Nos. 21-15313, 21-15318

United States Court of Appeals for the Ninth Circuit

CITY AND COUNTY OF HONOLULU et al.,

Plaintiffs – Appellees,

v.

SUNOCO LP, et al.,

Defendants – Appellants,

COUNTY OF MAUI,

Plaintiff – Appellee,

v.

SUNOCO LP, et al.,

Defendants – Appellants,

Appeal from the United States District Court
for the District of Hawaii,
Nos. 20-cv-00163, 20-cv-00470 (The Honorable Derrick K. Watson)

APPELLEES' RESPONSE TO APPELLANTS' MOTION TO TAKE JUDICIAL NOTICE

Dana M.O. Viola
Corporation Counsel
Robert M. Kohn
Nicolette Winter
Jeff A. Lau
Deputies Corporation Counsel
530 South King St., Room 110
Honolulu, HI 96813
(808) 768-5129
robert.kohn@honolulu.gov
nwinter@honolulu.gov
jlau3@honolulu.gov

Counsel for Plaintiffs–Appellees the City and County of Honolulu and Honolulu Board of Water Supply

Moana M. Lutey
Corporation Counsel
Richelle M. Thomson
Keola R. Whittaker
Deputies Corporation Counsel
200 South High Street, Third Floor
Wailuku, HI 96793
(808) 270-7741
moana.lutey@co.maui.hi.us
richelle.thomson@co.maui.hi.us
keola.r.whittaker@co.maui.hi.us

Counsel for Plaintiff–Appellee the County of Maui

(Additional counsel listed on signature page)

INTRODUCTION

The Court should reject out of hand Appellants' request for judicial notice of purported "concessions" by Appellees City & County of Honolulu, Honolulu Board of Water Supply, and County of Maui about the theory of their cases, based on oral argument in Hawaii state court proceedings. The Court may, of course, take judicial notice of the existence of the court transcripts Appellants proffer. The Court may not, however, take the additional step of drawing inferences against Appellees as to disputed issues based on the transcripts' contents. "It is improper to judicially notice a transcript when the substance of the transcript 'is subject to varying interpretations, and there is a reasonable dispute as to what the [transcript] establishes.'" *Khoja v. Orexigen Therapeutics, Inc*., 899 F.3d 988, 1000 (9th Cir. 2018) (quoting *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1193 (9th Cir. 2011)); *accord, e.g*., *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (A court "may not take judicial notice of a fact that is 'subject to reasonable dispute,'" including "disputed facts stated in public records.") (quoting Fed. R. Evid. 201(b)).

Contrary to Appellants' mischaracterization of the record, Appellees have never "conceded" and do not "concede" Appellants' argument that "it is Defendants' fossil-fuel products, not alleged misrepresentations, that give rise to claims of tortious conduct," *See* Mot. to Take Judicial Notice (Dkt. 89-1, Nov. 8, 2021) ("RJN") at 3 (quotation omitted). Any fair reading of Appellants' own exhibits

illustrates that judicial notice of a purported concession is inappropriate here. The truth is that *all* parties in the *Honolulu* matter repeatedly argued to the Hawaii state court that Appellants' alleged misrepresentations are an essential element of Appellees' deception-based theory of tort liability. Appellees' counsel was unambiguous on this point: "our burden is, again, to show the defendants participated in creating the public nuisance *by their failure to warn and campaign of deception*, and we have to show, obviously, that it was a substantial contributor, substantial cause of the nuisance." *See* RJN Ex. 2 at 122:2–6 (emphasis added).

Multiple Appellants' counsel also argued that misrepresentations are critical to Appellees' claims: Counsel for Defendants BHP Group Limited, BHP Group plc, and BHP Hawaii Inc., argued that "*deceptive marketing is at the heart of the claim* and is what establishes specific jurisdiction in this case." *See id.* at 19:25–20:2 (emphasis added). Counsel for Appellants Chevron Corp. and Chevron U.S.A., Inc., argued that "the plaintiffs say over and over again . . . *their complaint is focused on this campaign of deception*, the entire thrust of it is that defendants engaged in a deceptive campaign," to mislead the public about climate change. *See* RJN Ex. 1 at 13:15–18 (emphasis added). In fact, as the transcripts reflect, Chevron brought a motion to strike the *Honolulu* Plaintiffs' complaint under California's anti-SLAPP statute because, Chevron argued, "this suit *targets speech and opinions* on an issue of great public concern, climate change." *Id.* at 11:3–6 (emphasis added).

Appellants' contrary characterization here rests on a few phrases cherry-picked from more than 200 transcribed pages of argument. The purported "concession" is disputed—at a bare minimum—and not a proper subject of judicial notice.

