California that the foregoing is true and correct and that this declaration was executed this 23 day of October 2023, in Huntington Beach, California.

/s/ Philip Rizzo
Philip Rizzo

APPENDIX F — NAVY AND MARINE CORPS FACTS ABOUT HOME MOLD TESTING, FILED OCTOBER 26, 2023

NAVY AND MARINE CORPS PUBLIC HEALTH CENTER PREVENTION AND PROTECTION START HERE

Facts About Home Mold Testing

Mold Sampling – Should it Be Performed?

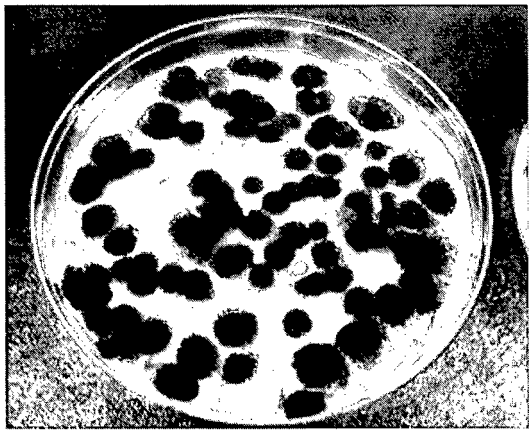
Expert organizations in assessing indoor air quality, such as the Environmental Protection Agency (EPA)[1], Centers for Disease Control and Prevention (CDC)[2], American Industrial Hygiene Association (AIHA)[3] and the Occupational Safety and Health Administration (OSHA)[4], recommend against routine mold sampling. Looking for evidence of water damage and visible mold growth should

be the first step.[3] If visible mold is present, sampling is usually unnecessary and the mold should be appropriately remediated. Results from mold sampling and the species of mold do not change the requirement to locate and stop the water intrusion. Finally, it is important to cleanup and remediate the affected area(s) as necessary.

In addition, there are no health standards for what are "acceptable" levels of mold in the indoor environment[3]; so there is no health standard to which to compare mold sampling results. Also, mold is ubiquitous; it is everywhere – outside and inside. If mold sampling were to be done, mold will be found most anywhere. The mere presence of mold does not necessarily mean that there is a problem or that occupants will be exposed or will have adverse health effects. However, if you have visible mold or suspect you have a mold problem, it is more important to spend time and resources solving the moisture problem and getting rid of the mold than on mold sampling.[3]

Appendix F

Commercial Home Mold Test Kits – How Effective Are They?



This image depicts a culture plate which contained malt extract agar (MEA) that had been grown from a sample obtained inside a home flooded by Hurricane Katrina, and which exhibited visible mold growth on its walls and furnishings. This is a type of black mold commonly found in homes. *(Photo by Ginger L. Chew/CDC)*

Generally, home mold test kits do not provide meaningful answers. Since mold will be found anytime such testing is done, the home test kits would only confirm what we already know – that mold is everywhere, both outside and inside. Even if the home test kit analysis provides detailed information, results can be misleading and difficult to interpret, even for the professional. Results can only be accurately interpreted together with a well-thought-out sampling and analysis plan and visual inspection.[4] Additionally, *Consumer Reports* recommends

to "avoid mold test kits [as we have] found them to be unreliable."[6] They also say, "Each of the kits we tested had significant flaws that were serious enough to earn a **Not Recommended Rating** in our 2006 tests."[7]

Professional Sampling: When Might It Be Necessary?

Sampling for mold should be performed by professionals who have specific experience in developing mold sampling protocols and conducting sampling methods as well as interpreting sample results. While routine mold sampling is not recommended, there are a few specific situations when mold sampling might be useful to the professional who has the specific experience previously mentioned.

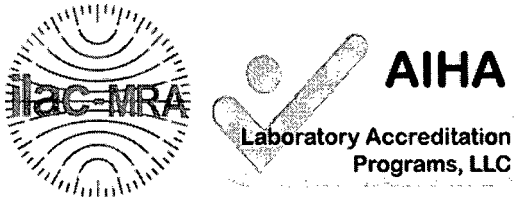
Sampling for mold is expensive and you should have a clear reason for doing so. In situations where visible mold is present but there is a specific need to have the mold identified, surface or bulk sampling might be warranted. In specific instances, such as cases where potential health concerns are an issue, litigation is involved or the source(s) of contamination is unclear, sampling may be considered as part of a building evaluation.[3] If mold is suspected but not visibly detected after a thorough inspection, then microbial air sampling, conducted in accordance with specific guidance documents, might reveal evidence of mold amplification indoors or hidden reservoirs behind walls and other building structures[3] (also see references 8 - 10). If mold is being removed and there is a question about how far the mold colonization extends, then surface or bulk sampling, in combination with moisture readings, might be applicable.[3] Surface sampling might also be

useful to determine if an area has been adequately cleaned or remediated. If samples are collected, regardless of the purpose, the results should clearly help to answer a specific question. Sampling without a specific purpose and a well-thought-out sampling plan greatly increases the chances of generating data that is not usable. The presence of mold depends on environmental conditions (e.g., heat, light, water availability, rain, humidity, winds, time of day, etc.), so carefully consider the seasons and ambient weather conditions when developing the sampling plan.

This image depicts various tools professionals use for mold sampling. *(Photo by NMCPHC Public Affairs)*

In situations where mold sampling might be useful, it must be performed by professionals, such as industrial hygienists, who are experienced in evaluating mold issues and familiar with current guidelines and, if applicable, local regulations, using a well-thought-out sampling plan. Sample analysis should follow recommended analytical methods by the AIHA, the American Conference of Governmental Industrial Hygienists (ACGIH) or other

professional organizations. Since laboratories vary in experience and capability, it is advised that professionals use an AIHA accredited laboratory (Laboratory Accreditation Programs, LLC, Environmental Microbiology Laboratory Accreditation Program [EMLAP]) or equivalent laboratory; this is required when mold sampling is performed by Navy Industrial Hygienists.[3,10,11]



Methods Used by Professionals to Interpret Sample Results

The presence of mold or other biological contaminants does not mean that occupants will have adverse health effects or that they will even be exposed. Like any other stressor, you must have a completed exposure pathway to the contaminant. The mold or mold fragments, spores, bacteria, metabolites or allergens must be produced, released, reach the occupants and then be inhaled, physically contacted, or ingested. Even after contact, human response will depend on individual susceptibility (e.g., genetic predispositions to allergens, age, health status, etc.) and type of exposure (e.g., allergen, toxin, infectious agent, etc.).[10]

A useful method for interpreting microbiological sample results is to compare the kinds and levels of mold detected in different environments. Usual comparisons include

indoors versus outdoors or complaint areas versus non-complaint areas.[3]

Sampling for airborne molds and mold spores can indicate whether the mix of indoor molds is representative of the outdoor mix or whether it is different at the time of sampling. In buildings without mold problems, the types and concentrations of indoor airborne mold and mold spores and those found outdoors should be similar. If the presence of one or two types of mold are more dominant indoors but those same types are absent outdoors, or if the concentrations of mold and mold spores are significantly elevated indoors over outdoors, it might indicate a moisture problem and degraded air quality.

Also, the consistent presence of certain molds that are over and beyond background concentrations might also indicate a moisture problem and a potential exposure. Generally, indoor mold types and airborne concentrations should be similar to, and be no greater than, those found outdoors and in non-complaint areas. Analytical results from bulk material or surface samples can also be compared to results of similar samples collected from reasonable comparison areas such as other rooms inside a building.

References:

[1] U.S. Environmental Protection Agency (EPA). Mold 2016. https://www.epa.gov/mold. Accessed October 21, 2016.

[2] Centers for Disease Control and Prevention (CDC). Mold 2010. http://www.cdc.gov/mold. Accessed February 10, 2010.

[3] American Industrial Hygiene Association (AIHA). Facts about Mold 2016. https://www.aiha.org/publications-andresources/

TopicsofInterest/Hazards/Pages/Facts-About-Mold.aspx. Accessed November 2016.

[4] The Occupational Safety and Health Administration (OSHA). A Brief Guide to Mold in the Workplace 2013. https://www.osha.gov/dts/shib/shib101003.html. Accessed December 29, 2016.

[5] Mold Report. Can I Use Home Mold Test Kits Instead of A Mold Inspection? http://www.moldreport.com/home_mold_testing_kits.html. Accessed 2016.

[6] Consumer Reports. Is Poor Indoor Air Quality Making You Sick? Protect Yourself Against Six Hidden Hazards in Your Home 2012. http://www.consumerreports.org/cro/magazine/2012/06/is-poor-indoor-air-quality-making-you-sick/index.htm. Accessed June 2012.

[7] Consumer Reports. Five Home Repairs You Shouldn't Ignore – Use Our Expert Advice to Stop Trouble in its Tracks 2009. http://www.consumerreports.org/cro/magazine-archive/june-2009/home-garden/5-home-repairs-you-shouldnt-ignore/overview/5-homerepairs-you-shouldnt-ignore-ov.htm. Accessed June 2009.

[8] Dillon, H. K. Field Guide for the Determination of Biological Contaminants in Environmental Samples, 2nd edition. Fairfax: AIHA, 2005.

[9] Prezant, B., Weekes, D. M., Miller, D. J. Recognition, Evaluation, and Control of Indoor Mold (The Green Book). AIHA, 2008.

[10] Navy and Marine Corps Public Health Center (NMCPHC). Navy Industrial Hygiene Field Operations Manual: Chapter 13 Indoor Environmental Quality. http://www.med.navy.mil/sites/nmcphc/Documents/industrial-hygiene/IHFOM CH13 Intro.pdf Accessed July 2015.

[11] AIHA Laboratory Accreditation Programs. Environmental Microbiology Laboratory Accreditation Program (EMLAP). http://www.aihaaccreditedlabs.org/LabAccreditationPrograms/EMLAP/Pages/default.aspx. Accessed November 17, 2016

APPENDIX G — LETTER OF THE DEPARTMENT OF THE NAVY HOUSING PRIVATION PARTNERS, FILED OCTOBER 26, 2023

DEPARTMENT OF THE NAVY
NAVAL FACILITIES ENGINEERING COMMAND
1322 PATTERSON AVENUE, SE, SUITE 1000
WASHINGTON NAVY YARD, DC 20374-5065

11101
Ser AM/036
26 MAY 2020

From: Commander, Naval Facilities Engineering Command

To: Department of the Navy Housing Privation Partners

Subj: NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2020, SECTION 3014(a)"(c)(1)(C)", 3014(a)"(d)(2)"; SHARE HEALTH, ENVIRONMENTAL, AND SAFTEY TEST AND INSPECTION RESULTS WITH TENANT AND HOUSING OFFICE

Ref: (a) National Defense Authorization Act for Fiscal Year 2020, Public Law 116-92

1. Section 3014 of reference (a) indicates: The housing management office is responsible for "maintaining all test results relating to the health, environmental, and safety condition of the housing unit and the results of any inspection conducted by the housing management

office, landlord, or third-party contractor for the life of the contract relating to that housing unit." This requirement is codified in Title 10 United States Code Section 2891a(c)(1)(C). Definitions applicable to reference (a) are addressed in Section 3001 of reference (a).

