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Electronically Filed
FIRST CIRCUIT
1CCV-20-0000380
02-JUN-2021
07:39 PM
Dkt. 353 MD

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BHP HAWAII INC.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CITY AND COUNTY OF HONOLULU,
AND HONOLULU BOARD OF WATER
SUPPLY,

Plaintiffs,

vs.

SUNOCO LP; ALOHA PETROLEUM,
LIMITED; ALOHA PETROLEUM LLC;
EXXON MOBIL CORP.; EXXONMOBIL
OIL CORPORATION; ROYAL DUTCH
SHELL PLC; SHELL OIL COMPANY;
SHELL OIL PRODUCTS COMPANY LLC;
CHEVRON CORP; CHEVRON USA INC.;
BHP GROUP LIMITED; BHP GROUP PLC;
BHP HAWAII INC.; BP PLC; BP

CIVIL NO.: 1CCV-20-0000380 (JPC)
(Other Non-Vehicle Tort)

**DEFENDANTS BHP GROUP LIMITED
AND BHP GROUP PLC'S MOTION TO
DISMISS FOR LACK OF PERSONAL
JURISDICTION; MEMORANDUM IN
SUPPORT OF MOTION;
DECLARATION OF JAMIE
STOLLERY; CERTIFICATE OF
SERVICE**

Trial Date: None

Hearing Date: August 27, 2021
Hearing Time: 8:30 a.m.

AMERICA INC.; MARATHON
PETROLEUM CORP.; CONOCOPHILLIPS;
CONOCOPHILLIPS COMPANY; PHILLIPS
66; PHILLIPS 66 COMPANY; AND DOES
1 through 100, inclusive,

Defendants.

The Honorable Jeffrey P. Crabtree

**DEFENDANTS BHP GROUP LIMITED AND BHP GROUP PLC'S MOTION TO
DISMISS FOR LACK OF PERSONAL JURISDICTION**

Defendants BHP Group Limited, an Australian corporation, and BHP Group plc, a U.K. corporation, by and through their attorneys, Bronster Fujichaku Robbins and Cleary Gottlieb Steen & Hamilton LLP, hereby move to dismiss Plaintiffs City and County of Honolulu and Honolulu Board of Water Supply's First Amended Complaint, Dkt. 45, filed March 22, 2021, for lack of personal jurisdiction pursuant to Rules 7 and 12(b)(2) of the Hawai'i Rules of Civil Procedure and Rule 7 of the Rules of the Circuit Courts of the State of Hawai'i. This motion is supported by the accompanying Joint Memorandum in Support of Defendants' Motion to Dismiss for Lack of Personal Jurisdiction (Dkt. 347) incorporated herein by reference and in which BHP Group Limited and BHP Group plc substantively join, the attached Memorandum in Support of Defendants BHP Group Limited and BHP Group plc's Motion to Dismiss for Lack of Personal Jurisdiction,¹ Declaration of Jamie Stollery, the entire record and files in this case, and evidence or arguments as may be presented at the hearing of this motion.

DATED: Honolulu, Hawai'i, June 2, 2021.

/s/ Margery S. Bronster
Margery S. Bronster

¹ See Order Granting Defendants' Ex Parte Motion for Leave to Exceed the Page Limit for Briefing on Their Motion to Dismiss the First Amended Complaint (Dkt. 131) (granting Defendants leave "to file two consolidated Memoranda of Law (one in support of Defendants' argument that the Complaint should be dismissed for failure to state a claim and the other in support of certain Defendants' argument that the Complaint should be dismissed for lack of personal jurisdiction) each not to exceed 45 pages If a Defendant deems it necessary to file a separate Merits Brief and/or Personal Jurisdiction Brief, such a separate brief shall not exceed 10 pages.").

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LIMITED, BHP GROUP PLC, AND BHP
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BHP HAWAII INC.; BP PLC; BP
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66; PHILLIPS 66 COMPANY; AND DOES
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CIVIL NO.: 1CCV-20-0000380 (JPC)
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**MEMORANDUM IN SUPPORT OF
DEFENDANTS BHP GROUP LIMITED
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DISMISS FOR LACK OF PERSONAL
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I. INTRODUCTION

Defendants BHP Group Limited (“BHP Ltd.”) and BHP Group plc (“BHP plc”) respectfully submit this memorandum in support of their motion to dismiss Plaintiffs City and County of Honolulu and Honolulu Board of Water Supply’s First Amended Complaint (“Am. Compl.”), Dkt. 45, filed on March 22, 2021, for lack of personal jurisdiction pursuant to Hawai‘i Rule of Civil Procedure 12(b)(2). BHP Ltd., an Australian corporation, and BHP plc, a U.K. corporation, are foreign defendants not “at home” in the State of Hawai‘i and do not have the requisite “minimum contacts” with the State of Hawai‘i that would subject them to jurisdiction here consistent with Hawai‘i’s long-arm statute and U.S. constitutional protections of due process. Additionally, defendant BHP Hawaii Inc. (“BHP Hawaii”), which is not moving to dismiss on jurisdictional grounds, is not the alter ego of BHP Ltd. or BHP plc. Thus, BHP Hawaii’s forum contacts cannot be imputed to BHP Ltd. or BHP plc, and those defendants should accordingly be dismissed.