ARGUMENT

"A court may take judicial notice of undisputed matters of public record, which may include court records," both state and federal. *See United States v. Raygoza-Garcia*, 902 F.3d 994, 1001 (9th Cir. 2018); *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) ("[W]e may take notice of proceedings in other courts, both within and without the federal judicial system." (quotation omitted)). The Rules of Evidence, however, only permit judicial notice of "a fact that is not subject to reasonable dispute." *See* Fed. R. Evid. 201(b).

This Court has repeatedly held that where a transcribed statement is amenable to multiple possible interpretations, it is not a proper subject of judicial notice. The Court in *Khoja* held that the district court abused its discretion by taking judicial notice of a transcript of a conference call among investors, proffered by a party to establish the truth of certain statements made in the call. The Court explained that although the transcript qualified as a "source[ ] whose accuracy cannot reasonably be questioned," "accuracy is only part of the question." *Id*. at 999. It might have been proper to take notice of the existence of the transcript, but:

> [i]t is improper to judicially notice a transcript when the substance of the transcript "is subject to varying interpretations, and there is a reasonable dispute as to what the [transcript] establishes." *Reina-Rodriguez v. United States*, 655 F.3d [at 1193]. In that scenario, there is no fact established by the transcript "not subject to reasonable dispute," and the fact identified does not qualify for judicial notice under Rule 201(b).

Khoja, 899 F.3d at 1000.[1]

Here, Appellants ask the Court to take judicial notice of the transcripts of two hearings on motions to dismiss pending in the Hawaii state court to which this case has been remanded,[2] for the proposition that Appellees there "conceded that their claims center on greenhouse-gas emissions," Appellants' Reply Brief ("Reply") at 8, which "concessions," they say, "are dispositive here," *id.* at 3. *See also* RJN at 3–4. This Court cannot and should not take judicial notice of those supposed "concessions," both because the "fact" of any concession is sharply disputed, and because recognizing it would require the Court to draw improper inferences.

---

[1] For the same reasons, this Court does not "draw inferences from the data contained" in judicially noticeable court records. *Raygoza-Garcia*, 902 F.3d at 1001. Even with respect to notice of other courts' opinions and final judgments, a court "may do so 'not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.'" *Lee*, 250 F. 3d at 690 (quoting *Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 426–27 (3rd Cir. 1999)); *Jergens v. Ohio Dep't of Rehab. & Corr. Adult Parole Auth.*, 492 F. App'x 567, 569 (6th Cir. 2012) ("Although we are certainly permitted to take judicial notice of court records and judicial proceedings under some circumstances, such as to confirm the fact of filing, . . . we may not do so in order to discern the truth of the facts asserted within that filing.").

[2] The motions remain pending in the underlying *Honolulu* matter.

First, the transcripts themselves demonstrate that arguments by Appellees' counsel, in addition to Appellees' complaints, can be and have been interpreted to center on alleged deceptive marketing—for the simple reason that they do. As Appellees' counsel explained to the state court at length, "the conduct that triggers defendants' liability is their failure to warn and deceptive promotion of dangerous products." RJN Ex. 1 at 111:6–8. "[T]he conduct that triggers liability in our case, pled in our complaint, read in the manner most favorable to us, is that defendants' failure to warn and deceptive promotion is the—is the foundation of the claims." *Id.* at 108:12–16. The transcripts on which Appellants rely do not show that Appellees made any concession "that their claims center on greenhouse-gas emissions," Reply at 8, much less a concession "not subject to reasonable dispute." Fed. R. Evid. 201(b). The opposite is true, and whether any "concession" was made is belied by the transcript itself.

Appellants' counsel cannot claim any confusion on this point; counsel for Appellants repeatedly recognized the deception-based nature of Appellees' cases in the same transcripts they now cite. Counsel for Appellants Exxon Mobil Corporation and ExxonMobil Oil Corporation strenuously argued that because the complaint turns on deceptive statements, Appellees had to allege and prove deceptive statements in Hawaii to establish personal jurisdiction over the Exxon Mobil entities. Counsel stated: "[T]hey say very clearly that this case focuses on the campaign—

alleged campaign of deception, . . . so the question is whether there is, in fact, any of the alleged tortious marketing, to use that conclusory term, that is tied in any way to Hawaii." RJN Ex. 1 at 61:20–62:5. Counsel continued: "all of those things are necessary parts of what [Appellees] must allege in order to establish that there is jurisdiction," *id.* at 62:8–10, because "when a claim is based on deception, . . . they have to demonstrate some connection between the alleged deceptive activities and Hawaii," *id.* at 66:11–17. Counsel for the BHP entity defendants likewise argued that personal jurisdiction was lacking over them because "deceptive marketing is at the heart of the claim and is what establishes specific jurisdiction," RJN Ex. 2 at 19:25–20:2, and "it matters very greatly whether or not a single allegation of a misstatement or deceptive marketing campaign or anything was uttered in the state or directed at the state" of Hawaii, *id.* at 21:14–17.