2. To this end, Section 3014 of reference (a) further indicates: "With respect to test results relating to the health and safety condition of a housing unit, the landlord providing the housing unit shall – (A) not later than three days after receiving the test results, share the results with the tenant of the housing unit and submit the results to the head of the installation housing management office; and (B) include with any environmental hazard test results a simple guide explaining those results, preferably citing standards set forth by the Federal Government relating to environmental hazards." This is codified in Title 10 United States Code Section 2891a(d)(2). Definitions applicable to reference (a) are addressed in Section 3001 of reference (a).

3. The Department of the Navy expects all entities entered or entering into agreement(s) per the Military Housing Privatization Initiative authorities for Navy or Marine Corps Public/Private Venture (PPV) Housing project, as well as all service providers or contractors of those entities, to comply with this requirement on that Navy or Marine Corps PPV Housing Project.

4. Commander Navy Installation Command (CNIC) and Marine Corps Installations Command (MCICOM) installation/base housing directors will serve as the

"head of the installation housing management office." Please submit tests and inspection results consistent with reference (a), relating to the health, environment, and safety condition of a housing unit to the tenant of the housing unit and to the appropriate CNIC or MCICOM installation/base housing director no later than three days after receiving the test results.

5. Please advise if you have any concerns with or questions on the above at this time or in the future.

6. My Point of contact for this matter is Mr. Eric Dauer, at eric.dauer1@navy.mil; 202-685-9344.

/s/ Scott D. Forrest
SCOTT D. FORREST
By direction

Distribution:
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Appendix G

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President & Chief Executive Officer
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Ms. Christy Pemble & Mr. Phillip Rizzo
CO-CEO's
Lincoln Military Housing
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President
Patrician Military Housing
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Baton Rouge LA 70809

Appendix G

Mr. Fran Coen Project
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Mr. Mark Schultz
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Landmark Organization, LP
5501 Balcones Drive #232
Austin, TX 78731

APPENDIX H — SCOTT D. FORREST LETTER TO THE DEPARTMENT OF THE NAVY, FILED OCTOBER 26, 2023

DEPARTMENT OF THE NAVY
NAVAL FACILITIES ENGINEERING COMMAND
1322 PATTERSON AVENUE, SE, SUITE 1000
WASHINGTON NAVY YARD, DC 20374-5065

11101
Ser AM/028
1 May 2020

From: Commander, Naval Facilities Engineering Command

To: Department of the Navy Housing Privatization Partners

Subj: NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2020, SECTION 3014(a)"(d)(9)"; GOVERNMENT ACCESS TO PRIVATIZED HOMES

Ref: (a) National Defense Authorization Act for Fiscal Year 2020, Public Law 116-92

1. Section 3014 of reference (a) indicates: "A landlord providing a housing unit shall allow employees of the housing management office and other officers and employees of the Department to conduct – (A) with the permission of the tenant of the housing unit as appropriate, physical inspections of the housing unit; and (B) physical inspections of any common areas maintained

by the landlord." Per reference (a), this requirement is codified in Title 10 United States Code Section 2891a(d)(9). Definitions applicable to reference (a) are addressed in Section 3001 of reference (a).

2. The Department of the Navy (DoN) expects all entities entered or entering into agreement(s) per the Military Housing Privatization Initiative authorities for Navy or Marine Corps Public/Private Venture (PPV) Housing project, as well as all service providers or contractors of those entities, to comply with this requirement on that Navy or Marine Corps PPV Housing Project. This specific subsection requires the landlord of project companies to allow employees of the housing management office and other employees of the Department of Defense to conduct physical inspections of housing units (with appropriate permissions from the tenant) and landlord-maintained common areas.

3. This requirement is acknowledged and included in existing Commander, Navy Installations Command (CNIC) and Marine Corps Installation Command (MCICOM) housing processes. Likewise, DoN expects PPV partners to support this requirement via their business agreements.

4. Please advise if you have any concerns with or questions on the above at this time or in the future.

5. My Point of contact for this matter is Mr. Eric Dauer, at eric.dauer1@navy.mil; 202-685-9344.

Appendix H

s/ Scott D. Forrest
SCOTT D. FORREST
By direction

Distribution:

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Appendix H

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outh Texas Military Housing, LP
Landmark Organization, LP
5501 Balcones Drive #232
Austin, TX 78731

APPENDIX I — LETTER OF THE DEPARTMENT OF THE NAVY, FILED OCTOBER 26, 2023

DEPARTMENT OF THE NAVY
NAVAL FACILITIES ENGINEERING COMMAND
1322 PATTERSON AVENUE, SE, SUITE 1000
WASHINGTON NAVY YARD, DC 20374-5065

111011
Ser AM/019
3 APR 2020

From: Commander, Naval Facilities Engineering Command
To: Distribution

Subj: NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2020, SECTIONS 3014(a)"(d)(12)", 3017 AND 3018; WORK ORDER SYSTEMS

Ref: (a) National Defense Authorization Act for Fiscal Year 2020, Public Law 116-92

1. Section 3014 of reference (a) indicates: "A landlord providing a housing unit shall maintain an electric work order system that enables access by the tenant to view work order history, status, and other relevant information, as required by section 2892 of this title". Per reference (a), this requirement is codified in Title 10 United States Code Section 2891(a) and (d)(12). Definitions applicable to reference (a) are addressed in Section 3001 of reference (a). The Department of the Navy (DoN) expects all entities entered or entering into agreement(s) per the Military

Housing Privatization Initiative authorities for a Navy or Marine Corps Public/Private Venture (PPV) Housing project to comply with this requirement on that Navy or Marine Corps PPV Housing project.

2. Section 3017 of reference (a), Maintenance Work Order System for Privatized Military Housing, adds Title 10 United States Code Section 2892, Maintenance Work Order System for Housing Units. Section 2892, requires "each landlord of a housing unit have an electronic work order system to track all maintenance requests relating to a housing unit"; and that each landlord "provide access to the maintenance work order system of the landlord relating the housing unit to", "Personnel of the housing management office at the installation", "Personnel of the installation and engineering command or center of the military department" and "Such other personnel" determined necessary. The Department of the Navy (DoN) expects all entities entered or entering into agreement(s) per the Military Housing Privatization Initiative authorities for a Navy or Marine Corps Public/ Private Venture (PPV) Housing project to comply with this requirement on that Navy or Marine Corps PPV Housing project.

3. Section 3018 of reference (a), Access by Tenants of Privatized Military Housing to Maintenance Work Order System, amends Title 10 United States Code Section 2892. Section 2892 as amended, requires each landlord of a housing unit to provide access to the maintenance work order system of the landlord relating to the housing unit to the tenant of the housing unit to permit the tenant,

at a minimum, to track the status and progress of work orders for maintenance requests relating the housing unit.". The Department of the Navy (DoN) expects all entities entered or entering into agreement(s) per the Military Housing Privatization Initiative authorities for a Navy or Marine Corps Public/Private Venture (PPV) Housing project to comply with this requirement on that Navy or Marine Corps PPV Housing project.

4. During DoN Housing PPV Partner meetings over the past year, all private partners for Navy and Marine Corps PPV Housing projects have indicated phone and electric systems, as well as mobile applications, are currently available for use by tenants for work orders (service or maintenance calls). Naval Facilities Engineering Command (NAVFAC) Business Agreement Managers (BAMs) will review electric systems, as well as mobile applications, with you to ensure compliance with the requirements of Title 10 United States Code Section 2891(d)(12) and 2892 addressed above.

5. NAVFAC BAMs will provide you with the names of employees of the Naval Facilities Engineering Command that require access to your electronic work order system for your particular project(s). NAVFAC BAMs will also provide you with the names of the headquarters, regional and/or installation/base housing directors with the Navy and/or Marine Corps that require access to your electronic work order system for your particular project(s). Headquarters, regional and/or installation/base housing directors with the Navy and/or Marine Corps will provide you with the names of leadership and housing staff that

require access to your electronic work order system for you particular project(s).

6. The above requirements should not be confused with that regarding "The right to be provided with a maintenance history of the prospective housing unit before signing a lease" included in Section 3011 of reference (a) and codified in Title 10 United States Code Section 2890. As you are aware, implementation plans for this particular right in Section 2011 are currently being discussed and coordinated across the DoD with all Housing PPV private partners. Final guidance and expectations on this particular right in Section 3011 will be provided as soon as possible. Your continued review and feedback to enable implementation of this particular right in a most fair and appropriate manner for all concerned is appreciated.

