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4 **IN THE DISTRICT COURT OF GUAM**

5 GATEWAY NETWORK CONNECTIONS, LLC,
6 a Guam limited liability company and ASIA
7 CONNECTIVITY ELEMENTS, INC., a Guam
corporation,

8 Plaintiffs,

9 v.

10 RUSSELL MATULICH,

11 Defendant.

Case No. 1:22-cv-00024

**DECISION AND ORDER GRANTING
MOTION TO DISMISS FIRST AMENDED
COMPLAINT FOR LACK OF SUBJECT
MATTER JURISDICTION**

12 Presently before the Court is Defendant Russel Matulich's motion to dismiss ("Mot. Dismiss," ECF
13 No. 31) the first amended complaint ("FAC," ECF No. 29) for lack of subject matter jurisdiction. The
14 matter was fully briefed,¹ and the Court took the matter under submission after oral arguments. (Mins.,
15 ECF No. 44.) Having reviewed the briefs, heard the arguments of counsel, and considered the applicable
16 law and the facts of this case, the Court GRANTS Matulich's motion to dismiss and DISMISSES the
17 action. Because the Court lacks jurisdiction, it cannot, and does not, make any findings as to the propriety
18 of Plaintiffs', Gateway Network Connections, LLC ("GNC") and Asia Connectivity Elements, Inc.
19 ("ACE"), motion to enjoin arbitration ("Mot. Enjoin Arbitration," ECF No. 33).

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21 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

22 Previously, the Court granted Matulich's motion to dismiss the complaint (ECF No. 18) for
23 Plaintiffs' failure to adequately plead diversity jurisdiction but granted Plaintiffs leave to amend their
24 complaint. (Order Granting Mot. Dismiss 4, ECF No. 27.)

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27 ¹ The motion was supported by a declaration of Chase Tajima with exhibits (ECF No. 31-1). Plaintiffs
28 filed their opposition to the motion to dismiss (ECF No. 37), which was also supported by declarations
and exhibits (ECF Nos. 37-1 – 37-4) to which Matulich filed his reply (ECF No. 42) supported by a
second declaration by Chase Tajima with more exhibits (ECF No. 42-1).

1 Plaintiffs filed the FAC, which was verified by Brett Lay, the Chief Executive Officer (“CEO”) of
2 GNC and ACE, supported with exhibits. (FAC 15.)² The FAC is premised upon diversity jurisdiction. (*Id.*
3 ¶ 8.)

4 The following facts taken from the FAC are as follows. Plaintiff GNC is a limited liability company
5 (“LLC”) comprised of two members: Plaintiff ACE and Teleguam Holdings, LLC dba GTA (“GTA”).
6 (FAC ¶¶ 3-4.) ACE is a corporation incorporated in Guam with investment in GNC as its principal business
7 activity and is thus a holding company. (*Id.* ¶ 5.) ACE’s directors “are located in various locations in the
8 United States, and for at least the last year, their board meetings have been noticed for Westport,
9 Connecticut (with directors generally attending remotely).” (*Id.*) As a LLC, GTA’s sole member is
10 Teleguam Holdings, Inc., which is a corporation incorporated in Delaware and headquartered in Guam.
11 (*Id.* ¶ 6.) Teleguam Holdings, Inc. “is a holding company” with its management team and directors located
12 in Guam, where the board meetings are regularly noticed. (*Id.*) Defendant Matulich is a citizen of California
13 and resides in Napa, California. (*Id.* ¶ 7.)

14 On January 3, 2021, ACE and GNC boards attempted to remove Matulich as CEO and director of
15 both companies. (FAC ¶ 13.) On May 17, 2022, the Hawaii Arbitration Panel determined that the removals
16 were ineffective as they failed to comply with certain procedural requirements. (*See id.* at 6-7, 27-28.)
17 From May 23, 2022, through July 18, 2022, GNC and ACE members and directors undertook several
18 actions to remove Matulich as CEO and director of both companies. (*Id.* ¶¶ 18-22, 26-28.)

