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20 Attorneys for Plaintiffs

21 **UNITED STATES DISTRICT COURT**
22 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

23 BERNADETTE BLACKWOOD,
24 individually and as guardian ad litem for
25 K.B. and E.B., et al.,

26 Plaintiffs,

27 v.

28 MARY DE VRIES, individually and dba
N&M DAIRY (aka N&M DAIRY # 1
and N&M DAIRY # 2) and as trustee of
the NEIL AND MARY DE VRIES
FAMILY TRUST; et al.,

Defendants.

Case No.: ED CV 14-00395 JGB SPx

**MOTION TO STRIKE
INADMISSIBLE EVIDENCE
PROFFERED BY DEFENDANTS IN
SUPPORT OF THEIR MOTION TO
DISMISS**

Date: July 14, 2014

Time: 9:00 a.m.

Courtroom: 1; Hon. Jesus G. Bernal

NOTICE

1
2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that, on July 14, 2014, at 9:00 a.m., or as
4 soon thereafter as may be heard in Courtroom 1 of the United States District
5 Court for the Central District of California, located at 3470 Twelfth Street in
6 Riverside, California, 92501, before the Honorable Jesus G. Bernal, plaintiffs
7 will, and hereby do, in conjunction with the motion to dismiss proceedings
8 initiated by the defendants, move the Court for an order striking the
9 documents attached as Exhibits C and I to defendants' motion to dismiss,
10 from the record.
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14 This motion is made on the grounds that:

15 (1) the document attached to defendant's motion as Exhibit C is
16 irrelevant, unauthenticated hearsay; it lacks foundation and violates
17 the best evidence rule; it is unduly prejudicial; and it is extraneous
18 and not properly before the Court in motion to dismiss proceedings;
19 and
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21
22 (2) the document attached to defendant's motion as Exhibit I is
23 irrelevant, not binding authority on this court, and therefore unduly
24 prejudicial and not properly before the Court in motion to dismiss
25 proceedings.
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1 This motion is made pursuant to Federal Rules of Evidence 401, 402,
2 602, 802, and 901.

3 This motion is made following the conference of counsel pursuant to
4 Local Rule 7-3, which took place on June 14, 2014, and June 16, 2014.

5
6 This motion is based on this Notice; the attached Memorandum of
7 Points and Authorities, the Declaration of Deborah Rosenthal filed herewith,
8 and supporting exhibits attached thereto; on all the pleadings and records on
9 file in this action; and on such other argument and evidence as may be
10 presented at the hearing of this motion.
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14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE**

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17 **I. INTRODUCTION**

18 Plaintiffs in this environmental contamination and nuisance case are
19 neighbors who live within one mile of defendants' dairy farm. Although
20 defendants dairy farm is not currently operational, defendants' operated their
21 farm—which was a large concentrated animal feeding operation within the
22 meaning established by federal law—for many years in a manner that violated
23 numerous state and federal statutes and regulations. Defendants' unlawful
24 conduct created a substantial and imminent danger to human health that has
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1 not been remedied, as well as a continuing but abatable nuisance on plaintiffs'
2 properties and in their community.

3 In support of their motion to dismiss, defendants filed Exhibits A
4 through J, which purport to be “true and correct copies of documents that
5 were in the Lahontan Regional Water Board files, or on their website.”

6 Defendants also requested that the Court take judicial notice of the contents of
7 these documents.
8

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10 Plaintiffs move to strike Exhibits C and I to the motion—“Justin Ervin
11 Comments to Draft Settlement Agreement 9/12/2013” and “*Schaeffer v.*

12
13 *Gregory Village Partner L.P.*, MSC11-01307 Order on Demurrer to First
14 Amended Complaint, Superior Court, Contra Costa County,” respectively—

15 on the grounds that the documents, even if otherwise admissible, are
16 irrelevant to the pending proceedings, unreliable, and unduly prejudicial.
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18 Additionally, as to the “Justin Ervin Comments,” the exhibit is

19 unauthenticated hearsay, lacks foundation, violates the best evidence rule, and

20 is extraneous and not properly before the Court in motion to dismiss

21 proceedings.
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23 **II. ARGUMENT**