7. Please advise if you have any concerns with or questions on the above at this time or in the future.

8. My Point of contact for this matter is Mr. Brian Miller, brian.miller9@navy.mil, 202-685-9343.

/s/ Scott D. Forrest
SCOTT D. FORREST
By direction

Appendix I

Subj: NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2020, SECTIONS 3014(a)"(d)(12)", 3017 AND 3018; WORK ORDER SYSTEMS

Mr. Phillip Carpenter
Executive General Manager of Operations
Atlantic Marine Corps Communities, LLC
Lend Lease (US) Public Partnership Holdings, LLC
1801 W. Earl Ave
Nashville, TN 37203-2577

Mr. John Ehle
President
Hunt Military Communities
980 North Michigan Ave, Suite 1150
Great Lakes, IL 60611

Mr. Chris Hunt
Chief Executive Officer
Hunt Companies
4401 N. Mesa, Suite 201
Coventry Park West
El Paso, TX 79902-1107

Mr. Tim Byrne
President & Chief Executive Officer
Lincoln Property Company
2000 McKinney Avenue, Suite 1000
Dallas, TX 75201

Appendix I

Mrs. Christy Pemble & Mr. Phillip Rizzo,
CO-CEO's
Lincoln Military Housing
4650 Von Karman Avenue
Newport Beach, CA 92660

Mr. Chris Williams
President
Balfour Beatty Communities
One Country View Road
Malvern, PA 19355

Mr. Alex Lewis, President
Patrician Military Housing
Louisiana Navy Family Housing, L.L.C.
8027 Jefferson Highway
Baton Rouge LA 70809

Mr. Fran Coen
Project Director
Clark Realty Capital, L.L.C.
555 West Beech Street Suite 206
San Diego, CA 92101

Mr. Mark Schultz
South Texas Military Housing, LP
Landmark Organization, LP
5501 Balcones Drive #232
Austin, TX 78731

APPENDIX J — SCOTT D. FORREST AND CHARLES A. WILLIAMS LETTERS TO THE DEPARTMENT OF THE NAVY, FILED OCTOBER 26, 2023

DEPARTMENT OF THE NAVY
NAVAL FACILITIES ENGINEERING COMMAND
1322 PATTERSON AVENUE, SE, SUITE 1000
WASHINGTON NAVY YARD, DC 20374-5065

111011
Ser AM/059
14 AUG 2020

From: Commander, Naval Facilities Engineering Command

To: Department of the Navy Housing Privatization Partners

Subj: NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2020, SECTION 3013(a) "(e)"; RESPONSIBILITY FOR RELOCATION COSTS

Ref: (a) National Defense Authorization Act for Fiscal Year 2020, Public Law 116-92

Encl: (1) DoN Property Management Minimum Standards for Tenant Displacement Guidelines

1. Section 3013 of reference (a), Responsibility for Relocation Costs, created Title 10 United States Code Section 2891, titled "Requirements relating to contracts

for provision of housing units." Section 2891(e) requires, "A landlord providing a housing unit shall pay reasonable relocation costs associated with the permanent relocation of a tenant from the housing unit to a different housing due to health or environmental hazards." Further, Section 2891(e) states, "The landlord shall pay reasonable relocation costs and actual costs of living, including per diem, associated with the temporary relocation of a tenant to a different housing unit due to health or environmental hazards." The Department of the Navy (DoN) expects all entities entered or entering into agreement(s) per the Military Housing Privatization Initiative (MHPI) authorities for a Navy or Marine Corps Public-Private Venture (PPV) Housing project to comply with this requirement on that Navy or Marine Corps PPV Housing project.

2. Enclosure (1) provides guidelines for the displacement of tenants living in MHPI which include:

a. Displacements shall occur when repairs to be performed in the home (including those due to a life, health and/or safety issue) cannot be efficiently or safely addressed while the tenant remains in the home.

b. Subject to applicable state and local law and the terms of the lease, the MHPI Company shall bear temporary lodging costs during displacement, as necessary.

c. Subject to applicable state and local law and the terms of the lease, rent on the leased premises

will continue to accrue and there will be no adjustment for Basic Allowance for Housing while the costs of temporary lodging are borne by the MHPI Company.

d. In the case of displacements greater than 30 days, the MHPI Company shall offer to relocate tenant to another habitable and comparable home managed by the MHPI Company, if one is available.

3. Request you ensure compliance with enclosure (1) effective immediately. Our intent is to incorporate enclosure (1) in the business documents for each DoN project at the next revision of those documents. If you have any concerns with implementation of enclosure (1), please advise in writing no later than 28 August 2020.

4. My Point of contact for this matter is Mr. Brian Miller, brian.miller9@navy.mil, 202-685-9343.

s/ Scott D. Forrest
Scott. D. Forrest
By direction

Distribution:

Mr. Phillip Carpenter
Chief Operating Officer
Atlantic Marine Corps Communities, LLC
Lend Lease (US) Public Partnership Holdings, LLC
1801 W. Earl Ave

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Nashville IN 37203-2577

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Landmark Organization, LP
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Austin, TX 78731

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DEPARTMENT OF THE NAVY
THE ASSISTANT SECRETARY OF THE NAVY
(ENERGY, INSTALLATIONS AND ENVIRONMENT)
1000 NAVY PENTAGON
WASHINGTON DC 20350-1000

APR 30 2020

MEMORANDUM FOR COMMANDER, NAVY INSTALLATIONS COMMAND COMMANDING GENERAL, MARINE CORPS INSTALLATIONS COMMAND
COMMANDER, NAVAL FACILITIES ENGINEERING COMMAND

SUBJECT: Criteria and Guidelines on Displacement of Tenants in Military Housing Privatization Initiative (MHPI) Housing

Reference: (a) Delegation of Authority to Execute Agreements under the Provisions of the Housing Revitalization Act of 1996 Memorandum, (27 Feb 1998)

The enclosed guidelines regarding tenant displacement are provided for widest dissemination within your commands. As part of on-going efforts to standardize processes and procedures across the Services as required by the National Defense Authorization Act for Fiscal Year 2020, these guidelines were developed by the Army in coordination with the MHPI companies and outline the criteria used to determine when tenants would be either

temporarily or permanently relocated from their family housing or unaccompanied housing. These standards do not apply to any housing outside of the MHPI program (i.e. private sector housing, personally owned property). It is important to note that these standards must be incorporated into the MHPI business agreements as they have the potential for financial impacts. As such, each business agreement will be revised separately with each MHPI company.

Per reference (a), Commander, Naval Facilities Engineering Command is directed to update the existing MHPI business agreements with the enclosed standards no later than 31 May 2020. Standards may be initially enforced via a Memorandum of Agreement with the MHPI companies until the business agreements are formally opened at their regularly scheduled dates. The enclosed guidelines will be reviewed and updated on an annual basis by Commander, Navy Installations Command, Commanding General, Marine Corps Installations Command, and Commander, Naval Facilities Engineering Command.

My POC for this memorandum is Mr. Jim Balocki, james.balocki@navy.mil, (703)-695-0461.

s/ Charles A. Williams
Charles A. Williams

Enclosures:
As stated

Appendix J

DoN Property Management Minimum Standards for Tenant Displacement Guidelines

30 Apr 2020

The below standards outline the Department of the Navy (DoN) guidelines as to when a tenant will be displaced when they reside in Military Housing Privatization Initiative (MHPI) provided family or unaccompanied housing.

1. Minimum standards and/or conditions within a housing unit that will require the displacement of a tenant:

Displacements shall occur when repairs to be performed in the home (including those due to a life, health and/or safety issue) cannot be efficiently or safely addressed while the tenant remains in the home. The MHPI Partner will make all displacement decisions or their designee, in consultation with the local installation Government Housing Office, and in accordance with standards set forth in applicable Federal, State, and local law.

Conditions for when displacement may be appropriate include, but are not limited to:

- Lead based paint hazards that require extensive mitigation, stabilization or abatement
- Structural, mechanical, or electrical defects in the home that pose a threat to tenant safety

- Any environmental condition in the home that poses a reasonably defined health hazard

- Repairs which render the home not reasonably occupiable during the course of the repairs, such as repairs which prevent use of the kitchen or all bathrooms

2. Minimum standards or entitlements that a displaced tenant will be allowed during the displacement time period:

a. **Entry during Repairs:** While displaced, tenants will generally be restricted from entering their home until the MHPI Company determines that the necessary repairs are complete. The MHPI company reserves the right to limit tenant access to the home during periods of displacement that are consistent with applicable law, to include changing the locks on the home when necessary, but only after notification to the tenant. The MHPI Company shall give reasonable notice of the displacement as the circumstances and tenant safety permit, to include allowing the tenant reasonable time to gather and secure personal belongings before they vacate the premises. Prior to commencing the repairs, and as the circumstances and safety permit, the MHPI company shall document, in the tenant's and Government Military Housing Official's (MHO) presence to the extent practicable, by video, photograph or other means the tenant's personal

property in the work area. MHPI Company shall also take reasonable efforts to ensure the repairs do not damage the tenant's property. Depending on the nature of the repairs and safety issues associated with those repairs, the tenant may request and the MHPI company may allow a tenant reentry into the home while repairs are underway while the tenant is displaced. If reentry is authorized during a period of displacement, MHPI company personnel shall accompany any tenant given access to the home. The tenant may also request an installation Government Housing Representative to attend, but representation is not required. Tenants shall enter the home for the limited circumstances stated in their request to enter and shall not disturb any work or enter any hazard containment area. The tenant may not make any alterations to the home during their entry. MHPI company shall not dispose of any of the tenant's personal property without the permission of the tenant, except as permitted by law following the displacement period if the tenant fails to reoccupy the property or coordinate for removal of their personal property in a reasonable time period.

b. **Temporary Lodging:** Subject to applicable state and local law and the terms of the lease, when the MHPI company is required to displace under the criteria above, the following temporary lodging options shall be offered in descending order and as availability permits:

- A guest suite or unit managed by MHPI company
- Department of Defense (DOD) temporary lodging that contains adequate cooking facilities
- Commercial hotel that contains adequate cooking facilities
- DOD temporary lodging or a commercial hotel without adequate cooking facilities

c. **Temporary Lodging Costs:** Subject to applicable state and local law and the terms of the lease, the MHPI company shall bear temporary lodging costs during displacement of the conditions listed below:

(1) The tenant reoccupies the home in accordance with these guidelines

(2) The Government Installation Housing Office has determined that the necessary repairs have been satisfactorily made to the tenant's home and the house is safe and habitable; or

(3) The tenant has been offered alternative housing either on-post or off-post in accordance with these guidelines.

When necessary, the MHPI Company will offer temporary lodging that accepts animals. Where such lodging is not available, the MHPI Company shall reimburse the tenant for the reasonable costs associated with the boarding of any animals listed on the tenant's lease or any addendum to it. Boarding costs for animals shall be payable to the tenant upon the provision of receipts to the MHPI company.

d. **Rent and Allowances:** Subject to applicable state and local law and the terms of the lease, rent on the leased premises will continue to accrue and there will be no adjustment for Basic Allowance for Housing while the costs of temporary lodging are borne by the MHPI Company.

Subject to applicable state and local law and the terms of the lease, when the MHPI Company places a tenant in temporary lodging as a result of displacement, the tenant shall be entitled to the following allowances that are paid for by the MHPI company:

- In all cases where a tenant is placed in temporary lodging, tenants and their authorized dependents will be entitled to the U.S. General Services Administration (GSA) or DOD incidentals per diem rate for the location of their leased premises for the period of their displacement.

- In the case where a tenant is placed in DOD temporary lodging or a commercial hotel that contains adequate cooking facilities, tenants and their authorized dependents will be entitled to the GSA or DOD incidentals per diem rate for the location of their leased premises for the period of their displacement.