19 **II. LEGAL STANDARD**

20 **A. Subject Matter Jurisdiction**

21 Federal courts are courts of limited jurisdiction empowered to hear only those cases authorized by
22 the Constitution or by Congress. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A
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² The Court references the page numbers located in the footer of the document and generated by the CM/ECF filing system.

1 court must dismiss a case if it determines that it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3).

2 Federal Rule of Civil Procedure 8(a)(1) requires a complaint to contain “a short and plain statement of
3 the grounds for the court’s jurisdiction, unless the court already has jurisdiction and the claim needs no new
4 jurisdictional support[.]” Although the party invoking “diversity jurisdiction always bears the burden of both
5 pleading and proving diversity jurisdiction[.] . . . allegations of jurisdictional fact need not be proven unless
6 challenged” at the pleading stage. *NewGen, Ltd. Liab. Co. v. Safe Cig, Ltd. Liab. Co.*, 840 F.3d 606, 613-14
7 (9th Cir. 2016) (first citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990); then citing
8 *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006); and then citing *Kanter v. Warner-Lambert Co.*,
9 265 F.3d 853, 857 (9th Cir. 2001)). In addition to pleading the citizenship of parties, a complaint should allege
10 facts to substantiate such claims. See *Harris v. Rand*, 682 F.3d 846, 850-51 (9th Cir. 2012). For example, a
11 complaint should assert “facts regarding the location of a [corporation’s] principal place of business” and
12 “[t]hose factual allegations are entitled to a presumption of truth under” *Bell Atlantic Corp. v. Twombly*, 550
13 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Harris*, 682 F.3d at 850-51.

15 Federal courts have diversity jurisdiction over “all civil actions where the matter in controversy exceeds
16 the sum or value of \$75,000, exclusive of interest and costs, and is between-- (1) citizens of different States;
17 (2) citizens of a State and citizens or subjects of a foreign state . . . ; (3) citizens of different States and in which
18 citizens or subjects of a foreign state are additional parties[.]” 28 U.S.C. § 1332(a). “The party seeking to invoke
19 the district court’s diversity jurisdiction always bears the burden of both pleading and proving diversity
20 jurisdiction.” *Rainero v. Archon Corp.*, 844 F.3d 832, 840 (9th Cir. 2016) (quoting *NewGen, LLC*, 840 F.3d at
21 613-14). “In cases where entities rather than individuals are litigants, diversity jurisdiction depends on the form
22 of the entity.” *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006). For example, a
23 corporation is a citizen of the state of incorporation and the state where its principal place of business is located.
24 *Id.* In contrast, LLCs are “citizens of every state of which its owners/members are citizens.” *Id.* “[W]here an
25 LLC is a member of another LLC, the citizenship of the ‘sub-member’ LLC is likewise defined by the
26 citizenships of its own members.” *19th Cap. Grp., Inc. v. 3 GGG’s Truck Lines, Inc.*, No. CV 18-2493 PA
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1 (RAOx), 2018 WL 6219886, at *2 (C.D. Cal. Apr. 3, 2018) (citations omitted). For individuals, citizenship in
2 a state requires United States citizenship and is determined by domicile. *Kanter v. Warner-Lambert Co.*, 265
3 F.3d 853, 857 (9th Cir. 2001). “A person’s domicile is her permanent home, where she resides with the
4 intention to remain or to which she intends to return.” *Id.* (citing *Lew v. Moss*, 797 F.2d 747, 749 (9th Cir.
5 1986)).

