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LORRAINE MULL, as Trustee of the Lorraine S. Mull Revocable Trust, and
FRANCES R. WHITE,
as Co-Trustee of the Andrew and Frances White Trust dated April 11, 2019

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

LORRAINE MULL, as Trustee of the Lorraine S. Mull Revocable Trust, and FRANCES R. WHITE, as Co-Trustee of the Andrew and Frances White Trust dated April 11, 2019, Plaintiffs, vs. SOF-XI KAUAI PV GOLF, L.P., a Delaware limited partnership; DOES 1 – 20, Defendants.	Civil No. 1:23-CV-00427-KJM PLAINTIFFS' MOTION FOR REMAND TO STATE COURT; MEMORANDUM IN SUPPORT OF MOTION; CERTIFICATE OF SERVICE Action Filed: October 18, 2023 Trial Date: None Judge: Magistrate Kenneth J. Mansfield

PLAINTIFFS' MOTION FOR REMAND TO STATE COURT

Plaintiffs LORRAINE MULL, as Trustee of the Lorraine S. Mull Revocable Trust, and FRANCES R. WHITE, as Co-Trustee of the Andrew and Frances White Trust dated April 11, 2019 (collectively, "Plaintiffs"), by and through their attorneys, Bronster Fujichaku Robbins, hereby move this Court pursuant to 28 U.S.C. § 1447(c) for an order remanding this case to the Circuit Court of the Fifth Circuit, State of Hawai'i.

This Court lacks subject matter jurisdiction of this action and must remand the case back to the State Court. Defendant SOF-XI Kauai PV Golf, L.P.'s ("Defendant") attempt to recharacterize Plaintiffs' First Amended Complaint ("FAC") does not give this Court jurisdiction. The mere reference to anthrax in the FAC does not invoke federal question jurisdiction under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq*. (1980), or the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq*. (1976). Defendant concedes diversity jurisdiction does not exist, and supplemental jurisdiction over Plaintiffs' state law claims should be rejected where no other basis for federal jurisdiction exists. Bluntly put, Defendant's removal is blatant attempt to forum shopping to get away from a judge who has made numerous rulings against Defendant. This is improper and the Motion should be granted.

This Motion is brought pursuant to 29 U.S.C. § 1447(c), Fed. R. Civ. P. 7(b), and Local Rule 7.1, and is supported by the Memorandum in Support, and the record and file of the case to date. This Motion is made following the conference of counsel on Friday, October 27, 2023, pursuant to Local Rule 7.8.

DATED: Honolulu, Hawai‘i, November 17, 2023.

/s/Sunny S. Lee
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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

More than two and a half years ago, Plaintiffs brought their action in Hawai‘i State Court asserting claims under state law for the protection of their private property rights in light of their neighboring Defendant’s proposed development of glamorous camping (“glamping”) and overnight accommodations. Plaintiffs are residents of the County of Kauai and own real properties in the master plan development known as Princeville at Hanalei. Defendant owns the Princeville Makai Golf Course which is directly adjacent to Plaintiffs’ real properties.

In the State Court Plaintiffs initially sought declaratory and injunctive relief to enforce the restrictions contained in the Dedication of Golf Course Property ("Dedication") dictating permissible uses of Defendant's property. The Dedication plainly prohibits Defendant's glamping plans. *See* ECF No. 10-17.

The State Court has ruled that the Dedication does not allow for glamping or overnight accommodations, despite Defendant's relentless and protracted campaign to invalidate Plaintiffs' rights.[1]

During discovery, Plaintiffs discovered that there were hundreds of livestock infected by anthrax that were buried on Defendant's property where Defendant sought to place the glamping units. Also, during discovery, Plaintiffs learned that Defendant plans to develop its property as a luxury housing complex upon the purported expiration of the Dedication on February 28, 2026, which ignores the Declaration of Restrictions, Covenants and Conditions of Princeville at Hanalei ("CC&Rs") provisions that automatically renews the Dedication for successive periods of five years. *See* ECF No. 10-17, ¶¶ 11, 98.