II. FACTUAL BACKGROUND

In their Amended Complaint, Plaintiffs assert multiple claims for harm from “anthropogenic global warming” allegedly caused by “the unrestricted production and use of fossil fuel products [that] create greenhouse gas pollution that warms the planet and changes our climate.” *See* Am. Compl. ¶¶ 1, 4, 10, Dkt. 45. Plaintiffs also allege that the 20 defendants, collectively, including BHP Ltd. and BHP plc, knew “for nearly half a century” that the production and use of fossil fuel products would lead to global climate change and so engaged in a “decades-long campaign designed to maximize continued dependence on their products and undermine national and international efforts to rein in greenhouse gas emissions.” *See* Am. Compl. ¶¶ 1, 92; *see also, e.g., id.* ¶¶ 1, 8, 93–117, 137–47; Pl.’s Resp. to Emergency Mot. to Stay, *City and County of Honolulu v. Sunoco LP*, No. 21-cv-15313 (9th Cir. 2021), Dkt. 23 at 1 (“The City

seeks redress for its local injuries caused by Defendants’ decades-long campaign to discredit the science of global warming, conceal the dangers posed by their fossil-fuel products, and misrepresent their role in combatting the climate crisis.”).

The allegations in the Amended Complaint concerning BHP Ltd. and BHP plc lack specificity as to their claimed conduct and are altogether conclusory. BHP is mentioned in only 10 out of the 206 paragraphs of the Amended Complaint. Eight of those paragraphs appear in the “BHP” section of the Amended Complaint identifying the defendants being sued and making jurisdictional allegations as to them, *see* Am. Compl. ¶ 24(a)–(h), and two paragraphs describe non-party trade associations that BHP is allegedly a member of, *see id.* ¶ 29(a), (d). In those sparse allegations, Plaintiffs allege that BHP Ltd. and BHP plc, through BHP Hawaii, have fossil fuel-related business in Hawai‘i; and, more specifically, that they had been and presently are manufacturing, refining, trading, distributing, promoting, marketing, advertising, selling, and/or consuming fossil fuel products through a fossil fuel refinery in Kapolei, O‘ahu and BHP-branded retail gas service stations. *See* Am. Compl. ¶ 24(f), (h).

The Declaration of Jamie Stollery (“Stollery Decl.”) submitted in support of this Motion refutes Plaintiffs’ jurisdictional allegations. BHP plc has had no contacts with Hawai‘i in connection with any fossil fuel-related business, and BHP Ltd.’s indirect fossil fuel-related contacts with Hawai‘i ended long ago. In approximately 1983–84, a BHP Ltd. subsidiary started selling a portion of its Australian crude oil production as one of several suppliers to the Kapolei refinery on O‘ahu. That refinery was then operated by a subsidiary of Pacific Resources Inc. (“PRI”), a Hawai‘i corporation. In 1989, BHP Ltd. formed an indirect subsidiary in Hawai‘i to acquire PRI from its public shareholders. Ultimately, PRI was renamed BHP Hawaii Inc. BHP Hawaii Inc. in turn owned the former PRI subsidiaries operating the Kapolei refinery and Hawai‘i

retail gas stations, among other assets, for less than a decade. In 1997 and 1998, BHP Hawaii sold the stock in its subsidiaries to Citizens Utilities Company and Tesoro Petroleum Corporation, respectively, transferring to them operation of and legal liability with respect to those petroleum operations. Since 1998, BHP Hawaii has not had any operations in the State of Hawai‘i. *See* Ex. A, Stollery Decl. ¶¶ 11–14, 17.

BHP Hawaii is not and never was an alter ego of BHP Ltd. or BHP plc. Thus, BHP Hawaii’s forum-related business operations cannot be imputed to BHP Ltd. or BHP plc. Even if imputation were proper — and it is not — BHP Hawaii divested its operating subsidiaries over 20 years ago. Thus, within the applicable two-year limitations period and for two decades before that, BHP Ltd. and BHP plc have had no contacts with the State of Hawai‘i that are jurisdictionally relevant to the claims Plaintiffs assert. *See generally* Ex. A, Stollery Decl.; Haw. Rev. Stat. § 657-7 (two year limitations period for tort claims).

III. ARGUMENT

A. Plaintiffs Bear the Burden to Establish Jurisdiction.

For all the reasons set out in the Joint Memorandum in Support of Defendants’ Motion to Dismiss for Lack of Personal Jurisdiction (“Omnibus Jurisdictional Brief”), Dkt. 347, the Amended Complaint’s jurisdictional allegations – even accepted as true – are legally insufficient to support the exercise of either general or specific jurisdiction over any of the moving defendants.