6 **B. Facial and Factual Attacks on Subject Matter Jurisdiction**

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8 A defendant may move to dismiss a claim for lack of subject matter jurisdiction under Rule 12(b)(1)
9 of the Federal Rules of Civil Procedure. Rule 12(b)(1) motions are either facial or factual. *Safe Air for*
10 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A facial attack does not challenge the veracity of
11 the plaintiff’s allegations, but instead asserts that they “are insufficient on their face to invoke federal
12 jurisdiction.” *Id.* Conversely, a defendant bringing a factual attack disputes the truthfulness of the
13 allegations underlying federal jurisdiction. *Id.*

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15 When considering a facial challenge to subject matter jurisdiction, all factual allegations in the
16 complaint “are taken as true and all reasonable inferences are drawn in [the plaintiff’s] favor.” *Pride v.*
17 *Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013) (citations omitted). In contrast for factual challenges, “[t]he
18 court need not presume the truthfulness of the plaintiff’s allegations.” *Safe Air*, 373 F.3d at 1039. Courts
19 may review evidence beyond the complaint without converting the motion to dismiss into a motion for
20 summary judgment. *Id.* Once the moving party has presented affidavits or other evidence for its factual
21 motion, “the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its
22 burden of establishing subject matter jurisdiction.” *Id.* (citation omitted).

23 **III. DISCUSSION**

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25 In his motion to dismiss, Matulich raises several arguments asserting that the Court lacks subject
26 matter jurisdiction over the FAC. First, he asserts a facial attack that the FAC inadequately alleges
27 Plaintiffs’ citizenships. (Mot. Dismiss 9.) Second, he raises a factual attack and asserts that ACE is
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1 controlled from California. (*Id.* at 11.) Third, he contends that the FAC defectively pleads the amount in
2 controversy for diversity jurisdiction. (*Id.* at 12.) Ultimately, the Court concludes that Plaintiff ACE is
3 controlled from California, not Guam as alleged in the FAC, thus destroying diversity as Matulich is a
4 citizen of California.

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6 **A. Matulich’s facial attack fails.**

7 Matulich levies a facial attack claiming that Plaintiffs fail to “allege what each [ACE] officer and
8 director does to control the corporation.” (*See* Mot. Dismiss 10-11 (citing *Pool v. F. Hoffman-La Roche,*
9 *Ltd.*, 386 F. Supp. 3d 1202, 1220-21 (N.D. Cal. 2019)).) However, in asserting this argument, Matulich
10 relies upon *Hertz Corp. v. Friend*, 559 U.S. 77 (2010) and *Pool*, but ignores *3123 SMB LLC v. Horn*, 880
11 F.3d 461 (9th Cir. 2018). In *Hertz*, the Supreme Court clarified that a corporation’s “principal place of
12 business” is “the place where a corporation’s officers direct, control, and coordinate the corporation’s
13 activities[.]” which is also known as the corporation’s “nerve center.” 559 U.S. 77, 92-93 (2010).

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15 [I]t should *normally* be the place where the corporation maintains its headquarters—
16 provided that the headquarters is the actual center of direction, control, and coordination,
17 *i.e.*, the “nerve center,” and not simply an office where the corporation holds its board
meetings (for example, attended by directors and officers who have traveled there for the
occasion).