[1] In State Court, Defendant's repeated refusal to produce discovery and obey the court orders resulted in multiple orders to show cause over a period of 14 months. *See* ECF Nos. 6-47, 6-100, 7-2, 8-3. Defendant vigorously opposed complying with the orders, including filing an unsuccessful writ of mandamus with the Hawaii Supreme Court.

Subsequently, Plaintiffs moved to amend the complaint, which the State Court granted over Defendants objected. Filed a First Amended Complaint ("FAC") which included new factual allegations related to the anthrax and additional declaratory and injunctive relief to protect Plaintiffs' property rights, including a determination of when the Dedication expires pursuant to the CC&Rs.

Seeking refuge from the State Court's adverse rulings in a transparent attempt at forum shopping, Defendant removed, asserting arguments that attempt to recast the state law claims in Plaintiffs' FAC. Defendant argues in its Notice of Removal ("NOR") that Plaintiffs' "Anthrax Claims" are removable because they "fall within the scope of the citizen suit provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), the Solid Waste Disposal Act of 1965, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments of 1984 ("RCRA"), and other Federal environmental laws[.]" ECF No. 1, ¶ 17. However, all of Defendant's arguments are meritless.

Defendant disingenuously failed to cite in its NOR a recent United States Supreme Court decision that demolishes its CERCLA argument: *Atlantic Richfield Co. v. Christian*, 140 S.Ct. 1335 (2020). In *Christian*, the Supreme Court held that claims brought by Montana property owners were brought exclusively under Montana law and were not CERCLA claims, thereby rejecting an expansive

jurisdictional reading of section 113(b) of CERCLA (codified at 42 U.S.C. § 9613(b)) as advocated by Defendant here. 140 S.Ct. at 1349-1352. Contrary to Defendant's argument that any state law claim that mentions anthrax must be swept into the exclusive jurisdiction of the federal courts under § 113(b), the Court said CERCLA "does not displace state court jurisdiction over claims brought under other sources of law." *Id*. at 1349 (footnote omitted). Like the Montana property owners in *Christian*, Plaintiffs' choice to have their state law claims heard in State Court must be respected.

Even if Defendant is allowed to recharacterize Plaintiffs' anthrax-related state claims to be comparable to CERCLA claims, Defendant has not shown that Plaintiffs have standing to bring a CERCLA claim. That is because Defendant has not shown that Plaintiffs have incurred cognizable Superfund cleanup costs, which is a statutorily required element of a private action CERCLA claim. *See United States v. Chapman*, 146 F.3d 1166, 1169 (9th Cir. 1998).

In the same way that Defendant fails to establish how Plaintiffs' claims arise under CERCLA, Defendant fails to show that Plaintiffs' state law claims arise under RCRA. A citizen suit under RCRA excludes civil action on the future mismanagement of a hazardous waste . 42 U.S.C. § 6972(a)(1)(B). There is no allegation in the FAC or the NOR that there is any active disposal of any hazardous waste. Rather, Plaintiffs' state law claims seek prospective declaratory under State

of Hawaii's declaratory ruling statute, HRS § 632-1(b), and injunctive relief. Defendant's argument conflicts with the specific language of the RCRA statute, which requires a remand.

Given that federal question jurisdiction does not exist, and Defendant admits that diversity jurisdiction is lacking, supplemental jurisdiction must be declined. Supplemental jurisdiction should be rejected more so here because the state law claims have been already considered and partially adjudicated on the merits by the State Court and constitute Defendant's waiver of any ability to remove. *See, e.g., Foley v. Allied Interstate, Inc*., 312 F. Supp. 2d 1279, 1282 (C.D. Cal. 2004); *Chicago Title & Trust Co. v. Whitney Stores, Inc.,* 583 F.Supp. 575, 577 (N.D. Ill. 1984).