Even if those allegations suffice to make out a prima facie case for jurisdiction, which they do not, as to BHP Ltd. and BHP plc, the facts alleged are simply not correct. Where, as here, “the defendant adduces sufficient evidence to put in issue the question of jurisdiction over the person,” the plaintiff bears the burden of establishing jurisdiction over a foreign defendant. *Atlas Elevator Co. v. Presiding Judge*, 49 Haw. 129, 142 n.12 (1996) (citing *Victory Carriers, Inc. v. Hawkins*, 44 Haw. 250, 352 P.2d 314 (1960)); *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1068 (9th Cir. 2015). The

court “may not assume the truth of allegations in a pleading which are contradicted by affidavit.” *Data Disc, Inc. v. Systems Tech. Assocs., Inc.*, 557 F.2d 1280, 1284 (9th Cir. 1977); *Pratt v. Hawaii*, Civ. No. 17-00599 DKW-RLP, 2019 WL 1548570, at *3 (D. Haw. Apr. 9, 2019) (“Conclusory allegations of law, unwarranted deductions of fact, and unreasonable inferences are insufficient to defeat a motion to dismiss.”). Instead, in the face of a declaration controverting the facts alleged in the complaint, the plaintiff must “come forward with facts, by affidavit or otherwise, supporting personal jurisdiction.” *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986). Plaintiffs must provide evidence sufficient to establish jurisdiction by a preponderance of the evidence, *Shaw v. North Am. Title Co.*, 76 Haw. 323, 327, 876 P.2d 1291, 1295 (1994), which they cannot do.

B. Plaintiffs Cannot Establish General Jurisdiction Over BHP Ltd. and BHP plc.

As Plaintiffs concede and as demonstrated in the Stollery Declaration, BHP Ltd. and BHP plc are not “at home” in Hawai‘i. BHP Ltd. is incorporated in Australia and has its principal place of business in Melbourne, Australia. *See* Am. Compl. ¶ 24(a); Ex. A, Stollery Decl. ¶ 3. BHP plc is incorporated in England and Wales and has its principal place of business in London, England. *See* Compl. ¶ 24(a); Ex. A, Stollery Decl. ¶ 5. Thus, this Court cannot exercise general personal jurisdiction over BHP Ltd. and BHP plc.

C. Plaintiffs Cannot Establish Specific Jurisdiction Over BHP Ltd. and BHP plc.

Nor can Plaintiffs establish specific jurisdiction over BHP Ltd. and BHP plc. Specific jurisdiction over a foreign defendant may not be exercised in Hawai‘i unless (1) the defendant’s activity falls under the state’s long-arm statute, and (2) the application of the statute complies with constitutional due process. *Norris v. Six Flags Theme Parks, Inc.*, 102 Haw. 203, 207, 74 P.3d 26, 30 (2003). The exercise of specific jurisdiction comports with constitutional due process only if the foreign defendant has sufficient “‘minimum contacts’ with the forum state ‘such that the

maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Shaw*, 76 Haw. at 329–30, 876 P.2d at 1297–98 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Therefore, specific jurisdiction is proper only if “(1) the defendant either purposefully direct[s] its activities or purposefully avails itself of the benefits afforded by the forum’s laws; (2) the claim arises out of or relates to defendant’s forum-related activities; and (3) the exercise of jurisdiction [] comport[s] with fair play and substantial justice.” *Williams v. Yamaha Motor Co., Ltd.*, 851 F.3d 1015, 1023 (9th Cir. 2017) (internal quotations and citations omitted); *see also In re Doe*, 83 Haw. 367, 373, 926 P.2d 1290, 1296 (1995). Constitutional due process’s limits on the jurisdictional reach of courts “are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limits on the power of the respective States,” and a State’s exercise of sovereign power “implic[s] a limitation on the sovereignty” of other States and even foreign nations. *Bristol-Myers Squibb v. Superior Ct.*, ___ U.S. ___, 137 S. Ct. 1773, 1780 (2017) (internal citation omitted).

Plaintiffs’ burden to demonstrate by a preponderance of the evidence that their claims “arise[] out of or relate[] to defendant’s forum-related activities” cannot be satisfied simply by showing that fossil fuels that a foreign defendant produces are (or, within the statute of limitations, were) consumed in Hawai‘i. *Williams*, 851 F.3d at 1023. “In order to serve as a basis for the exercise by a state court of personal jurisdiction over a nonresident served outside of the state, the contacts of the nonresident with the forum must be contacts which gave rise to or were causally connected with the obligation sought to be enforced.” *Gordon v. Granstedt*, 54 Haw. 597, 603, 513 P.2d 165, 169 (1973); *Shaw*, 76 Haw. at 328 (contacts cannot be “merely incidental”). The jurisdictional contacts Plaintiffs need to establish must relate to the conduct Plaintiffs allege gives

rise to Defendants' liability. *Walden v. Fiore*, 571 U.S. 277, 278 (2014) (no personal jurisdiction where defendant formed "no jurisdictionally relevant contacts" with the forum).