24 **A. Exhibits C and I to defendants’ motion to dismiss are irrelevant**

25 Federal Rule of Civil Procedure 12(f) permits a court to strike “from
26 any pleading any insufficient defense or any redundant, immaterial,
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1 impertinent or scandalous matter.” FED. R. CIV. P. 12(f). Only relevant
2 evidence is admissible FED. R. EVID. 402. “Evidence is relevant if: (a) it has
3 any tendency to make a fact more or less probable than it would be without
4 the evidence; and (b) the fact is of consequence in determining the action.”
5

6 Plaintiffs, who all live within one mile or less of defendants’ dairy in
7 Helendale, sue defendant dairy owners and operators for mismanagement of
8 dairy operations and property that caused (1) a substantial and imminent
9 endangerment of human health, and (2) nuisance and trespass on plaintiffs’
10 neighboring properties and in their homes. Specifically, defendants’ unlawful
11 manure handling and storage practices contaminated the domestic water
12 supplies of approximately half the plaintiffs and caused excessive odor and
13 fly swarms at the properties and in the homes of all of the plaintiffs. Because
14 of N&M Dairy’s past or present manure storage and disposal practices—
15 including the use of massive unlined earthen lagoons for manure and waste
16 washwater, approximately eight (8) downgradient residential wells exceed the
17 allowable nitrate Maximum Contaminant Level and approximately eleven
18 (11) downgradient wells exceed the TDS recommended Secondary Maximum
19 Contaminant Level. (See Lahontan Regional Water Quality Control Board
20 Cleanup and Abatement Order dated December 12, 2013, attached to the
21 Rosenthal Declaration as Exhibit 1, at p. 2, fn. 1.)
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1 Defendants' endangerment of plaintiffs' health forms the basis of
2 plaintiffs' defendants' violations of the Solid Waste Disposal Act, also known
3 as the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*
4 ("RCRA").
5