Federal courts have considered and rejected every ground for removal Defendant asserts here. Defendant's arguments are without merit, and this case should be remanded.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs first initiated this matter in the State Court because Defendant sought to violate a restrictive covenant, the Dedication, by building glamping units on Defendant's Makai Golf Course. *See* ECF No. 5-1. In the initial Complaint, Plaintiffs asked the State Court to declare that Defendant's proposed development of glamping is not allowed under the Dedication (Count I), and to enjoin

Defendant from violating the Dedication by proceeding with its proposed development of glamping (Count II). *See* ECF No. 5-1. The State Court granted summary judgment to Plaintiffs on their declaratory judgment claim. *See* ECF No. 9-90.

During the protracted discovery resulting in numerous orders against Defendant, it was discovered that (1) the Makai Golf Course contains potentially lethal and hazardous environmental contaminants (anthrax) and that, despite this knowledge, Defendant is planning on developing the Makai Golf Course, and (2) upon review of Article VIII, Section 2 of the CC&Rs, the Dedication automatically renews for success five-year periods starting on February 28, 2026, unless 3/4th of the record owners of lots then within Princeville at Hanalei Community Association ("PHCA") vote to record an instrument terminating the Dedication. *See* ECF No. 10-17, ¶¶ 11, 98.

The State Court granted leave for Plaintiffs to file their FAC to address additional claims over Defendant's objection. ECF Nos. 9-97, 10-15. In the FAC, Plaintiffs incorporated their discovery of references in the documents that Defendant produced that there had been an outbreak of anthrax amongst hundreds of livestock that were buried on the Makai Golf Course. ECF No. 10-17. In the FAC, Plaintiffs request that court to declare that Art. VIII, Sec. 2 of the CC&Rs automatically extends the effective period of the Dedication for successive five-

year periods, specifically beyond February 28, 2026, unless terminated by the 3/4ths of owners of lots in PHCA (Count II); to hold Defendant liable for damages that are the legal and proximate results of the nuisance it creates by its proposed development (Count IV); to temporarily restrain and/or permanently enjoin Defendant from furthering its proposed development in violation of the Dedication (Count V); and to temporarily restrain and/or permanently enjoin Defendant from disturbing the anthrax-contaminated soil (Count VI). *See id.*

Defendant removed the case under federal question and supplemental jurisdictions. *See* ECF No. 1, ¶ 14.

III. LEGAL STANDARDS

Federal courts are necessarily courts of limited jurisdiction, where statutes extending federal jurisdiction "are narrowly construed so as not to reach beyond the limits intended by Congress." *City of Oakland v. BP PLC*, 969 F.3d 895, 903 (9th Cir. 2020) (quoting *Phillips v. Osborne*, 403 F.2d 826, 828 (9th Cir. 1968)). Removal statutes are "strictly construed against federal court jurisdiction." *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 667 (9th Cir. 2012). 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); *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003) (same).

Removal under 28 U.S.C. § 1441 is controlled by the "well-pleaded complaint" rule, and "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 391–92 (1987). Because a plaintiff is "the master of the claim" in drafting the complaint, the plaintiff may choose to "avoid federal jurisdiction by exclusive reliance on state law." *Id*. at 392. This "severely limits the number of cases in which state law 'creates the cause of action' that may be initiated in or removed to federal district court." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal*., 463 U.S. 1, 9–10 (1983). A close corollary of the well-pleaded complaint rule is that "[f]ederal jurisdiction cannot be predicated on an actual or anticipated defense" based in federal law. *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009).

There are two relevant exceptions to the well-pleaded complaint rule. *See County of San Mateo v. Chevron Corp.*, 960 F.3d 586, 598 (9th Cir. 2020). First, federal question jurisdiction may lie over a "special and small category" of state law claims, *City of Oakland*, 969 F.3d at 904, that is confined "to those that really and substantially involv[e] a dispute or controversy respecting the validity, construction or effect of [federal] law." *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 313 (2005) (quotation marks and citation omitted). The second exception, referred to as "complete preemption"

or the "artful pleading" doctrine, permits federal-question removal in the rare circumstance where "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim.'" *Caterpillar*, 482 U.S. at 393 (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). Neither exception applies here.