1. BHP Ltd. and BHP plc have insufficient contacts with Hawai'i.

Plaintiffs do not allege (nor could they) that BHP Ltd. or BHP plc themselves have contacts with Hawai'i that would permit this Court to exercise specific jurisdiction over them based on fossil fuel products BHP Ltd. or BHP plc subsidiaries produce and market outside Hawai'i. *See* Am. Compl. ¶ 24(f)–(h) (alleging that the "BHP Group" had fossil fuel-related business in Hawai'i through "subsidiaries"). And, to the extent Plaintiffs' claims arise from or relate to Defendants' communications and advertising directed at Hawai'i residents to induce their continued consumption of hydrocarbons, there likewise can be no jurisdiction over BHP Ltd. or BHP plc because Plaintiffs do not even allege that any BHP entity, let alone BHP Ltd. or BHP plc, advertised in publications directed specifically at Hawai'i consumers. Plaintiffs allege merely that "BHP" had been and presently is marketing its fossil fuel products through "BHP-branded retail petroleum service stations throughout Hawai'i." Am. Compl. ¶ 24(h). But as the Stollery Declaration explains, those retail gas service stations were owned, for a brief period of time, by a BHP Hawaii subsidiary from 1989 until 1998. And, since then BHP Hawaii has not had active operations and therefore has not "distributed, marketed, advertised, and promoted" "BHP" products for Hawai'i citizens to consume since the late 1990s, over two decades before the Complaint was filed. Ex. A, Stollery Decl. ¶¶ 12, 14, 26–27.²

BHP Ltd. is not registered to do business in Hawai'i; does not pay taxes in Hawai'i; does not have a registered agent for service of process in Hawai'i; does not have employees based in

² BHP Hawaii's sole function today remains to address certain contingent legacy environmental issues with respect to sites owned and operated by former subsidiaries of BHP Hawaii or its predecessors within the State of Hawai'i, Ex. A, Stollery Decl. ¶ 15, from which Plaintiffs' claims in this suit do not relate or arise.

Hawai‘i; does not have offices, telephone or facsimile listings, or mailing addresses in Hawai‘i; does not maintain corporate books or records in Hawai‘i; and does not own or operate personal or real property, sales, or income in Hawai‘i. Ex. A, Stollery Decl. ¶¶ 19–24. Nor does BHP Ltd. direct fossil fuel-related print advertising specifically to Hawai‘i consumers. *Id.* ¶ 25. And BHP Ltd. itself has never owned or operated a refinery or retail gas stations in Hawai‘i *Id.* ¶ 12.

As to BHP plc, it is a mining and metals business and not a petroleum business. *Id.* ¶ 9. BHP plc is not registered to do business in Hawai‘i, and it does not have, and has never had, any ownership interest or business connection to BHP Hawaii, which was formed as a BHP Ltd. indirect subsidiary before the BHP plc and BHP Ltd. businesses entered into the dual listed company arrangement in 2001. *Id.* ¶¶ 7–8, 10, 12, 17. BHP plc has never had any direct or indirect interest in the fossil fuel refinery in Kapolei or retail gas stations in Hawai‘i. *Id.* ¶¶ 10, 12, 17.

2. Plaintiffs cannot establish the requisite minimum contacts through BHP Hawaii.

Because Plaintiffs recognize they cannot establish jurisdiction over BHP Ltd. and BHP plc based on their *own* contacts with Hawai‘i, Plaintiffs allege that the “BHP Group owns several subsidiaries that do fossil fuel products-related business in the United States, including in Hawai‘i, including, but not limited to, BHP Hawaii Inc.,” and that these subsidiaries function as an alter ego of BHP Ltd. and BHP plc. *See* Am. Compl. ¶ 24(e)–(f). To establish this alter ego relationship, Plaintiffs allege – and would need to establish by a preponderance of the evidence – that:

- “BHP [Ltd. and BHP plc] ... operate[] as a multinational, vertically-integrated” company and that BHP Ltd. and BHP plc “control[] and ha[ve] controlled company decisions about the quantity and extent of fossil fuel production and sales,” as well as “climate change and greenhouse gas emissions from its fossil fuel products.” Am. Compl. ¶ 24(b)–(d).
- BHP Hawaii functions as their alter ego “by conducting fossil-fuel related business in Hawai‘i that BHP [Ltd. and BHP plc] would otherwise conduct if [they] were present in Hawai‘i, shar[es] directors and officers with supervisory roles over both BHP [Ltd. and BHP plc] and [BHP Hawaii], and employ[s] the same people.” *Id.* ¶ 24(e).

Plaintiffs' allegations are contradicted by the facts. As to BHP plc, it has never had any ownership in nor control over BHP Hawaii. Ex. A, Stollery Decl. ¶ 10. As to BHP Ltd., aside from BHP Hawaii and the subsidiaries it once owned, BHP Ltd. has no other direct or indirect subsidiaries engaged in fossil fuel-related business in Hawai'i. *Id.* ¶ 16, 18. And for the reasons set out below, BHP Hawaii's long-ceased operations in the State of Hawai'i may not be imputed to BHP Ltd. to establish jurisdiction over it.