- In the case where a tenant is placed in DOD temporary lodging or a commercial hotel that does not contain adequate cooking facilities, tenant and their authorized dependents will be entitled to the GSA or DOD meals and incidentals per diem rate for the location of their leased premises for the period of their displacement.

- A tenant may elect to move into alternate temporary lodging outside of what is offered by the MHPI Company, such as staying with family or in a recreational vehicle. If elected, the tenant and their authorized dependents will be entitled to the GSA or DOD incidentals per diem rate for the location of their leased premises during the period of their displacement.

- Tenants will only be authorized displacement entitlements if the tenant has fully complied with the terms of the lease and the displacement is due to a maintenance issue that is not the fault of the tenant, tenant's

spouse, dependents, guests or invitees (collectively "Tenant Parties").

The MHPI Company shall notify the tenant of the conditions of their displacement, the temporary lodging location and the tenant via signature will acknowledge their allowances in writing, and those conditions. This written notification shall contain at a minimum:

- The general reason(s) for displacement and the initial schedule to remedy the life, health or safety issue
- The location of the temporary lodging and a statement that the costs of such lodging will be borne by the MHPI company
- The per diem entitlement, as applicable
- That the tenant may not access the home during the period of repairs, and that the locks will be altered or changed, if applicable
- The process by which the tenant can request access to the home during repairs and the conditions of that access
- That the MHPI company will keep tenant apprised of the progress of the repairs, any changes to the schedule to repairs, and will notify tenant promptly when the home is available for re-occupancy

e. **Permanent Relocation:** In the case of displacements greater than 30 days, the MHPI Company shall offer to relocate tenant to another habitable and comparable home managed by MHPI company, if one is available. If the tenant accepts the move to the home managed by MHPI Company, the current lease term will terminate without penalty and the MHPI Company shall continue to pay the costs of temporary lodging until the tenant is relocated to the new home, as well as the reasonable cost of moving the tenant's household goods to the new home. If tenant refuses to relocate to the new home offered by MHPI Company within 30 days, temporary lodging and per diem entitlements will cease, and no household goods moving allowance will accrue.

At any time during displacement, and in consultation with the installation Government Housing Office, the MHPI Company may permanently relocate a displaced tenant to a comparable home in the same school district based on service member rank and home size eligibility. The MHPI Company shall continue to pay the costs of temporary lodging and per diem for a period of no longer than 30 days, and no longer than the expiration of the tenant's existing lease in any event, until the tenant is relocated to the new home, as well as the reasonable cost for moving the tenant's household goods.

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If the MHPI Company is unable to offer a home managed by MHPI Company, tenant may elect to move to a home not managed by the MHPI Company within the "Housing Market Area" for that installation, generally defined as a location within 20 miles of the installation. The MHPI Company shall continue to pay the costs of temporary lodging and per diem for a period of no longer than 30 days, and no longer than the expiration of the tenant's existing lease in any event, until the tenant is relocated to the new home, as well as the reasonable cost for moving the tenant's household goods. Tenants will only be entitled to relocation entitlements if the tenant has fully complied with the terms of the lease, the relocation is due to a maintenance issue not the fault of the Tenant Parties, and the tenant has agreed to reside again in PPV Housing.

APPENDIX K — PLAINTIFF'S FIRST AMENDED COMPLAINT FOR DAMAGES AND JURY TRIAL DEMAND OF THE SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO – CENTRAL DIVISION, FILED DECEMBER 5, 2019

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO –
CENTRAL DIVISION

Case No.: 37-2019-00022759-CU-BC-CTL

LENA CHILDS, AN INDIVIDUAL;
DONALD CHILDS, AN INDIVIDUAL;
T. CHILDS, A MINOR, BY AND THROUGH HER
GUARDIAN AD LITEM, LENA CHILDS; HER
GUARDIAN AD LITEM, LENA CHILDS; A.
CHILDS, A MINOR, BY AND THROUGH HER
GUARDIAN AD LITEM, LENA CHILDS,

Plaintiff,

vs.

SAN DIEGO FAMILY HOUSING, LLC,
A CALIFORNIA LIMITED LIABILITY
CORPORATION; LINCOLN MILITARY PROPERTY
MANAGEMENT LP, A DELAWARE LIMITED
PARTNERSHIP; INDEPTH CORPORATION,
A CALIFORNIA CORPORATION; AND
DOES 1 THROUGH 25, INCLUSIVE,

Defendants.

Filed December 5, 2019

Appendix K

PLAINTIFF'S FIRST AMENDED COMPLAINT FOR DAMAGES AND JURY TRIAL DEMAND:

(1) NEGLIGENCE

(2) PRIVATE NUISANCE

(3) BREACH OF CONTRACT

(4) BREACH OF IMPLIED WARRANTY OF HABITABILITY

(5) BREACH OF IMPLIED COVENANT OF PEACEFUL AND QUIET ENJOYMENT

(6) CONSTRUCTIVE EVICTION

UNLIMITED CIVIL CASE

JURY DEMANDED

Plaintiffs LENA CHILDS, DONALD CHILDS, T. CHILDS, a minor, by and through her guardian ad litem, LENA CHILDS, and A. CHILDS, a minor, by and through her guardian ad litem, LENA CHILDS, respectfully file this Complaint, demand a jury trial, and allege as follows:

Parties to the Civil Action

1. Plaintiff, LENA CHILDS, is an adult natural person who is and was at all times relevant hereto, a resident of San Diego County, California.

2. Plaintiff, DONALD CHILDS, is an adult natural person who is and was at all times relevant hereto, a resident of San Diego County, California.

3. Plaintiff, T. CHILDS, a minor, represented by her guardian ad litem, LENA CHILDS, is and was at all times relevant hereto, a resident of San Diego County, California.

4. Plaintiff, A. CHILDS, a minor, represented by her guardian ad litem, LENA CHILDS, is and was at all times relevant hereto, a resident of San Diego County, California.

5. Plaintiffs are informed and believe, and thereon allege that defendants SAN DIEGO FAMILY HOUSING LLC, a California Limited Liability Corporation, and LINCOLN MILITARY PROPERTY MANAGEMENT LP, a Delaware Limited Partnership, (all parties collectively "Defendants"), at all times material to this Complaint, owned, maintained, controlled, and/or managed that certain real property located at 1333 Saipan Rd, San Diego, CA 92118 (herein ("PROPERTY").

6. Plaintiffs are informed and believe, and thereon allege that defendant INDEPTH CORPORATION, a California Corporation located at l0954 Via Frontera in San Diego County, at all times material to this Complaint, performed inadequate and deficient mold remediation services on the PROPERTY.

7. The PROPERTY is and at all times herein mentioned, was located in this judicial district.

8. Plaintiffs are informed and believe, and thereon allege that SAN DIEGO FAMILY HOUSING LLC is a California Limited Liability Corporation that has its principal place of business at 3360 Murray Ridge Road located in the city of San Diego, California and that it owns and operates dozens of properties, both on base and off, including the PROPERTY, which is located at 1333 Saipan Rd. in San Diego, California and is therefore subject to the jurisdiction of this Court.

9. Defendant LINCOLN MILITARY PROPERTY MANAGEMENT, LP provides property management services at military housing communities owned and operated by San Diego Family Housing, LLC.

10. Defendant Does 1-25 are business entities of unknown form or individuals, who Plaintiffs are informed and believe, were the owners or property managers or other parties responsible is some unknown capacity with respect to the premises and are herein sued under fictitious names. Their true names and capacities are unknown to Plaintiffs. Plaintiffs are informed and believe and thereon allege that each of these fictitiously named Defendants is responsible in some way for occurrences herein alleged and for plaintiffs' damages as herein alleged.

11. Plaintiffs are informed and believe, and thereon allege that at all times mentioned in this Complaint, Defendants were the agents and employees of their co-defendants, and in doing the things alleged in this Complaint were acting within the course and scope of such agency and employment and acted in such a manner as to ratify the conduct of their co-defendants.

12. Plaintiffs are informed and believe, and thereon allege that there exists, and, at all times relevant to this complaint, existed a unity of interests between certain of the Defendants such that any individuality and separateness between these certain Defendants has ceased, and those certain Defendants are the alter ego of the other certain Defendants and exerted control over each other. Adherence to the fiction of the separate existence of these certain Defendants as an entity distinct from other certain Defendants will permit an abuse of the corporate privilege and would sanction fraud and /or promote injustice.

Venue and Jurisdiction

13. Venue is proper because the actions and injuries giving rise to this Complaint took place in the City of San Diego located in the County of San Diego, California and because at least one Defendant has their principal place of business in the County of San Diego.

14. Subject matter in this action is properly heard in this Court, as the action incorporates an amount in controversy as set forth in the complaint, which exceeds $25,000.00.

15. Plaintiffs are informed and believe, and based thereon allege, that Defendants, and each of them, including DOES 1 through 25, are, and at all times herein mentioned were, doing business in the County of San Diego, including acting as a landlord offering homes for rent to the general public.

16. Plaintiffs commence this action timely and all relevant statutes of limitation are tolled from the date of discovery of harm.

Facts Common to All Causes of Action

17. At all times mentioned in this Complaint, Defendants SAN DIEGO FAMILY HOUSING LLC, LINCOLN MILITARY PROPERTY MANAGEMENT LP, and/or DOES 1-25 were the **owners** of the residential dwelling located at 1333 Saipan Rd., San Diego, CA 92118.

18. At all times mentioned in this Complaint, Defendant SAN DIEGO FAMILY HOUSING LLC, LINCOLN MILITARY PROPERTY MANAGEMENT LP, and/or does 1-25 were the **property managers** of the residential dwelling located at 1333 Saipan Rd., San Diego, CA 92118.

19. At all times mentioned in this Complaint, Defendant INDEPTH CORPORATION, and/or does 1-25 performed inadequate and deficient mold and moisture remediation services on the residential dwelling located at 1333 Saipan Rd., San Diego, CA 92118.

20. At all times herein mentioned, plaintiffs were paying tenants of defendants at the PROPERTY.

21. On August 8, 2016, plaintiffs LENA CHILDS and her husband, DONALD CHILDS, entered into a written residential lease agreement with Defendants for the PROPERTY. Defendants rented to plaintiff LENA

CHILDS, her husband, DONALD CHILDS, and their two minor children, T. CHILDS, and A. CHILDS, the PROPERTY for an initial six-month term at the agreed rental rate equivalent to the United States Navy's Basic Allowance for Housing (BAH), payable on the first day of each and every month, commencing August 8, 2016. Plaintiffs timely paid rent each and every month that the lease agreement was in effect, until they were constructively evicted in August of 2017.