IV. BASES FOR REMAND BACK TO STATE COURT

A. LACK OF FEDERAL QUESTION JURISDICTION FOR REMOVAL

1. Plaintiffs' Claims Do Not Invoke CERCLA Jurisdiction

The main thrust of Defendant's removal is that "[t]he Anthrax Claims in Plaintiffs' Amended Complaint constitute a 'controversy arising' under CERCLA." ECF No. 1, ¶ 58. Defendant contends that "[j]urisdiction under CERCLA is 'more expansive than . . . . those claims created by CERCLA" and "can extend to purely state law claims." NOR, ¶50, quoting *Lehman Bros., Inc. v. City of Lodi*, 333 F.Supp.2d 895, 901 (E.D. Cal. 2004). Specifically, Defendant claims that Plaintiffs are seeking specific remedial actions and additional reporting requirements beyond that set forth under CERCLA. *Id.,* ¶¶ 59, 60. Aside from taking the allegations in the FAC out of context, Defendant's argument cannot fabricate a federal question out of Plaintiffs' state law claims.

In an opinion totally ignored by Defendant in its NOR, in 2020 the U.S. Supreme Court in *Atlantic Richfield Co. v. Christian* held that state law claims of trespass, nuisance, and strict liability brought by Montana property owners against a nearby Superfund site owner were brought exclusively under Montana law and were not CERCLA claims, notwithstanding that the plaintiffs were seeking restoration damages for a plan that went beyond the Environmental Protection Agency's ("EPA") cleanup plan. 140 S.Ct. 1335, 1345 (2020). The Court rejected an expansive jurisdictional reading of section 113(b) of CERCLA:

> Section 113(b) of the Act provides that "the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter," so state courts lack jurisdiction over such actions. 42 U.S.C. § 9613(b). This case, however, does not "arise under" the Act. The use of "arising under" in § 113(b) echoes Congress's more familiar use of that phrase in granting federal courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In the mine run of cases, "[a] suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S.Ct. 585, 60 L.Ed. 987 (1916). **The landowners' common law claims for nuisance, trespass, and strict liability therefore arise under Montana law and not under the Act. As a result, the Montana courts retain jurisdiction over this lawsuit, notwithstanding the channeling of Superfund claims to federal courts in § 113(b).**

140 S.Ct. at 1349-1350 (footnotes omitted; emphasis added). Thus, "[CERCLA] permits federal courts and state courts alike to entertain state law claims, including challenges to cleanups." *Id*. at 1351.

In the wake of *Christian*, numerous federal courts have rejected removal of state law claims on the basis of jurisdiction exclusivity under § 113(b) of CERCLA. *See, e.g., City of Visalia v. Mission Linen Supply, Inc*., 2020 WL 2556763, *7 (E.D. Cal. May 20, 2020); *Port of Bellingham v. Bornstein Seafoods, Inc*., 2021 WL 1783336, *3 (W.D. Wash. May 4, 2021); *City of Brunswick, by and through its Mayor v. Honeywell Int'l, Inc*., 2023 WL 5671290, *4-5 (S.D. Ga. Sept. 1, 2023). As one district court interpreting *Christian* put it, "[i]n sum, *Christian* clarifies that CERCLA §§ 113(b) and 113(h) do not work together to 'federalize' state law claims, even if those state law claims may constitute a 'challenge' to a CERCLA cleanup." *City of Visalia*, 2020 WL 2556763 at *7 (remanding to state court case seeking declaration that remediation of site was subject to competitive bidding).

Therefore, Defendant's reliance upon *Lehman Bros.* and similar cases that pre-date *Christian* are effectively abrogated or are otherwise distinguishable. NOR at ¶¶47-60. Recent environmental cases distinguished *Lehman Bros.*' site from a Superfund site and *Lehman Bros.*' contractual provision that challenged EPA remedial or cleanup measures and order, then remanded the cases to state because "defendants fail to establish how plaintiff's challenge CERCLA. … The fact that the Property is the subject of CERCLA remediation is insufficient on its own to establish federal jurisdiction." *Oberwil Corp. v. 366-394 Wilson Ave, LLC,* No.