18 *Id.* at 93 (emphasis added). The Ninth Circuit has recognized *Hertz* as binding precedent; however, it has
19 recognized an exception for holding companies because their primary purpose of holding interest in other
20 companies “is passive.” *Horn*, 880 F.3d at 465 (citation omitted). A holding company is “not ‘normal’”
21 since “[i]t engages in little activity, so there is little to direct, control, or coordinate.” *Id.* The Ninth Circuit
22 recognized *Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337 (3d Cir. 2013), wherein the Third Circuit
23 explained why “the Supreme Court’s dictum [in *Hertz*] that a corporation’s nerve center is ‘normally . . .
24 not simply an office where the corporation holds its board meetings’ . . . [is] inapplicable to holding
25 companies[.]” *Horn*, 880 F.3d at 465. For a holding company “relatively short, quarterly board meetings
26 may well be all that is required to direct and control the company’s limited work” as the holding company’s
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1 primary activity of managing its assets “is straightforward and takes little time” such that “[t]he location
2 of board meetings is therefore a more significant jurisdictional fact . . . than it was in *Hertz*[.]” *Id.* (quoting
3 *Johnson*, 724 F.3d at 354.) Ultimately, the Ninth Circuit adopted “a rule presuming that from inception a
4 holding company directs its business from the place where it holds board meetings[.]” which may be
5 rebutted if “evidence shows that the corporation is directed from elsewhere.” *See id.* at 469-70. It rejected
6 the “assumption that a holding company’s principal place of business is the state where its officers reside
7 in.” *Id.* at 469. Further, the Ninth Circuit remarked on the difficulty of applying that assumption, especially
8 with “holding companies that have more than one decision maker living in more than one state.” *Id.* Here,
9 “ACE is a holding company whose predominant business activity is the passive investment in GNC, there
10 are little to no day-to-day activities to manage” and “all decisions affecting the company occur during the
11 director meetings.” (Mass Decl. ¶ 7, ECF No. 37-4.) As such, Matulich’s argument that Plaintiffs must
12 allege what each ACE officer and director does to control ACE is incorrect. Additionally, Matulich’s
13 reliance upon *Pool* for that assertion is misplaced as the parties in *Pool* were not holding companies.
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16 In their FAC, Plaintiffs assert that ACE, as a holding company, had its board meetings for the past
17 year “noticed for Westport, Connecticut (with directors generally attending remotely).” (FAC ¶ 5.) Even
18 with the Ninth Circuit’s test from *Horn*, there is the additional complication that ACE’s board meetings
19 are held virtually such that it may be hard to definitively determine the location from where ACE’s business
20 is directed from.³ In *Johnson*, the case that the Ninth Circuit relied upon in *Horn*, the Third Circuit still
21 concluded that the holding company’s principal place of business was Wilmington, Delaware because that
22 is where the board meetings were held, even though two of the three board members often participated in
23 the board meetings telephonically. *Johnson*, 724 F.3d at 342, 354, 356; *but see Travelers Com. Ins. Co. v.*
24 *Liberty Utilities (CalPeco Elec.) LLC*, No. 2:21-CV-01485-MCE-AC, 2022 WL 992935, at *3 (E.D. Cal.
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27 ³ The Supreme Court recognized this complication during “this era of telecommuting, [where] some corporations may divide
28 their command and coordinating functions among officers who work at several different locations, perhaps communicating over
the Internet.” *Hertz*, 559 U.S. at 95-96.

1 Apr. 1, 2022) (declining to apply *Horn* where the corporation’s board meetings were routinely not held in-
2 person);⁴ *P2Es Holdings, LLC v. Trinity Petro. Mgmt., LLC*, No. 4:22-cv-03002, 2023 WL 1967949, at *5
3 (S.D. Tex. Feb. 13, 2023) (questioning whether virtual board meetings facilitated in Denver determines
4 that the principal place of business is in Denver). Recognizing the Ninth Circuit’s reliance upon *Johnson*
5 in *Horn*, this Court elects to apply the general rule that a holding company’s principal place of business is
6 where the company holds its board meetings, even if some board members attend the meeting virtually.
7 Additionally, the Ninth Circuit, Third Circuit, and the Supreme Court have recognized the need for a
8 simple, easily-applied test for determining the principal place of business in the interests for judicial
9 administration. *See Horn*, 880 F.3d at 470 (citing *Johnson*, 724 F.3d at 355). Further, the Ninth Circuit has
10 recognized the impossibility of determining a holding company’s principal place of business when
11 decision-makers reside in more than one state. *Id.* at 469; *see also Hertz*, 559 U.S. at 95-96 (recognizing
12 the imperfection in even the nerve center test where “in this era of telecommuting, some corporations may
13 divide their command and coordinating functions among officers who work at several different locations,
14 perhaps communicating over the Internet”).

17 Applying the Ninth Circuit’s test for determining a holding company’s principal place of business,
18 the Court finds that Plaintiffs have adequately plead diversity jurisdiction for ACE by pleading the location
19 of ACE’s board meetings for each corporation. Therefore, Matulich’s facial attack fails.