22. On August 9, 2016, The CHILDS moved into their new home and the laundry room immediately flooded due to plumbing issues. Another incidence of water intrusion occurred roughly a month later, on or about September 19, 2016. Between September of 2016 and October 2017, the CHILDS reported at least nine instances of water intrusions, mold growing on their personal effects or unusual moisture within the home.

23. On December 17, 2016, Maintenance assessed the bathroom shower for evidence of water intrusions.

24. On December 29, 2016, Plaintiffs reported the living room window was collecting visible water droplets and visible mold was growing between window panes.

25. On March 26, 2017, Plaintiffs reported soft drywall due to water intrusion in the master bathroom.

26. On March 31, 2017, Defendant's maintenance personal returned to the PROPERTY to check for mold, soft drywall, and further water intrusion. That same day,

Defendant mailed a letter saying the work completed on March 26 had been successful and attached the guidelines for Prevention and Treatment of Moisture/Mold in Residential Housing.

27. Throughout their tenancy, plaintiffs adhered to the Mold Prevention Guidelines included in the lease.

28. On April 17, 2017, Defendant's maintenance personnel discovered a hole in the roof of the PROPERTY which left the building exposed to the elements.

29. On May 1, 2017, the hallway bath's plumbing clogged and initiated another water intrusion.

30. On and around May 8, 2017, Plaintiff LENA CHILDS sought treatment for what she believed was a severe cold or flu which had persisted for nearly two weeks. Her symptoms included a sore throat, cough, nausea, and headaches. These symptoms would abate and return over the next few months.

31. In the months following May 2017, Plaintiff LENA CHILDS experienced recurring shortness of breath, headaches, fatigue, gastro-intestinal distress, and other symptoms.

32. During this same period the CHILDS noticed their daughter, A. CHILDS, was suffering from prolonged recovery of her occasional eczema outbreaks. Plaintiff, T. CHILDS began to suffer from bouts of anxiety and depression. DONALD CHILDS also began

to suffer periods of persistent fatigue, shortness of breath on exertion, headaches. and other symptoms. His performance on his physical fitness tests also began to decline sharply.

33. On May 16, 2017, Plaintiffs reported sewage backing up from the PROPERTY's plumbing system.

34. On June 6, 2017, The PROPERTY's hot water heater began to leak and Defendant's maintenance personnel again responded to the home.

35. On or about July 1, 2017, Plaintiff LENA CHILDS suffered excruciating abdominal pain, nausea and vomiting, headaches, and was bedridden for two days. LENA CHILDS initially suspected her symptoms were attributable to a food allergen or contaminant that had triggered a recurrence of her celiac disease. She sought treatment from a physician on July 7, 2017.

36. When Plaintiff, LENA CHILDS visited her family in July 2017 for five days she noticed that her persistent symptoms abated almost entirely. Upon returning to the PROPERTY, LENA CHILDS again began suffering the same symptoms she had experienced while living in the PROPERTY.

37. On July 30, 2017, Plaintiff LENA CHILDS discovered and reported multiple instances of visible mold growth throughout the PROPERTY to Defendant.

38. On July 31, 2017, representatives from LINCOLN and INDEPTH inspected the CHILDS' home and, using

moisture meters, recorded elevated levels of moisture in the home. They also noted visible mold growing in multiple areas of Plaintiffs' home. Defendant's representative further stated, "There is no reason to run any tests because there is visible mold on your furniture."

39. On August 1, 2017, Defendant property manager acknowledged the mold issue and engaged a mold remediation company, In Depth, to return the home to a habitable condition. The CHILDS were asked to leave their home from August 1, 2017 to August 6, 2017 while INDEPTH performed mold remediation services on the PROPERTY.

40. Plaintiffs were told the remediation process had been successfully completed and that they were free to move back into their home on August 6, 2017. When Plaintiffs requested documentation verifying that abnormal levels of mold were no longer present in the home, Defendant property manager refused to provide any such reports or documents and insisted the home was habitable.

41. On August 6, 2017, Plaintiffs returned to the PROPERTY and engaged an independent mold remediation company to perform a superficial inspection and verify that the home was successfully and correctly remediated and returned to a habitable condition.

42. Tests conducted by Plaintiffs' independent inspectors on August 6, 2017, involved the use of air sampling instruments to test for the presence of airborne

environmental contaminants, moisture meters to measure the level of water present in the drywall, and a non-invasive spot check of surfaces in the home to check for readily visible mold growth. Samples in the interior of the home were benchmarked against air samples taken from outside the home and sent to an independent laboratory for analysis.

43. Environmental testing revealed elevated levels of several species of mold known to be hazardous to human health throughout the home. Compared to the baseline sample, indoor environmental air sampling revealed unusually high-levels of; *penicillium/aspergillum* in the master bath, *ascospres* and *curvalaria* in the master bedroom, *chaetomium* in the front bedroom, and *stachybotrys* in the back bedroom. Moisture detectors showed elevated levels of water absorbed into the drywall of the master bathroom.

44. Alarmingly, Plaintiffs' inspectors recommended that Plaintiff engage a professional remediation company to physically remove the source of the mold and ensure the home is properly dried and cleaned. This, despite Defendant's assurances that the home was suitable for habitation. Specifically, Plaintiffs' report advised, "we recommend contacting a professional remediation company to clean, dry, and remove [mold] spores in the Master Bathroom, Master Bedroom, Front Bedroom and Back Bedroom."

45. On or about August 7, 2017, Plaintiffs met with representatives from LINCOLN and a representative

from INDEPTH. At this meeting LINCOLN refused to recognize any deficiency in the work performed by INDEPTH and certified by LINCOLN.

46. When Plaintiffs later approached Defendant with the results of their independent analysis, Defendant responded that its own tests, which were limited to swabbing select surfaces and visually spot-checking for mold, showed no mold. Defendant refused to conduct environmental air sampling. Despite Plaintiffs more exhaustive testing methodology, Defendant refused to acknowledge Plaintiffs' test results as legitimate or warranting further action or concern. LINCOLN also refused to pay Plaintiffs' costs for conducting their confirmatory tests and for expenses incurred since August 1.

47. Plaintiffs, under the advice of their doctors and fearing for their health and the safety of their children, refused to move back into the PROPERTY after August 6, 2017 unless it was properly remediated to habitable condition.

48. Plaintiffs moved from the Marriott, where they had been staying during Defendant's initial work on the PROPERTY, to the Gateway Inn after learning the results of their independent mold inspection. On August 21, 2017, Plaintiffs moved again to the Navy Lodge.

49. At both the Navy Lodge and the Gateway Inn, Plaintiffs were forced to check out of their rented rooms every morning and wait until 5:00-6:00PM in

the hope that there would be a vacancy for the family that evening.

50. LINCOLN repeatedly refused to communicate with Plaintiffs in writing and it was not until August 25, 2017 that the CHILDS were informed, via a letter from Defendant's attorneys, that they would be reimbursed for their time away from the PROPERTY from August 1 to August 6. LINCOLN refused to reimburse Plaintiffs for any expenses incurred since then.

51. Plaintiffs have paid out of pocket for food, lodging, and all other expenses incurred since August 6, 2017. Defendant has refused to reimburse Plaintiffs for any expense incurred after August 6, 2017, including the cost of Plaintiffs' independent tests which showed the home had not been successfully remediated for mold.

52. Beyond the financial impact and adverse health conditions, Plaintiffs have been subjected to chronic stress from Defendant's conduct and the attendant circumstances. Aside from refusing to properly remediate the PROPERTY, Defendant has communicated to DONALD CHILDS chain of command that he is dishonest, a trouble-maker, and a bully. He has been isolated by his peers in the mess hall and had his career threatened by Defendant's characterization of him as "threatening" to the United States Navy. LENA CHILDS has also been painted by Defendant as a "bully" and as being intent on tarnishing the reputation of the Navy. Both Donald and Lena CHILDS have become so distressed by this ordeal that each has sought professional evaluation and treatment for mental health concerns.

53. While the CHILDS were staying at their outside accommodations they would occasionally return to the PROPERTY to clean and salvage their personal belongings, and to ventilate the home in accordance with the Mold Prevention Guidelines in the lease. The CHILDS were also required to maintain the outside of the home in accordance with the character of the neighborhood and per the terms of their lease. These trips to the PROPERTY were related to cleaning and maintaining the home as demanded by Defendant LINCOLN.

54. During these necessary trips to the PROPERTY, Plaintiffs noticed unusual moisture and continued incidences of mold growth. Defendant LINCOLN and INDEPTH, visited the home on four occasions between August 6, when Defendant cleared the home as habitable, and October 10, 2017. On each occasion Defendant LINCOLN insisted there were no issues of water intrusion and that no further action to treat the PROPERTY for mold or moisture was necessary.

55. For example, on one such occasion in August, a representative from LINCOLN came unannounced to the PROPERTY and discovered two areas of drywall containing elevated levels of moisture. Despite these instances, LINCOLN and INDEPTH refused to acknowledge continued issues of mold and water intrusion.

56. On October 10, 2017 Robin Wallace, from LINCOLN, Senior Chief Smith, a Naval Liaison, and an unidentified mold contractor accompanying Ms. Wallace, all met with Plaintiff DONALD CHILDS at the PROPERTY following another report of visible mold. Ms. Wolfe entered

the PROPERTY and physically removed a toilet seat upon which visible mold was growing. After removing the toilet seat, Ms. Wallace allowed the mold inspector to enter and inspect the home. DONALD CHILDS, fearing LINCOLN was attempting to conceal the mold growing on the toilet -seat, had to argue with a Mr. Checo Martinez to retain it. The inspector subsequently reported that no visible mold was discovered in the home.

57. During this time DONALD CHILDS spoke with Senior Chief Smith who acknowledged that he had not been provided with any of LINCOLN's mold tests to verify the suitability of the PROPERTY for habitation.

58. On October 261 2017, Defendant LINCOLN insisted that, "the CHILDS home does not need to undergo any further remediation."

59. On November 1, 2017, Plaintiffs hired a new company, T & T Consulting, to perform comprehensive testing in the PROPERTY to determine whether, nearly two months after reporting visible mold, the PROPERTY had been successfully remediated for mold.