Plaintiffs bear a high burden when seeking to establish jurisdiction over a foreign defendant by imputing to it an in-state party's jurisdictional contacts based on an alter ego theory. To show that one corporate entity is the alter ego of another, the entities alleged to be alter egos of each other must satisfy a two-part test: (1) "the corporation is not only influenced and governed by that person, but that there is such a unity of interest . . . that the individuality, or separateness, of such person and corporation has ceased," and (2) "the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice." *Robert's Haw. School Bus, Inc. v. Laupahoehoe Transp. Co.*, 91 Haw. 224, 242, 982 P.2d 853, 871 (1999), superseded by statute on other grounds (internal citations and quotes omitted); *see also Calipjo v. Purdy*, 144 Haw. 266, 277, 439 P.3d 218, 229 (2019).

Normal parental control, such as monitoring the subsidiary's performance, supervising finance and capital budget decisions, and articulating general policies and procedures, is not enough. *Doe v. Unocal Corp.*, 248 F.3d 915, 927 (9th Cir. 2001). Control over day-to-day operations is what is required to meet the first element of the alter ego test. *Id.*; *see also Ranza*, 793 F.3d at 1073 (no alter ego finding even with "[t]otal ownership and shared management personnel"); *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir. 1980) (no alter ego relationship even though the parent guaranteed loans for the subsidiary, reviewed and

approved subsidiary's major decisions, placed several of its own directors on the subsidiary's board, was closely involved in the subsidiary's pricing decisions, and had "general executive responsibility for the operation of [the subsidiary].").

The Stollery Declaration confirms that no alter ego relationship exists with BHP Hawaii. BHP Ltd. is separately capitalized from BHP Hawaii; has its own assets, cash flows, and income separate from BHP Hawaii; and maintains separate bank accounts from BHP Hawaii. Ex. A, Stollery Decl. ¶ 29. BHP Ltd. and BHP Hawaii Inc. have also never shared directors or officers with supervisory roles over both BHP plc and BHP Hawaii Inc., except for a limited time from 2008 to 2010 (long after BHP Hawaii ceased operating any businesses), when one officer of BHP Ltd. also had the titles of director and president of BHP Hawaii, among other BHP Ltd. subsidiaries. *Id.* ¶ 28.

In 2017, the federal court in Arizona found that BHP Ltd. and BHP plc do not have an alter ego relationship with two U.S. indirect subsidiaries: BHP Copper Inc. and Broken Hills Proprietary (USA), Inc.³ *McGeachy v. Pinto Valley Mining Corp.*, 2:16-cv-03348 JWS, 2017 WL 3130639 (D. Ariz. July 24, 2017). The court there dismissed the claims against BHP Ltd. and BHP plc for lack of jurisdiction finding that the plaintiff had not "shown that the BHP Parents direct the BHP Subsidiaries' day-to-day operations, nor has he shown that the parties have failed to observe their separate corporate formalities," even accepting plaintiff's allegations that:

- The plaintiff's employment documents referenced the "BHP Billiton" name and logo and a subsidiary's name or logo;
- Some of the directors and officers of the BHP subsidiaries also worked for BHP Ltd./BHP plc;

³ For the avoidance of doubt, BHP Copper Inc. and Broken Hills Proprietary (USA), Inc. are not incorporated in Hawai'i and do not have their principal place of business in Hawai'i.

- Broken Hills Proprietary (USA) had no revenue from outside operations and so BHP Ltd. and BHP plc must have indirectly paid the salaries of the BHP Copper, Inc.’s employees;
- BHP’s SEC filings stated that “BHP Billiton” operates as a “single economic entity, run by a unified Board and management team and that BHP Billiton’s Charter, Code of Business Conduct, and Group Level Documents prescribe to employees “what we will do and how we will do it;” and
- BHP Billiton held a memorial for a worker who died at the Pinto Valley mine operated by BHP Copper.

McGeachy, 2017 WL 3130639, at *5. So too here, on the facts as established by the Stollery Declaration, there is no basis to find the day-to-day control of BHP Hawaii’s short-lived business necessary to establish an alter ego relationship. Nor is there any allegation by Plaintiffs that respecting the corporate separateness between BHP Hawaii, BHP Ltd., and BHP plc would “sanction a fraud or promote injustice,” as Plaintiffs must also show.⁴ Accordingly, there can be no jurisdiction over BHP Group plc nor BHP Group Limited under the alter ego theory Plaintiffs allege but cannot establish.

IV. CONCLUSION

For all the foregoing reasons and for the reasons stated in the Omnibus Jurisdictional Brief, Defendants BHP Group Limited and BHP Group plc should be dismissed for lack of personal jurisdiction.

DATED: Honolulu, Hawai‘i, June 2, 2021.

/s/ Margery S. Bronster
 Margery S. Bronster
 Lanson K. Kupau

⁴ Plaintiffs also allege that non-party fossil fuel industry associations “engaged in a long-term course of conduct ... to misrepresent, omit, and conceal the dangers of Defendants’ fossil fuel products” and acted “on behalf of the Defendants and others.” Am. Compl. ¶¶ 27–35. “BHP” is alleged to be a member of the American Petroleum Institute (“API”), *id.* ¶ 29(a), and the U.S. Oil & Gas Association (“USOGA”), *id.* ¶ 29(d). But neither BHP plc, BHP Ltd. nor BHP Hawaii is a member of API or USOGA, although another subsidiary of BHP Ltd. is a member of API. Ex. A, Stollery Decl. ¶ 30. In any event, membership in a trade association is insufficient to establish an agency or alter ego relationship. *California Chiropractic Ass’n v. Am. Specialty Health Plans, Inc.*, No. D039238, 2003 WL 1870963 (Cal. Ct. App. Apr. 14, 2003).