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21 **B. Matulich’s factual attack prevails as ACE’s principal place of business is San
22 Francisco, California.**

23 Even with the Ninth Circuit’s test for determining a holding company’s principal place of business,
24 the issue of subject matter jurisdiction is not resolved. Matulich asserts a factual attack that ACE’s principal
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26 ⁴ In *Travelers Commercial Insurance Co.*, the court also distinguished *Horn* where the corporation was newly formed. 2022
27 WL 992935, at *3. However, the undersigned does not construe *Horn* so narrowly; rather, the rule that the location of board
28 meetings is the principal place of business for a holding company applied to all holding companies regardless of formation date.
See Horn, 880 F.3d at 470 (recognizing the benefits of “a rule presuming that from inception a holding company directs its
business from the place where it holds board meetings”).

1 place of business is California, arguing that there is no diversity jurisdiction because he is a citizen of
2 California. (Mot. Dismiss 11.) Specifically, Matulich cites ACE’s bylaws establishing San Francisco as
3 the initial place of business, prior meetings in San Francisco, a San Francisco mailbox, and a Napa bank
4 account. (*Id.*)

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6 From the outset, the Court clarifies that Matulich’s contention that California is ACE’s principal
7 place of business is incorrect because a corporation’s nerve center is not a state, but a single place within
8 a state. *Hertz*, 559 U.S. at 93. “[D]iversity jurisdiction ‘depends upon the state of things at the time of the
9 action brought[.]’ *Horn*, 880 F.3d at 467 (citing *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567,
10 570 (2004)). However, “courts must be alert to the possibility of jurisdictional manipulation.” *Horn*, 880
11 F.3d at 470-71 (citing *Hertz*, 559 U.S. at 97). In *Horn*, the Ninth Circuit identified evidence that the plaintiff
12 LLC’s owners “manipulated the ownership structure of the real property at the center of th[e] lawsuit in
13 order to manufacture diversity [jurisdiction]” and remanded the case to the district court to determine
14 whether “there was jurisdictional manipulation that would warrant treating [the plaintiff] as a California
15 citizen[.]” which would destroy diversity jurisdiction with the defendant’s California citizenship. *Id.* at
16 463. A month before the filing of the lawsuit in *Horn*, the plaintiff was a California citizen, but the
17 manipulation of the ownership structure “rendered the parties nominally diverse just in time to file this
18 lawsuit in federal court.” *Id.* at 471. The Ninth Circuit instructed that if the district court found jurisdictional
19 manipulation, “it should ‘take as the “nerve center” the place of actual direction, control, and coordination,
20 in the absence of such manipulation.” *Id.* (quoting *Hertz*, 559 U.S. at 97). “The Supreme Court has at least
21 suggested that the party seeking to establish diversity jurisdiction bears the burden of showing that there
22 has been no jurisdictional manipulation when that question arises.” *3123 SMB LLC v. Horn*, No. CV 14-
23 8115 DSF (FFMx), 2018 WL 5801875, at *1 (C.D. Cal. May 7, 2018) [hereinafter *Horn II*] (quoting *Hertz*,
24 559 U.S. at 96-97).