21-CV-13469-CCC-ESK, 2022 WL 707830, *3 (D.N.J. Feb. 22, 2022) (citation omitted). Likewise, in *West Virginia State University Board of Governors v. Dow Chemical Company*, 23 F.4th 288, 307 (4th Cir. 2022), the court affirmed remand of the case to state court because it concluded that the University's state claims did not challenge a "cleanup" as defined in CERCLA. Here, Defendant's site is neither a Superfund site nor an RCRA site, and the EPA has not issued any cleanup orders. Accordingly, *Lehman Bros.* is clearly not applicable.

Even if federal question jurisdiction under CERCLA is not contingent upon the existence of an ongoing CERCLA cleanup, "[f]ederal courts must ask whether the 'state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.'" *See id.* (citing *Grable*, 545 U.S. at 314); *see also Lehman Bros.,* 333 F.Supp.2d at 903. That Court clarified "actually disputed and substantial" federal issue to mean that "*every* legal theory supporting the [state law] claim[s] require[] the resolution of a federal issue." *W. Virginia State Univ.*, 23 F.4th at 307 (quoting *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004) (quotations omitted)). Plaintiffs do not dispute CERCLA, and State Court is fully capable to continue to resolve the matters of Dedication and CC&Rs, affecting Plaintiffs' private property rights, without looking to CERCLA.

2. Defendant Fails to Plead That it or Plaintiffs Incurred any CERCLA Cognizable Clean-Up Costs

Defendant also cannot show that Plaintiffs could in fact assert a CERCLA claim in federal court. An essential element to a CERCLA claim is that the plaintiff *already incurred* recoverable response costs. *E.g.*, 42 U.S.C. § 9607(a)(4) (providing liability for "necessary costs of response incurred by [a non-government] person consistent with the national contingency plan [(40 C.F.R. § 300)]"); *In re Dant & Russell, Inc.*, 951 F.2d 246, 249–50 (9th Cir. 1991) ("Under CERCLA's scheme for private action, response costs may not be recovered when there has been no commitment of resources for meeting these costs. Section 9607(a)(4)(B) permits an action for response costs 'incurred'—not 'to be incurred.' ". Normally, this prima facie showing involves circumstances in which a plaintiff sues a defendant as the responsible party who disposed of hazardous waste under CERCLA and is therefore liable for a broad range of remediation expenses said plaintiff expended consistent with the National Contingency Plan ("NCP") for remediation. *See id*. (noting that CERCLA "envision[s] that, *before suing*, CERCLA plaintiffs will spend some money responding to an environmental hazard. They can then go to court and obtain reimbursement for their initial outlays, as well as a declaration that the responsible party will have continuing liability for the cost of finishing the job.") (emphasis added). The Ninth Circuit has

expressly held that incurred costs do not "encompass expenses that are mere potentialities" or future response costs. *See, e.g.*, *ASARCO LLC v. Atl. Richfield Co.*, 975 F.3d 859, 866 (9th Cir. 2020); *United States v. Atl. Research Corp.*, 551 U.S. 128, 139 (2007).

Here, neither Plaintiffs nor Defendant can allege "at least one type of 'response cost' cognizable under CERCLA that has been incurred to state a prima facie case[,]" which is both necessary and "consistent with the national contingency plan." *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1154 (9th Cir. 1989). Nowhere in Plaintiffs' state law claims and Defendant's NOR show either party took any actions to clean the anthrax-contaminated property, and any such CERCLA lawsuit would be subject to dismissal. *See Prisco v. A & D Carting Corp.*, 168 F.3d 596, 603 (2d Cir. 1999) (finding that the CERCLA claim was nonetheless correctly dismissed by the district court because landowner plaintiff failed to the establish the elements of a § 9607(a) claim); *see also Bello v. Barden Corp.*, 180 F.Supp.2d 300, 308 (D. Conn. 2002) (dismissing a CERCLA claim pled incorrectly by landowner plaintiffs); *Durham Mfg. Co. v. Merriam Mfg. Co.*, 128 F.Supp.2d 97, 100 (D. Conn. 2001) (citing *Prisco* and *Bello* as precedent for plaintiff, as a PRP, to must assert its CERCLA claim for recovery of remediation costs against) (citations omitted).