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HAWAII INC.

Exhibit A

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LIMITED; ALOHA PETROLEUM LLC;
EXXON MOBIL CORP.; EXXONMOBIL
OIL CORPORATION; ROYAL DUTCH
SHELL PLC; SHELL OIL COMPANY;
SHELL OIL PRODUCTS COMPANY LLC;
CHEVRON CORP; CHEVRON USA INC.;
BHP GROUP LIMITED; BHP GROUP PLC;
BHP HAWAII INC.; BP PLC; BP
AMERICA INC.; MARATHON
PETROLEUM CORP.; CONOCOPHILLIPS;
CONOCOPHILLIPS COMPANY; PHILLIPS
66; PHILLIPS 66 COMPANY; AND DOES
1 through 100, inclusive,

CIVIL NO. 1CCV-20-0000380 (JPC)
(Other Non-Vehicle Tort)

**DECLARATION OF JAMIE STOLLERY
IN SUPPORT OF DEFENDANTS BHP
GROUP LIMITED AND BHP GROUP
PLC'S MOTION TO DISMISS FOR
LACK OF PERSONAL JURISDICTION**

Trial Date: None

Hearing Date: August 27, 2021
Hearing Time: 8:30 a.m.

The Honorable Jeffrey P. Crabtree

Defendants.

I, Jamie Paul Stollery, declare and state as follows:

I. Background

1. I am employed by Defendant BHP Group Limited. Since 1 January 2019, I have held the position of Head of Disputes (Legal) for BHP Group Limited and BHP Group plc (together, “BHP Group”). I have worked for BHP Group Limited since 30 March 2015 in a number of positions in the Legal team.

2. In my capacity as Head of Disputes (Legal), as a result of my work at BHP Group since 30 March 2015, and based on my review of BHP Group corporate records and the corporate records concerning Defendant BHP Hawaii Inc., I have personal knowledge of the matters set forth herein and believe them to be true and correct to the best of my knowledge. I make this declaration in support of the motion to dismiss for lack of personal jurisdiction filed by Defendants BHP Group Limited and BHP Group plc.

3. BHP Group Limited is an Australian corporation that has its principal place of business in Melbourne, Victoria, Australia. BHP Group Limited is a public company incorporated in 1885. BHP Group Limited was formerly named BHP Billiton Limited, before that, BHP Limited, and before that, The Broken Hill Proprietary Company Limited.

4. BHP Group Limited is an international resources company. BHP Group Limited’s principal business lines are mineral exploration and production, including coal, iron ore, nickel and copper, as well as petroleum.

5. BHP Group plc is a public limited company incorporated under the laws of England and Wales that has its principal place of business in London, England.

6. Prior to June 2001, BHP Group plc was known as Billiton plc. Billiton plc traces its origins to a Dutch company formed in 1860.

7. In June 2001, Billiton plc (now known as BHP Group plc) and BHP Limited (now known as BHP Group Limited) entered into a dual listed company (“DLC”) arrangement.

8. The DLC is a contractual arrangement under which the two listed companies operate as if they are a single economic enterprise while retaining their separate legal identities, tax residences, and stock exchange listings. Under the DLC arrangement, BHP Group plc (and its subsidiaries) preserved their separate legal identity from those of BHP Group Limited and its subsidiaries.

9. The company now known as BHP Group plc (the former Billiton plc) has had no involvement in the manufacturing, marketing or distribution of petroleum. BHP Group plc has been primarily involved in the mining and metals business.

10. BHP Hawaii Inc., a Hawai‘i corporation, is an indirect subsidiary of BHP Group Limited. BHP Hawaii Inc. is not (and has never been) a direct or indirect subsidiary of BHP Group plc. BHP Group plc has never had any ownership interest in BHP Hawaii Inc.

II. BHP Hawaii Inc.

11. Starting in or around 1983–1984, a subsidiary of BHP Group Limited began selling a portion of its Australian crude oil production to the Kapolei refinery in Honolulu, then owned by a subsidiary of Pacific Resources, Inc., a Hawai‘i corporation.

12. In 1989, BHP Group Limited (then called The Broken Hill Proprietary Company Limited) decided to acquire Pacific Resources, Inc. (then engaged, through its subsidiaries, in manufacturing, importing, distributing, and retailing of energy products, including gas and petroleum products). To effect that acquisition, on 11 May 1989, RTV Corp., an indirect

wholly-owned subsidiary of BHP Group Limited, merged with Pacific Resources, Inc. The surviving corporation took the name Pacific Resources, Inc. and became an indirect subsidiary of BHP Group Limited. Through its subsidiaries, Pacific Resources, Inc.'s assets included a propane utility business, a non-operational manufactured gas plant in Iwilei, O'ahu, a synthetic natural gas plant in Kapolei, O'ahu, the crude oil refinery in Kapolei, O'ahu, a petroleum terminal at Pier 29 in Honolulu Harbor (on land leased from the State of Hawai'i), and retail gas stations.