1 Here, this lawsuit was initially filed in October 2022, and in May and July of that same year, ACE
2 held board meetings in Westport, Connecticut. (Mass Decl. Ex. 4, 6; ECF No. 37-4 at 38, 56.) Brian Mass,
3 who resides in Connecticut, is one of ACE’s directors and is ACE’s Chief Financial Officer, Treasurer,
4 and Secretary, and attests that he attends ACE’s director meetings in person. (Mass Decl. ¶¶ 1, 7, ECF No.
5 37-4.) Meanwhile, ACE’s two other directors, Brett Lay who lives in California and Hawaii, and David
6 Yulie who lives in Australia, “appear telephonically for the meetings as needed.” (*Id.*)
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8 The Court has concerns of jurisdictional manipulation such that 2022 is not the relevant time frame
9 to determine ACE’s principal place of business. Plaintiffs and Matulich are engaged in highly contentious
10 litigation in multiple fora, ranging from federal district courts, state courts, and arbitration panels. One
11 dominant issue that the Hawaii Arbitration Panel with the Dispute Presentation and Resolution, Inc.
12 adjudicated was “whether ACE effectively removed Matulich as its CEO, which GNC claims ACE did at
13 a validly held special meeting of the ACE Board on January 3, 2021.” (FAC 26.) Ultimately, the Hawaii
14 Arbitration Panel “conclude[d] that the ACE special meeting of the ACE Board of Directors held on
15 January 3, 2021, was not called in accordance with the Bylaws of ACE and that therefore, the actions taken
16 at said meeting are void *ab initio*.” (*Id.* at 27-28.) After the Hawaii Arbitration Panel reached this
17 conclusion, ACE’s Board held numerous meetings to remove Matulich as ACE’s CEO (*id.* ¶¶ 26-28), but
18 Matulich vehemently disputes these meetings, (Matulich Decl. ¶ 11, ECF No. 18-1).⁵
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21 Plaintiffs only provide evidence of ACE meetings noticed for Connecticut (for what appears to be
22 the first time) mere months before they filed this instant action. The parties’ relationships have clearly
23 soured as demonstrated by the 2021 failed attempt to remove Matulich and the numerous lawsuits between
24 the parties. For these reasons, there appears to be jurisdictional manipulation. Plaintiffs have not provided
25 evidence to the contrary; therefore, the Court looks to the parties’ citizenships prior to the hostility—the
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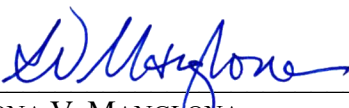
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28 ⁵ At this juncture, the undersigned makes no conclusion about the validity of these removals or Matulich’s current status with ACE, which is the subject of this action. (*See* FAC 13.)

1 time period of 2019 to 2020. *See Horn II*, 2018 WL 5801875, at *1-2 (looking at time period prior to filing
2 of action to determine jurisdictional manipulation). During that time frame, ACE’s minutes, each one
3 signed by Brian Mass, list the location of board meetings as San Francisco, California, or using California
4 time. (*See* ECF No. 18-2 at 28, 34, 43, 51, 62.)⁶ The last of these ACE board meetings occurred on February
5 5, 2020, pre-COVID-19 pandemic, and was held via conference call. (*Id.* at 62.) Therefore, the Court
6 concludes that ACE’s principal place of business for the instant action is San Francisco, California. With
7 Matulich as a citizen of California, the parties are not diverse, and the Court does not need to analyze the
8 amount in controversy to conclude that there is no diversity subject matter jurisdiction.
9

10 **IV. CONCLUSION**

11 Given the lack of diversity subject matter jurisdiction, the Court GRANTS Defendant Matulich’s
12 motion to dismiss (ECF No. 31) and dismisses the action. As such, the Court lacks authority to rule on the
13 merits of Plaintiffs’ motion to enjoin arbitration (ECF No. 33).
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15 IT IS SO ORDERED this 29th day of September, 2023.

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19 RAMONA V. MANGLONA
20 Designated Judge
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26 _____
27 ⁶ The Hawaii Arbitration Panel conclusion that “[n]o ACE board meetings were ever held in person at the designated corporate
28 office [located in San Francisco]—all actions of the ACE board were always handled by electronic communications[,]” (Compl.
27 27) does not necessarily negate this Court’s conclusion that ACE’s principal place of business is California. The meeting minutes
place the location of the board meetings as San Francisco. Moreover, ACE’s 2022 board meetings are noticed for Connecticut
but also appear to be conducted via electronic communications with various board members appearing virtually (*see* Mass Decl.
¶ 7); nevertheless, Plaintiffs similarly contend that Connecticut is ACE’s principal place of business (FAC ¶ 5).