6 Additionally, the homes of plaintiffs have been invaded by swarms of
7 flies, particularly heavily during the hot summer months, due to the excessive
8 quantity of manure at defendants' dairy and the defendants' failure to dispose
9 of the manure properly. Plaintiffs have been forced to spend an excessive
10 amount of time and money attempting to clean fly residue off their walls and
11 windows, blinds, light fixtures, even smoke detectors. Spending three to five
12 hours to clean a single room is not uncommon, and several of plaintiffs have
13 had to repaint their interior walls and windowsills more than once in the past
14 decade. Plaintiffs' lives have been significantly compromised by their
15 inability to enjoy time outdoors, or eat or sleep in peace. These facts support
16 plaintiffs' claims for trespass and nuisance under state tort law. (See
17 Plaintiffs' First Amended Complaint, currently on file and in the records of
18 this Court [Docket Entry No. 26], at ¶¶ 119-124).
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24 Defendants moved to dismiss the First Amended Complaint based on
25 theories of abstention, primacy, and remoteness of the federal question to the
26 issues of state tort law. [Docket Entry Nos. 33-35].
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1 Exhibit C to defendants' motion purports to be an email from an email
2 user named "Justin Ervin" to "Patty Kouyoumdjian" at the Water Board, in
3 which the author complains about conditions and about the Water Board's
4 proposed settlement agreement with N&M Dairy and Neil and Mary De
5 Vries. [Docket Entry No. 35-1 at p. 40 of 132.] (See Declaration of Lee N.
6 Smith supporting defendants' motion to dismiss, attached as Exhibit 2 to the
7 Rosenthal Declaration filed herewith, and Exhibit C to defendants' motion,
8 attached as Exhibit 3 to the Rosenthal Declaration.)
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11 Exhibit I to defendants' motion is an "Order on Demurrer to First
12 Amended Complaint" filed on May 15, 2012, in the Superior Court of
13 California, County of Contra Costa. [Docket Entry No. 35-1 at p. 113 of 132.]
14 (See Exhibit 4 to the Rosenthal Declaration filed herewith.)
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17 Neither of these documents contain facts that are material to any of the
18 issues raised in defendants' motion. In the Ninth Circuit, a defense is
19 "immaterial" under Rule 12(f) where it "has no essential or important
20 relationship to the claim for relief or the defenses being pleaded," and is
21 "impertinent" where it "do[es] not pertain, and [is] not necessary, to the
22 issues in question." *Fantasy v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993).
23
24 The abstention and primacy issues have to do with whether this Court has
25 discretion to decline to hear the RCRA claim, and if so, whether the facts of
26 this case fall into the "extraordinary and narrow exception to the duty of a
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1 district court to adjudicate a controversy properly before it.” *Quackenbush v.*
2 *Allstate Ins. Co.*, 517 U.S. 706, 728, 116 S.Ct. 1712 (1996). Defendant offers
3 the email by “Justin Ervin” as evidence that Plaintiffs reviewed the CAO.
4 [Docket Entry 34-1, at 9:1-4]. Defendant then goes on to rely on this email to
5 argue that the plaintiffs have played a role in the regulatory efforts at the
6 facility. [Docket Entry 34-1, at 11:21-22]. However, “Justin Ervin” is not a
7 plaintiff, so even assuming that the document attached as Exhibit C contained
8 otherwise admissible evidence, statements made by a person not involved in
9 the pending litigation has no bearing on the role of the Water Board with
10 respect to these court proceedings, nor does it have any bearing on the
11 plaintiffs’ harms relevant to this litigation. Likewise, a state trial court ruling
12 on demurrer has no bearing on this Court’s application of federal law at issue
13 in the pending proceedings.
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19 **B. Exhibit C is unauthenticated hearsay and lacks foundation**
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21 Federal Rule of Evidence 602 requires that a witness’s testimony be
22 based on personal knowledge. Federal Rule of Evidence 802 prohibits hearsay
23 statements from being offered into evidence, subject to certain limited
24 exceptions. Federal Rule of Evidence 901 requires a proponent of a writing to
25 produce sufficient evidence to support a finding that the item is what the
26 proponent claims it is. And Federal Rules of Evidence 1001-1004 require that
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1 a duplicate copy of a document only may be introduced as evidence of the
2 original writing if there is no genuine question raised about the authenticity of
3 the original or the circumstances make it unfair to admit the duplicate.
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5 Exhibit C purports to be an email from “Justin Ervin” that defense
6 counsel found either “in the Lahontan Regional Water Board files, or on their
7 website.” (Exhibit 2 to the Rosenthal Declaration at ¶ 3.) Defendant is
8 offering this email as evidence of the truth of the matter asserted; that is, as
9 support for the argument that this Court should elect to abstain from giving
10 plaintiffs’ an opportunity to litigate their federal environmental claim in
11 federal court. To the extent that the content of Exhibit C has any bearing on
12 this, which it does not, it would be through the statements of the author of the
13 document, which are hearsay, and therefore inadmissible.
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17 As noted above, Justin Ervin is not a plaintiff, it is unclear who he is,
18 and the document is not signed by him nor by any representative of the Water
19 Board. The document is unreliable and unauthenticated, and it would thus be
20 unfair to admit it.
21

22 The document also is improperly offered in support of a motion to
23 dismiss. Extrinsic evidence only may be offered in support of a motion to
24 dismiss if the document is referenced in the complaint or is of a type that the
25 Court properly may take judicial notice of. *Knievel v. ESPN*, 393 F.3d 1068,
26 1076 (9th Cir. 2005); *Southmark Prime Plus, L.P. v. Falzone*, 776 F.Supp.
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1 888, 892-893 (D. Del. 1991). The email from “Justin Ervin” is extrinsic
2 evidence that does not fit into either category.
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5 **III. CONCLUSION**

6 For the reasons set forth above, plaintiffs respectfully request that the
7 Court strike Exhibits C and I from defendants’ motion to dismiss. The
8 exhibits are inadmissible, not properly before the Court in motion-to-dismiss
9 proceedings, and therefore unduly prejudicial in the context of the
10 proceedings presently before this Court.
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14 Date: June 14, 2014

SIMMONS BROWDER GIANARIS
ANGELIDES & BARNERD LLC



17 _____
Deborah Rosenthal
Attorney for Plaintiffs
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