13. On 8 February 1993, Pacific Resources, Inc. changed its name to BHP Petroleum Americas (Hawaii) Inc. On 28 June 1994, BHP Petroleum Americas (Hawaii) Inc. changed its name to its current name, BHP Hawaii Inc.

14. Starting in 1997, BHP Hawaii Inc. began a process of divesting of all of its assets in the State of Hawai'i.

- a. On 9 January 1997, BHP Hawaii Inc. entered into a stock sale agreement with Citizens Utilities Company ("Citizens"). The transaction closed in October 1997. Pursuant to the agreement, BHP Hawaii Inc. conveyed all of its interest in the stock of its subsidiary Gasco, Inc. (which owned the propane utility business) to Citizens, and leased to Citizens the synthetic natural gas plant in Kapolei, O'ahu, which BHP Hawaii Inc. then ceased to operate. In 2002, The Gas Company, LLC ("TGC") replaced Citizens as the lessee of the Kapolei synthetic natural gas plant and in 2016 also became the successor-in-interest to the real property, as explained in paragraph 14(d) below. Also in 1997, BHP Hawaii Inc.'s lease on the Pier 29 petroleum terminal ended, the physical facilities were removed, and the land was returned to the State of Hawai'i.

- b. On 18 March 1998, BHP Hawaii Inc. sold the stock in its subsidiary BHP Petroleum Americas Refining Inc. to Tesoro Petroleum Corporation. This transaction ended BHP Hawaii Inc.'s active business operations in the State of Hawai'i as it effected the sale by BHP Hawaii Inc. of its remaining operating interests, including the crude oil refinery in Kapolei and its retail gas stations, to Tesoro Petroleum Corporation. BHP Hawaii Inc.'s remaining assets included only the Kapolei synthetic natural gas plant which was then being leased to (and operated by) Citizens, and the non-operational Iwilei manufactured gas plant.
- c. On 31 December 2007, BHP Hawaii Inc. sold its fee interest in the land underlying the non-operational Iwilei manufactured gas plant and the plant itself (referenced in paragraphs 14(a) and (b), above) to Weston Solutions.
- d. On 29 January 2016, BHP Hawaii Inc. sold its fee interest in the land underlying the Kapolei synthetic natural gas plant and the physical facilities on that property, which BHP had been leasing to TGC since 2002, to TGC. With this transaction, BHP Hawaii Inc. had divested all of its assets in the State of Hawai'i.

15. BHP Hawaii Inc. remains in existence today only to address certain legacy environmental issues with respect to sites owned or operated by BHP Hawaii or its predecessors within the State of Hawai'i. Since 2000, BHP Hawaii Inc. has had no employees based in the State of Hawai'i. Since 2008, BHP Hawaii Inc. has had no officers or directors based in the State of Hawai'i.

16. BHP Hawaii Inc. and the subsidiaries it once owned were, and per the available records of BHP Group Limited, have been since the acquisition of Pacific Resources, Inc. in 1989, BHP Group Limited's only subsidiaries with operations in the State of Hawai'i in connection with any fossil fuel-related business.

III. BHP Group plc's and BHP Group Limited's Contacts with Hawai'i

17. BHP Group plc does not have, and has never had, any ownership interest or business connection to BHP Hawaii Inc., which was formed as a BHP Group Limited indirect subsidiary before BHP Group plc and BHP Group Limited entered into the DLC arrangement. BHP Group plc is not currently registered to do business in the State of Hawai'i, and after a diligent search, has not found any evidence that it ever was so registered. Neither BHP Group plc nor any of its subsidiaries has offices in the State of Hawai'i, telephone or facsimile listings or mailing addresses in the State of Hawai'i, or books or records maintained in the State of Hawai'i. Since at least 1975, neither BHP Group plc nor any of its subsidiaries has paid taxes in the State of Hawai'i in connection with any fossil fuel-related business; this is not to suggest that prior to 1975, BHP Group plc or any of its subsidiaries paid taxes in the State of Hawai'i in connection with any fossil fuel-related business. Neither BHP Group plc nor any of its subsidiaries has owned any physical assets in the State of Hawai'i since 2012 at the latest; this is not to suggest that in or prior to 2012, BHP Group plc or any of its subsidiaries owned any physical assets in the State of Hawai'i.

18. Per the available records of BHP Group Limited, aside from BHP Hawaii Inc., BHP Group Limited has never directly or indirectly owned or controlled any fossil fuel-related business entity formed or operating in the State of Hawai'i.

19. BHP Group Limited is not currently registered to do business in the State of Hawai'i, and after a diligent search, has not found any evidence that it ever was.

20. BHP Group Limited does not now have, and after a diligent search, has not found any evidence that it ever had, a statutory registered agent for service of process in the State of Hawai'i.

21. Per the available records of BHP Group Limited, neither BHP Group Limited itself nor any direct or indirect subsidiary of BHP Group Limited other than BHP Hawaii Inc. has ever had employees based in the State of Hawai'i in connection with any fossil fuel-related business.