60. T & T's inspectors discovered visible signs of fungal growth in a master bedroom dresser that had been treated and cleared by Defendant's contractor. T & T took a sample of the mold found on the dresser and sent it to an independent laboratory for analysis. Testing revealed that the mold growing on the dresser was of the *penicillium/aspergillus* species.

61. T & T also took environmental humidity samples throughout the home and discovered elevated humidity in

the master bathroom. The drywall in the master bathroom had not been replaced during Defendant's August remediation and showed several penetrating marks left by moisture meters. That area of the drywall was soft to the touch and indicated elevated moisture. Plaintiffs' inspectors also examined the master bathroom toilet seat that Ms. Wallace had removed from the PROPERTY. T & T's technician described it as having "extensive visible mold growth on all sides."

62. Inspectors also discovered readily visible mold growing along the vinyl flooring. A sample was collected and sent to an independent laboratory for analysis. Again, testing revealed the mold to be *penicillium/aspergillus* species.

63. Inspectors also utilized a specialized concrete moisture meter to analyze the moisture content of the concrete slab flooring. The instrument identified elevated moisture beneath both bathrooms, the hall way, and the living room. Inspectors also observed strong odors associated with fungal growth below the hall bathtub and noted that the tub was improperly caulked and allowed water to enter the surrounding walls and baseboards.

64. T & T also took five environmental air samples from within the home. These samples were sent to an independent laboratory, EMLab P&K, for analysis. T & T summarized its findings as follows:

> The presence of Stachybotrys and Chnetomium and substantially elevated Pen/Asp within the bedrooms that were not remediated are

> indicators of the level of contamination that was likely present within the residence prior to and during the remediation process. These elevated airborne mold spore counts are an indication that significant contamination is present from multiple sources of water damaged materials. The findings indicate there may also be remaining sources of fungal growth in wall cavities specifically around the exterior walls that have not been addressed. It is also likely that elevated moisture levels within the concrete slab floor below the sheet vinyl is producing fungal growth ... we believe the existing visible fungal growth, elevated airborne mold spore concentrations and related smells are the result of elevated moisture from water penetrating the exterior walls in specific locations, elevated moisture content in the concrete slab, [and] the previously leaking hall bathroom shower/tub.

65. On or about November 9, 2017, Plaintiffs reported T & T's findings regarding continued water issues and mold in the PROPERTY. On this occasion, Defendants admitted to discovering a roughly one square foot patch of mold growing within the living room sleeper-sofa and along the floor, and another roughly one square foot patch of mold in a bedroom dresser.

66. Defendant acknowledged the presence of visible mold in both rooms, but rather than remedy the chronic and pervasive mold and moisture issues Defendant instead cast aspersions on the CHILDS. Defendant LINCOLN

insisted that the mold growth in the living room was the result of, "a spill of liquid beverage by someone within the house." And coincidentally, that the mold growth in the bedroom dresser was the result of the home, "being kept closed up by the Childs."

67. Throughout this ordeal, plaintiffs did everything possible to return their home to a habitable condition, including cleaning mold from their furniture and clothing in their own time, and reporting any instance of unusual moisture or mold to LINCOLN. They also followed Defendant LINCOLN's Mold Prevention Guidelines and opened the windows almost daily to circulate fresh air through the PROPERTY. Beyond maintaining the home in accordance with the lease, Plaintiffs also diligently reported every instance of unusual moisture or visible mold when they discovered it.

68. The Mold Prevention Guidelines clearly admonish residents to, "Immediately notify us of any water intrusion problems, such as overflows from toilets or bathtubs, appliance leaks, and roof leaks." And that once mold/moisture issues are identified maintenance will "repair any leaks" and "clean/remove all mold affected material." Finally, the Guidelines assure residents that "[a]fter a water or mold-related repair is completed, we will follow up to confirm that the source of water or mold growth does not re-occur."

69. Plaintiffs are informed and believe and thereon allege that despite Plaintiffs continually providing immediate notice of these conditions, defendants failed

to "evaluate ... and/or take appropriate corrective action" based upon customary industry practices.

70. Under the provisions of *Civil Code* §1941, defendants were required to put the PROPERTY in a condition fit for human occupation before renting it, and to **repair all subsequent defects**, other than those caused by the tenants' want of ordinary care, that rendered the premises untenantable. Plaintiffs are informed and believe and thereon allege that defendants knew of prior water leaks in the kitchen area and the toilets as evidenced by the repetitive leaks, wallboard delamination, black spots, and running toilet.

71. At the time defendants rented the premises to plaintiffs, defendants so negligently owned, maintained, and repaired the property so as to cause it to be unfit for human occupation and to be unsafe and dangerous in that the premises substantially failed to comply with those applicable building and housing code standards that materially affected the health and safety of plaintiff, including permitting defective conditions to exist which caused water intrusion problems to form inside the property.

72. Despite verbal and written notices provided to defendants on numerous occasions, no suitable actions were taken to remediate the wet conditions of the PROPERTY in such a way as to make it safe for plaintiffs and their family. Unable to wait any longer for defendants to remedy the problems, plaintiffs and their family were constructively evicted and forced to move out of their home.

73. Liability for negligent maintenance of the premises is also imputed to defendants due to the conduct of defendants' employees or agents who undertook to inspect and repair the conditions that were causing the formation of the water intrusion problems. Defendants' employees/agents so carelessly and negligently inspected and/or repaired the defective conditions that the defects remained a safety hazard, thereby further exposing plaintiff to a dangerous condition.

74. Plaintiffs, at all times relevant, were unaware of the defects causing the water intrusions; the defects which caused the dangerous and unsafe health conditions were not apparent to nor discoverable through the exercise of ordinary care on the part of the plaintiffs despite their repeated attempts and requests.

75. At all times herein mentioned, the provisions of *Civil Code* §3479 and *Code of Civil Procedure* §731, prohibit the interference of a tenant's comfortable enjoyment of the use of property requiring the maintenance of leased property in a habitable condition and free from dangerous hazards.

76. At the time of leasing the property to plaintiffs, and at all subsequent times herein mentioned, there were defective conditions which resulted in the property being dangerous and unsafe for its intended purposes because of the existence of the mold, in violation of the aforementioned code sections.

77. While using the PROPERTY for its intended purpose, and without knowledge of the defects, plaintiffs

were continually exposed to mold, thereby sustaining serious injury.

78. Knowledge of the existence of the defects is imputed to defendants because defendants were made aware of the mold and other water-related problems relating to the PROPERTY.

79. Plaintiffs were forced to move out of the PROPERTY due to a damp home environment causing microbial contamination, musty odors and an uninhabitable condition at the PROPERTY. The damp home environment and odors were caused by excessive moisture, which was not the fault of plaintiffs, and it rendered the PROPERTY uninhabitable. Plaintiffs are informed and believe that the damp home environment was occurring in areas including, but not limited to, plaintiffs' bedrooms, bathrooms, and other parts of the home. Conditions in the home were in violation of applicable codes, standards, and laws, including standards regarding habitability.

80. Plaintiffs are informed and believe and thereon allege that fungal contamination was present which included toxic and allergenic fungi, which emit toxic and allergenic byproducts such as microbial volatile organic compounds, endotoxins and mycotoxins. The conditions also caused the amplification of bacterial dust mites and other biological organisms that are dangerous to human health. The exposure caused plaintiffs to suffer toxic, allergic, irritant, and infectious responses. The contamination has also resulted in property damage, loss of use, and other injuries to plaintiffs.

81. The conditions in the apartment constituted a nuisance in that they were offensive, harmful, dangerous and hazardous. The apartment was unreasonably damp, moist, humid, and musty. These and other factors caused extreme biological contamination and very high levels of spore counts, which have been confirmed by independent testing companies.

82. Defendants, and each of them, were aware that water damage and mold constitute a health hazard and can result in a breach of the implied warranty of habitability.

83. Defendants were aware of plaintiffs' complaints about the damp home environment, mold, and water damage, yet they failed to properly respond. Further, defendants exhibited a conscious disregard for the rights and safety of tenants, such as plaintiffs, and engaged in despicable conduct, which caused injury to plaintiffs. Defendants' constructive eviction of the plaintiffs is an independent basis for despicable conduct, which justifies punitive damages.

84. The laws of the State of California, including but not limited to, California *Civil Code* §1941.1, *Health & Safety Code* §17920.3 and the Uniform Housing Code, require defendants to provide and maintain habitable premises for the plaintiffs. Defendants therefore owed a duty of care under the statutes and laws mentioned above to provide and maintain habitable premises for the plaintiffs.

85. At all relevant times, the plaintiffs belonged to the class of persons for whom those statutes were designed

to protect. The harms which have befallen plaintiffs are of the types these statutes were designed to protect against. Accordingly, defendants' conduct constitutes a negligence *per se.*

86. During plaintiffs' tenancy at the subject property owned and managed by defendants, substantial habitability violations existed in the plaintiffs' rental unit and about the premises which constituted violations of housing laws, including but not limited to, California *Civil Code* §§1941.1 and 1941.3, *Health & Safety Code* §17920.3 and the Uniform Housing Code. During the ownership and management by defendants, defective conditions in the unit included, but were not limited to, mold, dust mites and/or water intrusion, musty smells, and water damage.

87. By defendants' acts and omissions, defendants materially breached the requirements of California *Civil Code* §1941.1, *Health & Safety Code* §17920.3 and the Uniform Housing Code, and defendants' duties as a landlord to plaintiffs. By that breach, defendants proximately caused the damages and injuries to the plaintiffs complained of herein.

88. Defendants were aware of plaintiffs' complaints about water damage, yet they did not adequately respond. Further, defendants exhibited a conscious disregard for the rights and safety of tenants, such as plaintiffs, and engaged in despicable conduct, which caused injury to plaintiffs. Defendants' constructive eviction of the plaintiffs is an independent basis for despicable conduct, which justifies punitive damages.

89. Plaintiffs repeatedly complained to defendants about making the required repairs and the adequacy of the required repairs to the home including problems that caused water intrusion problems. However, the defendants did not adequately respond to these complaints nor properly remedy the deficiencies. Defendants' inaction caused the water intrusion problems to exacerbate considerably.

90. Plaintiffs are informed and believe, and based thereon allege that defendants, and DOES 1-25, were the past and/or present owners and/or managers of the PROPERTY, were the property managers of the PROPERTY, or were a plumber, restoration company, repairer, maintenance company, flood response company, or other contractor who was involved in the investigation and/or remediation of the PROPERTY prior to plaintiffs moving out of that residence, and were required by California law to act in a reasonably prudent and/or responsible manner and/or were charged with investigating, repairing, and/or maintaining conditions at the subject home. At all times herein mentioned, each of the defendants was and is the agent, representative, servant, independent contractor, subcontractor, partner, joint venturer, alter ego, successor-in-interest, affiliate, subsidiary, and/or employee of each or some of the other defendants, and, in doing those acts herein referred to, was acting within the course and scope of its authority as such and with the express and/or implied permission, knowledge, consent, and ratification of all said other defendants.