Although CERCLA is generally construed liberally, a court "must reject a construction that the statute on its face does not permit, and the legislative history does not support." *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 881 (9th Cir. 2001). Where conclusory allegations of costs incurred are insufficient, Defendant's conclusory allegations of CERCLA claim must be less tolerated. *See City of Spokane v. Monsanto Co.*, 237 F.Supp.3d 1086, 1094 (E.D. Wa. 2017); *Crescent Mine, LLC v. Bunker Hill Mining Corp.*, 2022 WL 612394, at *6 (D. Idaho March 2, 2022) (dismissing "a prototypical example of a conclusory allegation" that included the failure to "identif[y] a single action it took to incur response costs"). Likewise, the Court should reject Defendant's conclusory characterizations of Plaintiffs' state law claims as being CERCLA claims.

3. No RCRA Jurisdiction

Similar to Defendant's arguments relating to CERCLA, its assertion that RCRA ousts Plaintiffs' state claims is misplaced. "RCRA's authorization of [the] citizen suits does not preempt all state law claims. Indeed, the text of RCRA includes a citizen-suit savings clause that ensures state law claims remain unaffected." *W. Virgina State Univ.*, 23 F.4th at 311. Plainly, "common law claims for negligence, public nuisance, private nuisance, trespass, strict liability, and unjust enrichment are allowed under § 6972[,]" and do not challenge or interfere with "the RCRA's permitting, enforcement, or conclusions." *Id*.

Plaintiffs' claims do not draw on federal law as the exclusive basis, or as any basis, for holding Defendant accountable to its golf course Dedication. Accordingly, Plaintiffs' state claims are not preempted by RCRA.

Moreover, a citizen suit under RCRA excludes a civil action on the future mismanagement of a hazardous waste. *See* 42 U.S.C. § 6972(a)(1)(B). Three elements are required to establish RCRA liability: "(1) that the defendant 'ha[s] contributed to the past or [is] contributing to the present handling, treatment, transportation, or disposal' of certain material; (2) that this material constitutes 'solid waste' under RCRA; and (3) that the solid waste 'may present an imminent and substantial endangerment to health or the environment.'" *California River Watch v. City of Vacaville*, 39 F.4th 624, 629 (9th Cir. 2022) (citing *Ctr. for Cmty. Action & Env't Just. v. BNSF R. Co*., 764 F.3d 1019, 1023 (9th Cir. 2014)).

"The Ninth Circuit has held that 'contribution' requires "that a defendant be actively involved in or have some degree of control over the waste disposal process to be liable under RCRA.'" *HomeFed Vill. III Master, LLC v. Otay Landfill, Inc*., No. 3:20-CV-0784-L-JLB, 2023 WL 5813736, at *7 (S.D. Cal. Sept. 6, 2023) (quoting *Hinds Investments, L.P. v. Angioli*, 654 F.3d 846, 851 (9th Cir. 2011)). "Pursuant to 42 U.S.C. § 6903(3), the term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous

waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." *HomeFed*, 2023 WL 5813736, at *7.

There is no active anthrax disposal subject to RCRA jurisdiction in this case. In fact, Plaintiffs altogether aim to prevent the discharge of anthrax onto the environment and maintain public health and safety, while Defendant volunteers itself to be in the fiction of a future potential RCRA claim to vest subject matter jurisdiction in this Court. *See* ECF No. 1, ¶¶ 66 – 68. Far from being a champion of the environment, Defendant skews the law.