22. Neither BHP Group Limited nor any of its subsidiaries (including BHP Hawaii Inc.) has offices in the State of Hawai'i. Neither BHP Group Limited nor any of its subsidiaries (aside from BHP Hawaii Inc.) has telephone or facsimile listings or mailing addresses in the State of Hawai'i or books or records maintained in the State of Hawai'i.

23. Since at least 1975, neither BHP Group Limited nor any of its subsidiaries (with the exception of BHP Hawaii Inc.) has paid taxes in the State of Hawai'i in connection with any fossil fuel-related business. This is not to suggest that prior to 1975, BHP Group Limited or any of its subsidiaries paid taxes in the State of Hawai'i in connection with any fossil fuel-related business.

24. Currently and since 2016 at the latest, neither BHP Group Limited nor any of its subsidiaries has owned or operated any tangible personal or real property, sales, or revenue in the State of Hawai'i in connection with any fossil-fuel related business. This is not to suggest that prior to 2016, BHP Group Limited owned or operated any tangible personal or real property,

sales, or income in the State of Hawai‘i in connection with any fossil-fuel related business other than BHP Hawaii Inc.

25. Based on reasonable enquiries, BHP Group Limited does not currently advertise, and since 2014 at the latest has not advertised, in a print publication directed specifically at consumers in the State of Hawai‘i in relation to any fossil fuel business. This is not to suggest that, prior to 2014, BHP Group Limited advertised in a print publication directed specifically at consumers in the State of Hawai‘i in relation to any fossil fuel business.

26. Neither BHP Group Limited nor any of its subsidiaries has manufactured or refined fossil fuel products in Hawai‘i since 1998. According to an accessible computer system, no portion of BHP Group Limited’s or any of its subsidiaries’ fossil fuel products have been traded or knowingly sold to industry customers in Hawai‘i since 2012 at the latest.

27. Neither BHP Group Limited nor any of its subsidiaries, including BHP Hawaii Inc., has owned or operated the fossil fuel refinery in Kapolei on O‘ahu since 1998. Neither BHP Group Limited nor any of its subsidiaries (including BHP Hawaii Inc.) has conducted or controlled, either directly or through franchise agreements, retail fossil fuel sales at BHP-branded retail petroleum service stations in Hawai‘i since 1998.

IV. Plaintiffs’ Alter Ego Allegations

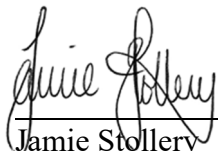
28. BHP Group Limited and BHP Hawaii Inc. have never shared directors with supervisory roles over both BHP Group Limited and BHP Hawaii Inc. BHP Group Limited and BHP Hawaii Inc. have never shared officers with supervisory roles over both BHP Group Limited and BHP Hawaii Inc., except for a time from 2008 to 2010, when an officer of BHP Group Limited also had the titles of director and president of BHP Hawaii Inc., among other BHP Group Limited subsidiaries.

29. BHP Group Limited has never maintained bank accounts in Hawai'i. BHP Group Limited is and has always been separately capitalized from BHP Hawaii Inc. BHP Group Limited has and has always had its own assets, cash flows, and income, separate from BHP Hawaii Inc. BHP Group Limited maintains and has always maintained separate bank accounts from BHP Hawaii Inc.

30. Neither BHP Group Limited nor any of its subsidiaries is a member of U.S. Oil & Gas Association. Neither BHP Group Limited nor BHP Hawaii Inc. is a member of the American Petroleum Institute, although another subsidiary of BHP Group Limited not named as a Defendant is a member of the American Petroleum Institute. Neither BHP Group plc nor any of its subsidiaries is a member of the American Petroleum Institute or U.S. Oil & Gas Association.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief.

Executed in Melbourne, Victoria, Australia, on 2 June 2021.



Jamie Stollery
Head of Disputes (Legal)
BHP Group

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CITY AND COUNTY OF
HONOLULU AND HONOLULU
BOARD OF WATER SUPPLY,

Plaintiffs,

vs.

SUNOCO LP; ALOHA PETROLEUM, LTD.;
ALOHA PETROLEUM LLC; EXXON
MOBIL CORP.; EXXONMOBIL OIL
CORPORATION; ROYAL DUTCH SHELL
PLC; SHELL OIL COMPANY; SHELL OIL
PRODUCTS COMPANY LLC; CHEVRON
CORP.; CHEVRON USA INC.; BHP GROUP
LIMITED; BHP GROUP PLC; BHP HAWAII
INC.; BP PLC; BP AMERICA INC.;
MARATHON PETROLEUM CORP.;
CONOCOPHILLIPS; CONOCOPHILLIPS
COMPANY; PHILLIPS 66; PHILLIPS 66
COMPANY; AND DOES 1 through 100,
inclusive,

Defendants.

CIVIL NO.: 1CCV-20-0000380 (JPC)
(Other Non-Vehicle Tort)

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on June 2, 2021, and by the method 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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DATED: Honolulu, Hawai‘i, June 2, 2021.

/s/ Margery S. Bronster

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