Appendix K

91. The true names and capacities of defendants sued herein under *Code of Civil Procedure* §474 as DOES 1 through 25 inclusive, are unknown to plaintiffs, or plaintiffs are presently unaware of causes of action versus defendants and/or the true and correct identity of said defendants. Plaintiffs therefore sue said defendants by such fictitious names. Each defendant is somehow responsible in some manner for the events herein referred to and was thus a cause of the damages and injuries suffered by plaintiffs as hereinafter alleged.

92. Plaintiffs are informed and believe, and based thereon allege, that defendants. And DOES 1 through 25 were either agents, employees or representatives of the above-named defendants and/or are responsible in some way for the damages and/or defects hereinafter alleged. All existing defendants are the agents, employees. or representatives of each other and every other defendant.

93. Defendants, and each of them, including DOES 1 through 25, were under a duty to exercise ordinary care whether as owners, landlords, flood restoration companies, restoration contractors, remodelers, maintenance professionals, property managers, engineers, designers, builders, plumbers, sellers, buyers, subcontractors, manufacturers, and/or users, to avoid reasonably foreseeable injury and property damage to residents living in the subject home, including plaintiffs. Defendants also knew or should have foreseen the potential for injury to residents such as plaintiffs if defendants failed to act with reasonable care and in accordance with applicable codes, laws, ordinances, regulations, statutes and constitutions, if any.

94. Based upon the information and belief of plaintiffs, defendants were made aware of moisture and/or mold problems immediately at the property in question. Accordingly, injuries such as those suffered by the plaintiffs were easily foreseeable. Defendants knew of such problems and mold growth in the home, yet they ignored the ongoing nature of the problems. Defendants, when and if they chose to act) took the cheapest way in dealing with the water intrusion problems and moisture issues, incomplete disregard of plaintiffs' health and safety.

95. Plaintiffs are informed and believe, and based thereon allege, that defendants, and DOES 1 through 25, were the past and/or present owners and/or managers of the subject property. As owners and/or managers, defendants were required by California law to act as a reasonably prudent landlord and/or manager and were charged with maintaining and repairing conditions at the subject home.

96. There exists, and at all times herein mentioned existed, a unity of interests and ownership between all of the defendants, including any individual, partnership and/or corporate defendants, and their principals, including all DOE defendants, such that all individuality and separation ceased and defendants became the alter egos of the other defendants and their principals.

97. Said defendants are, and at all times herein mentioned was, so inadequately capitalized that, compared to the business to be done by them and where such business was being conducted in relation to plaintiffs, and

the risk of loss attendant thereto, the available capital of the entities was practically non-existent. Partnership, corporate and other formalities were disregarded such that the separate identities of the entities ceased to exist and such entities became the alter egos of the other defendants and their principals, and vice versa.

98. Adherence to the fiction of any separate existence of any of the defendants as a distinct entity apart from the other defendants or their principals and/or the fiction that defendants or their principals and/or the fiction that defendant limited partnerships have "limited" liability would permit an abuse of the corporate and/or partnership privilege and other privileges allowing the formation of business entities under California law. Injustice would also result given that defendants and their principals have specifically created the multiple entities in an effort to avoid their liabilities and responsibilities. Such a result would promote injustice.

99. Whenever in this complaint reference is made to any act or omission of a particular defendant, such allegation shall be deemed to mean that said defendant, and its officers, directors, agents, representatives, and employees, did authorize such act while actively engaged in the management direction or control of that defendant, and while acting within the course and scope of their employment.

100. Defendants and DOES 1 through 25, inclusive, took actions or engaged in omissions which tolled any statute of limitation and which are sufficient to

justify an estoppel or waiver because defendants' acts, representations, and/or omissions made plaintiffs unaware of the problems at the home, the necessity to sue and/or unaware of their causes of action and delayed discovery thereof. Additionally, defendants have unclean hands. Had defendants made a proper disclosure of material facts including the history of the damp home environment, water leaks, mold growth and toxic conditions in the home, plaintiffs would never have signed the lease or agreed to live in the home. Plaintiffs relied upon defendants' false representations and their failure to disclose material facts to their detriment.

101. Prior to renting the subject property, defendants and/or their agents represented to plaintiffs that the property would be in a good, clean and habitable condition.

102. The lease that plaintiffs entered into was a boilerplate, form lease provided by the defendants. Plaintiffs lacked the sophistication, knowledge and bargaining strength of the defendants and accordingly, they did not bargain over the terms of the lease.

103. **Plaintiffs relied on the assurances of defendants, assuming they would do their job properly and rectify the problems in a reasonable manner.** Plaintiffs reasonably believed defendants would solve the problems within the home, and did not think they would be forced to evacuate their home. Plaintiffs reasonably assumed defendants had the knowledge of a reasonably prudent owner/manager and that they would take reasonable actions, including investigating the cause of the

mold growth (not resorting to a "sniff test") and hiring a professional to investigate what was necessary.

104. The disruption and inconvenience caused by the need to relocate was severe and has caused plaintiffs extreme distress.

105. If any action was taken, defendants only took cursory or band-aid measures to deal with the problems at the subject home, and when they took actions, they were slow in doing so. Defendants never tried to properly evaluate the significant health ramifications of the microbial contamination that had resulted. Defendants, if anything was done at all, sought to implement quick fixes, which were cheap and easy and/or ignored the problem.

106. As a result of plaintiffs' exposure to water intrusion problems and other improper conditions in the subject home, which have amplified because of excessive humidity, they have been physically harmed in that they have suffered physical injury as result of such exposure. Plaintiffs' injuries are causally linked to their exposure to conditions in the home.

107. As a result of defendants' negligence and improper conduct, plaintiffs have suffered property damage, including, but not limited to, the destruction of personal property caused by water damage, water intrusion problems and moist conditions.

108. As a proximate and legal result of the acts, conduct, failure to act, and/or omissions of said defendants,

and their employees, agents and servants, plaintiffs have suffered foreseeable injury and will continue to suffer injuries and damages in an amount which is above this Court's minimum jurisdiction and in an amount which will be proven at time of trial.

109. At all relevant times herein, the conduct of defendants, and DOES 1 through 25, was despicable, outrageous, malicious, and demonstrated conscious disregard for the health, safety, and welfare of plaintiff. Defendants' conduct was typified by their utter refusal to address the harmful consequences and damaged conditions within the subject home. Defendants repeatedly disregarded plaintiffs' situation despite being aware of conditions of disrepair, which caused excess moisture and mold.

110. Despite their awareness and despite plaintiffs' pleas for help, defendants failed to investigate and/or abate the conditions, and intentionally refused to investigate the extent of the problem, or to abate its causes. Accordingly, defendants consciously disregarded the rights and safety of plaintiffs by ignoring the harmful conditions and the likely risk of personal injury.

111. Defendants' ongoing conscious disregard for plaintiffs' rights and safety and their decision to leave plaintiffs in a dangerous and unsafe environment eventually resulted in a constructive eviction. Said eviction caused serious hardship on the plaintiffs, both emotionally and financially. The behavior of defendants rose to the level of outrageous, despicable, and malicious conduct

and it warrants the imposition of punitive damages in an amount sufficient to punish defendants and to deter them and others from engaging in such reckless and intentional conduct in the future.

112. In order to pursue this action it has been necessary for the plaintiffs to hire an attorney and incur costs. Pursuant to the terms of the rental agreement between the parties to this action, plaintiffs claim entitlement to the recovery of reasonable attorney's fees plus costs. Plaintiffs' claims arise under the express and implied terms of the rental agreement entered into with defendants, and accordingly plaintiff is entitled to this damage item.

FIRST CAUSE OF ACTION

Negligence

113. Plaintiffs incorporate by reference each and every allegation contained in each and every preceding paragraph of this Complaint as though fully set forth herein.

114. Defendants, and each of them, owed a duty of care to plaintiffs to exercise reasonable skill in the management of defendants' property so as to avoid injury to the plaintiffs. Defendants further owed a duty of care to the plaintiffs to provide and maintain conditions on the leased premises which were decent, safe, sanitary and in compliance with applicable state law and local codes. Defendants owed a duty to plaintiffs, in plaintiffs' capacity

as a person on the property, occupant, resident and tenant, to exercise care in the management of the property so as not to cause harm to the plaintiffs.

115. Defendants, and each of them, owed a duty to plaintiffs to exercise ordinary care as owners, contractors, property managers, material providers, installers, and/or lessors, to avoid reasonably foreseeable injury to the users and occupants of the property.

116. Said defendants, and each of them, breached their duties of due care to plaintiffs by acting unreasonably for reasons including, but not limited to:

1) Failure to cure defects in the PROPERTY, which were known or should have been known, which led to a damp home environment, moisture intrusion, increased moisture, noxious odors and pervasive mold and mildew growth in and around plaintiffs' home;

2) Failing to properly investigate and decontaminate the PROPERTY after being notified of water leaks, a damp home environment, and other problems;

3) Failing to warn plaintiffs of known defects, a damp home environment, water intrusion problems, and other problems associated with the PROPERTY;

4) Placing plaintiffs in a home known to have a damp home environment, water intrusion problems, and/or possibly microbial contamination problems;

5) Failing to provide a habitable residence for plaintiffs after accepting their rent payments;

6) Failing to hire an adequate professional with regard to the damp home environment, water intrusion problems, and microbial contamination issues to properly and reasonably evaluate the contamination in the home, including an evaluation of whether such damp home environment presented a health risk and/or risk to property for the plaintiffs;

7) Unduly delaying the evaluation and investigation of known defective conditions and by their failure to make the proper necessary repairs, which caused the home to become uninhabitable, causing a constructive eviction of plaintiffs;

8) Failing to conduct adequate maintenance and inspection;

9) Failing to consult, read and utilize current literature regarding a damp home environment, fungal contamination, indoor air quality and "sick-building syndrome" and other materials, including those produced by the EPA for building owners and managers. Defendants' failure to do so caused harm to plaintiffs;

10) Violating applicable state housing, building and landlord/tenant codes; and

11) Causing plaintiffs' furniture, clothing, and other personal property to be damaged by the moisture in the home.