B. LACK OF DIVERSITY OF CITIZENSHIP AND AMOUNT IN CONTROVERSY JURISDICTION FOR REMOVAL

Defendant admits, and Plaintiffs agree, that "Plaintiffs and Defendant are not of diverse citizenship, because the State of Hawaii Employee Retirement System ("ERS") is … Defendant's indirect parent company." ECF No. 1, ¶ 24. Even if there was diversity of citizenship, Defendant admits that Plaintiffs seek awards of declaratory and injunctive relief, and any amount in controversy would not exceed $75,000.00. *See id.*, ¶¶ 28 – 32. Even if Defendant were to backtrack on its admissions to now assert diversity jurisdiction, it cannot. A notice of removal "cannot be amended to add a separate basis for removal jurisdiction after the thirty day period." *O'Halloran v. University of Washington,* 856 F.2d 1375, 1381 (9th

Cir. 1988). The 30-day period has elapsed. There can be no removal under diversity jurisdiction.

C. COURT'S DISCRETIONARY POWER TO DECLINE ANCILLARY JURISDICTION ON ISSUES PREVIOUSLY ADJUDICATED

Defendant's reference to federal supplemental jurisdiction 28 U.S.C. § 1367(a) is on this Court's discretionary powers over Plaintiffs' "nonanthrax claims"; however, the matter of interpretation of the Dedication has already been partially adjudicated in State Court. Because Defendant fails to allege viable CERCLA and/or RCRA claims against Plaintiffs, the Court lacks federal question jurisdiction, and diversity jurisdiction does not exist. A court should not assert supplemental jurisdiction if "the district court has dismissed all claims over which it has original jurisdiction[,]" and this Court should decline to exercise supplemental jurisdiction of Plaintiffs' state law claims. 28 U.S.C. § 1367(c)(3).

"[A] defendant may inadvertently waive its right of removal when, after it is apparent that the case is removable, the defendant litigates on the merits in state court." *Foley v. Allied Interstate, Inc*., 312 F. Supp. 2d 1279, 1282 (C.D. Cal. 2004) (finding that defendant's filings of an answer, form interrogatories, and a request for extension of time to respond to discovery in state court did not constitute litigation on the merits or waiver of the right to remove); *see e.g., Chicago Title & Trust Co. v. Whitney Stores, Inc.,* 583 F.Supp. 575, 577

(N.D.Ill.1984); *Resol. Tr. Corp. v. Bayside Devs.*, 43 F.3d 1230 (9th Cir. 1994) ("In general, the right of removal is not lost by action in the state court short of proceeding to an adjudication on the merits."). "However, a defendant may not experiment in state court and then seek to remove upon receipt of an adverse ruling." *Foley*, 312 F.Supp.2d at 1285; *see Moore v. Permanente Med. Group, Inc.,* 981 F.2d 443, 447 (9th Cir.1992); *Acosta v. Direct Merchants Bank*, 207 F.Supp.2d 1129, 1131 (S.D. Cal. 2002).

Unlike in *Foley*, the State Court directly addressed the validity of the Dedication on Defendant's golf course. *See* ECF No. 9-90. The State Court also granted additional claims be contained in Plaintiffs' FAC, where Count I was adjudicated on the merits against Defendant. *See id.* Defendant removed Plaintiffs' state law claims due to State Court's adverse ruling on the golf course Dedication, and under these facts, Defendant waives the Court's ancillary jurisdiction. Moreover, Plaintiffs' claims are brought under Haw. Rev. Stat. § 632-1(b), not 28 U.S.C. § 2201.

The Eighth Circuit holds that "ancillary jurisdiction does not provide an independent source of removal separate from § 1441." *Bridgeton Landfill, LLC v. Missouri Asphalt Prods., LLC*, No. 4:20 CV 1486 RWS, 2021 WL 663156, at *4 (E.D. Mo. Feb. 19, 2021) (citing *Motion Control Corp. v. Sick, Inc*., 354 F.3d 702, 705-06 (8th Cir. 2003). Similar to *Bridgerton* that remanded, this Court's ancillary

or supplemental jurisdiction may be foreclosed by the Eighth Circuit's decision in *Motion*, though the case factually relates to CERCLA.