117. Defendants knew or reasonably should have known that failing to keep the premises in a decent, safe and healthful condition would result in injury and damage to plaintiffs. Defendants nonetheless failed to take or order appropriate action to avoid harm to plaintiffs. An ordinarily prudent property owner and manager would not have acted similarly under these circumstances.

118. As a direct result of defendants' acts and omissions plaintiffs have sustained and will sustain damages as alleged herein, including loss of the use and enjoyment of plaintiffs' rental unit, loss of extensive personal property, loss of possessory interest in real property and damages of bodily injury and pain and suffering.

SECOND CAUSE OF ACTION

Private Nuisance

119. Plaintiffs incorporate herein by reference each and every previous and subsequent allegation as though fully set forth herein.

120. Plaintiffs are informed and believe, and based thereon allege, that defendants, and each of them, by their

acts, conduct, failure to act, and/or omissions, created, maintained, exacerbated, and concealed a private nuisance and did not take any reasonable steps to immediately abate said nuisance, although requested to do so.

121. Plaintiffs are informed and believe, and based thereon allege, that the aforementioned defective conditions and damages affecting the property constituted a nuisance within the meaning of California Civil Code §3479 and California Civil Code §731, in that said conditions were injurious to the health and welfare of the plaintiffs and/or plaintiffs' property, and that the conditions and/or injuries created a substantial and unreasonable interference with the plaintiffs' peaceful and quiet enjoyment of their home.

122. As a proximate and legal result of the acts and/or omissions of said defendants, and each them, to permanently abate said nuisances, plaintiffs were deprived of the peaceful and quiet enjoyment of the property, have suffered discomfort and annoyance as more fully alleged above resulting in general damages in an amount to be determined at trial. Further, plaintiffs suffered property damage and economic loss including, but not limited to, the loss of use of the premises in an amount to be determined at trial.

123. As a further proximate result of defendants' maintenance of the nuisance, plaintiffs suffered serious emotional and physical distress, and were required to and did endure medical and related expenses in an amount to be determined at trial.

124. In maintaining the nuisance, defendants acted with full knowledge of the consequences, or reckless disregard thereof, and of the damages being caused to Plaintiffs. Despite this knowledge or disregard, defendants failed to abate the nuisance by repairing the defective and dangerous conditions of the premises, or causing them to be repaired. Their failure to act was oppressive and malicious within the definition of California Civil Code Section 3294 in that they subjected plaintiffs to cruel and unjust hardship in willful and conscious disregard of the rights and safety of plaintiffs. Therefore, plaintiffs are entitled to recover general and punitive damages.

THIRD CAUSE OF ACTION

Breach of Contract

125. Plaintiffs incorporate herein by reference each and every previous and subsequent allegation as though fully set forth herein.

126. Plaintiffs have performed each and every obligation under the terms of the rental agreement, except for those that were prevented, frustrated, excused and/or waived by the conduct of Defendants.

127. Within four years prior to the commencement of this action, Defendants breached the rental agreement, at a minimum, by failing to make proper repairs to the premises, by interfering with Plaintiffs' quiet enjoyment of the premises, and by failing to provide a clean and habitable premises, free of mold, as agreed upon in the

the rental agreement and attached Mold Prevention Guidelines. Specifically, Defendants breached the rental agreement by permitting and/or failing to cure the wet conditions of the premises as described herein and by failing to adequately respond to Plaintiffs' complaints regarding the condition of the Premises.

128. Plaintiffs are further informed and believe and thereon allege that because the Defendants breached the rental agreement and because Plaintiffs had to hire an attorney to assist the with recovering their related harms and losses, that Plaintiffs, as the prevailing party, are entitled to recovering their reasonable attorney's fees and court costs per Section 32 of the rental agreement, allowing for the recovery of attorney's fees for the prevailing party.

FOURTH CAUSE OF ACTION

Breach of the Implied Warranty of Habitability

129. Plaintiffs incorporate herein by reference each and every previous and subsequent allegation as though fully set forth herein.

130. At all times mentioned herein, defendants were the owners of the rental property referred to as the PROPERTY.

131. On August 8, 2016, plaintiffs, LENA CHILDS, and her husband DONLAD CHILDS, entered into a written rental agreement by the terms of which

defendants rented the PROPERTY to plaintiffs for an initial six-month term at the agreed rental of BAH per month, payable on the first day of each and every month, commencing August 8, 2016, and impliedly warranted that the PROPERTY was habitable. The rental agreement and all subsequent agreements implicitly warranted that the premises were suitable for habitation.

132. Plaintiffs entered into possession of the PROPERTY in August 2016 and were forced to move out in August of 2017.

133. Either before or during the time defendants rented the property to plaintiffs, the premises became unfit for human occupation in that defendants substantially failed to comply with those applicable building and housing code standards that materially affect the health and safety of tenants such as plaintiffs. Specifically, while plaintiffs were in possession, the defective conditions resulted in the formation of a damp home environment, a dangerous condition rendering the premises uninhabitable and unfit for human occupation. Further, the unit became uninhabitable and unfit for human occupation because the air quality was heavily contaminated while Plaintiffs were unaware of the contamination until 2017. These conditions constitute a breach of the implied warranty.

134. Such repairs that defendants performed at the subject property were insufficient, failed to remedy the defect, not properly done, caused additional damage or exacerbated the problem.

135. As a proximate result of defendants' breach of implied warranty of habitability, plaintiffs sustained the personal injuries as set forth above, and were injured in their health, strength, and activity, sustaining injury to their body and shock and injury to their nervous system and person, all of which injuries have caused and continue to cause plaintiffs mental, physical, and nervous pain and suffering. These injuries will result in some permanent disability to plaintiffs all to their general damage.

136. Said injuries also caused plaintiffs to suffer rent overpayment, loss of the use and enjoyment of plaintiffs' rental unit, loss of possessory interest in real property and loss of personal property as a result of the conditions at the subject property.

137. As a further proximate result of defendants' breach of implied warranty of habitability, plaintiffs were required to and did employ physicians for medical examination, treatment, and care of these injuries, and did incur medical and incidental expenses and will incur further medical and incidental expenses for the care and treatment of these injuries, the amount of which will be proven at trial.

138. Defendants' failure to put the premises into a condition fit for human occupation after receiving notice from plaintiffs and their failure to repair the dangerous and defective conditions within a reasonable time, were oppressive and malicious within the definition of California Civil Code Section 3294 in that they subjected plaintiffs to cruel and unjust hardship in willful and conscious

disregard of the rights and safety of plaintiffs. Therefore, Plaintiffs are entitled to recover punitive damages.

139. As a proximate result of defendants and/or Does 1-25 conduct, plaintiffs were forced to incur court-costs and attorney's fees, which are recoverable pursuant to the rental agreement.

FIFTH CAUSE OF ACTION

Breach of the Implied Covenant of Peaceful and Quiet Enjoyment

140. Plaintiffs incorporate herein by reference each and every previous and subsequent allegation as though fully set forth herein.

141. Implied in the subject rental agreement was an implied covenant of quiet enjoyment by which landlord impliedly promised the tenants' possession during the contract term and to not, through acts or omissions, create conditions which would disturb the tenants' possession and beneficial use and enjoyment of the premises for the purposes contemplated by the rental agreement, such as allowing plaintiffs to use the home as a residence.

142. Plaintiffs are informed and believe that defendants breached the implied covenant for the above-described reasons by failing to supply plaintiffs with an appropriately safe and secure living environment and a residence that was habitable. Defendants' breach of the implied covenant of quiet enjoyment worsened over time

as defendants engaged in improper acts and omissions, including failing to remedy the subject conditions, failing to adequately test the air after being given notice, and failing to provide plaintiffs with a habitable alternative residence with which they could enjoy the use of their residence for its intended purpose.

143. Plaintiffs are further informed that defendants engaged in retaliatory actions due to plaintiffs' complaints about the improper conditions in their apartment and defendants' failure to rectify those conditions. Defendants failed to remedy the damp home environment, mold contamination and other defects, which rose to the level of a constructive eviction.

144. As a proximate and legal result of defendants' acts and omissions in breaching the implied covenant of quiet enjoyment, plaintiffs have suffered damages in excess of the minimum jurisdiction as previously described.

SIXTH CAUSE OF ACTION

Constructive Eviction

145. Plaintiffs incorporate by reference each and every allegation contained in each and every preceding paragraph of this Complaint as though fully set forth herein.

146. As a proximate cause of defendants' failure to maintain the premises in a condition fit for human

occupation, plaintiffs were forced to vacate the premises. They were forced out of their home in August of 2017 after defendants failed to 1) properly identify the wet conditions inside the unit, 2) properly contain and remediate the areas, and 3) properly test the air to ensure it was safe, all of which are standard industry practices after identifying water-damaged homes.

147. As a proximate result of defendants' conduct as alleged in this Complaint, Plaintiffs suffered general damages of mental anguish, pain, and physical injury in an amount to be determined at trial.

148. As a further proximate result of defendants' conduct and Plaintiffs mental anguish, pain, and physical injury, as alleged in their Complaint, LENA CHILDS and DONALD CHILDS, and their children, were required to and did incur medical and related expenses to be determined at trial.

149. As a further proximate result of defendants' conduct, as alleged in her Complaint, plaintiffs were required to and did incur moving expenses, additional rental expenses, and other special damages in an amount to be to be determined at trial.

150. Defendants' failure to put the premises into a condition fit for human occupation was oppressive and malicious within the definition of California Civil Code Section 3294 in that they subjected plaintiff plaintiffs to cruel and unjust hardship in willful and conscious

disregard of the rights and safety of plaintiffs. Therefore, plaintiffs are entitled to recover punitive damages.

151. As a further proximate result of defendants' conduct, Plaintiff has incurred attorney's fees and costs.

Prayer for Relief

WHEREFORE, plaintiffs pray for judgment against defendants, and each of them, as follows:

1. For general and compensatory damages in amounts to be determined at trial;

2. For investigative costs and fees according to proof;

3. For special and incidental damages including, but not limited to: medical expenses, moving and relocation costs, consulting fees and costs, according to proof;

4. For costs of suits incurred;

5. For punitive damages;

6. For reasonable attorney fees per the rental agreement;

7. For prejudgment interest; and

8. For any other relief as the Court may deem just and proper.

DATED: October 20, 2019. FITZPATRICK LAW, APC

By /s/ Robert Fitzpatrick
Robert J. Fitzpatrick,
Attorney for Plaintiffs