D. LATE REMOVAL OF CIVIL ACTION TO DISGUISE FORUM SHOPPING

"If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable...." *Webster v. Dow United Techs. Composite Prod., Inc*., 925 F.Supp. 727, 729 (M.D. Ala. 1996); *see* 28 U.S.C.A. § 1446(b)(1).

"The plain purpose of this language 'is to permit the removal period to begin only after the defendant is able to ascertain intelligently that the requisites of removability are present.'" *Webster*, 925 F.Supp. at 729 (quoting *Smith v. Bally's Holiday*, 843 F.Supp. 1451, 1454 (N.D.Ga.1994). "A defendant can 'intelligently ascertain' notice of the requisites of removability from either formal or informal 'papers'; and interrogatory answers have generally been recognized as 'other papers' sufficient to trigger the running of the thirty-day period." *Webster*, 925 F.Supp. at 729; *see, e.g., Chapman v. Powermatic Inc*., 969 F.2d 160 (5th Cir.1992); *Ellis v. Logan Co*., 543 F.Supp. 586 (W.D.Ky.1982); *Van Gosen v. Arcadian Motor Carriers*, 825 F.Supp. 981 (D.Kan.1993).

The time requirement of the removal statutes is mandatory and must be strictly applied, in which "[t]imely objection to a late petition for removal will therefore result in remand." *See e.g., Webster*, 925 F.Supp at 729; *Mackay v. Uinta Development Co*., 229 U.S. 173, 33 S.Ct. 638, 57 L.Ed. 1138 (1913); *Fristoe v. Reynolds Metals Co*., 615 F.2d 1209 (9th Cir.1980); *Leininger v. Leininger*, 705 F.2d 727 (5th Cir.1983); *St. Louis Home Insulators v. Burroughs Corp.*, 597 F.Supp. 98, 99 (E.D.Mo.1984); *accord McCain v. Cahoj*, 794 F.Supp. 1061 (D.Kan.1992); *Flood v. Celin Jewelry, Inc*., 775 F.Supp. 700 (S.D.N.Y.1991).

Defendant was the first party to have knowledge of its anthrax-contaminated property as contained in its Ka Pa'aKai O Ka'aina Analysis as early as December 2020. The Ka Pa'aKai Analysis was part of Defendant's permit application to build the glamping units. ECF No. 5-68 at p. 172-173. The 30-day period to remove under the alleged CERCLA and/or RCRA claims was triggered as early as June 24, 2021, when the Complaint in the State Court was filed. Defendant failed to remove by late July 2021 and missed its removal deadline by over two years.

This timeline reflects Defendant's ruse of forum shopping to mitigate a long string of unfavorable outcomes it has suffered in the State Court, rather than to ensure the application of federal environmental laws. This case must be remanded.

V. CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court remand this case to State Court.

DATED: Honolulu, Hawai‘i, November 17, 2023.

/s/Sunny S. Lee
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LORRAINE MULL, as Trustee of the Lorraine S. Mull Revocable Trust, and FRANCES R. WHITE, as Co-Trustee of the Andrew and Frances White Trust dated April 11, 2019

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

LORRAINE MULL, as Trustee of the Lorraine S. Mull Revocable Trust, and FRANCES R. WHITE, as Co-Trustee of the Andrew and Frances White Trust dated April 11, 2019, Plaintiffs, vs. SOF-XI KAUAI PV GOLF, L.P., a Delaware limited partnership; DOES 1 – 20, Defendants.	Civil No. 1:23-CV-00427-KJM CERTIFICATE OF SERVICE Trial Date: None Judge: Magistrate Kenneth Mansfield

CERTIFICATE OF SERVICE

I hereby certify that, on the date and methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

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