The Chevron entities went further, specifically seeking to dismiss the *Honolulu* Plaintiffs' complaint under California's anti-SLAPP statute and the *Noerr-Pennington* doctrine. According to Chevron, "Plaintiffs challenge public statements . . . aimed at persuading national and international regulators," RJN Ex. 1 at 11:11–13, and "the plaintiffs say over and over again . . . their complaint is focused on this campaign of deception, the entire thrust of it is that defendants engaged in a deceptive campaign, quote, to change public opinion and avoid regulation," *id.* at

13:16–19.[3] Both Appellees' counsel's statements and the transcript as a whole are, at best, "subject to varying interpretations." *Khoja*, 899 F.3d at 1000 (quotation omitted).

Second, while the Court may take judicial notice of the existence of the transcripts and the fact that hearings occurred in Hawaii state court on Appellants' motions to dismiss, the Court may not "draw inferences from the data contained" in those transcripts. *See Raygoza-Garcia*, 902 F.3d at 1001; *Khoja*, 899 F.3d at 1000; *Reina-Rodriguez*, 655 F.3d at 1193. Appellants ask the Court to infer from certain statements, pulled out of context, that Appellees' "theory of causation and damages hinges on increased combustion of fossil fuels, resulting in increased emissions"—not on Appellants' campaign of disinformation and deception. *See* RJN at 2 (citing RJN Ex. 2 at 35:13–15). But their argument misses the point. Appellees noted in state court that "BHP Group Limited, according to the CEO, transported more than 8 million barrels of crude to Hawaii," as a basis for establishing personal jurisdiction over the BHP entities. *See* RJN Ex. 2 at 35:13–16. Establishing that BHP made relevant fossil fuel sales in Hawaii that have a "connection" to Appellees' claims for personal jurisdiction purposes does not "concede" that "it is Defendants' fossil-fuel products, not alleged misrepresentations, that give rise to claims of tortious

[3] Appellees do not agree or concede that their claims target protected petitioning activity or protected speech.

conduct," as Appellants contend. *See* RJN at 3–4. To the contrary, the point is that the Appellants failed to warn about the products they sold in Hawaii, just as they did elsewhere as part of the deceptive conduct that led to dire climate-related impacts on Appellees and supports liability in these cases. Appellants focus on decontextualized snippets of the complaint and argument that "serve to tell a broader story" about the impacts of Appellants alleged deceptive conduct and are "necessary to establish the avenue of [Appellees'] climate change-related injuries, [but are] not the source of tort liability." *See Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 467 (4th Cir.), *vacated and remanded on other grounds*, 141 S. Ct. 1532 (2021).

As Appellants themselves acknowledge, the Supreme Court recently held that the "requirement of a 'connection' between a plaintiff's suit and a defendant's activities" for personal jurisdiction purposes does not require a "causal showing" tying the defendant's forum contacts directly to the plaintiff's injury. *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1026 (2021); Reply at 25. Here, Appellees argued that BHP entities sold substantial amounts of crude oil in Hawaii during the 1980s and 1990s, and those sales were "jurisdictional contacts [that] dovetail at least in part with the alleged misconduct," and are therefore sufficient to establish personal jurisdiction. RJN Ex. 2 at 35:17–18. That was the extent of Appellees' argument. To judicially notice counsel's statements as "concessions" that Appellees' case is really "about the production, marketing, sale,

and third-party combustion of Defendants' fossil fuels," Reply at 3, misstates the record and requires multiple compounding inferences. The Court would need to interpret counsel's argument as Appellants suggest, weigh that interpretation against all the other statements of counsel at the same hearing and throughout the state and federal record, and determine which one is the *real* argument, all in conflict with the actual statements reflected in the record. Making those inferences based on another court's transcript would warp judicial notice beyond recognition and is not permissible.

Appellees' deception-based theory of the case is straightforward. The district court below and other courts around the country have flatly rejected Appellants' repeated efforts to mischaracterize it.[4] The Fourth Circuit summarized the City of Baltimore's similar case, noting that the complaint there contains "many references to fossil fuel production," but that

> Baltimore does not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil fuel products; it is the concealment and misrepresentation of the products' known dangers—and simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change.

[4] *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW-RT, 2021 WL 531237, at *1 (D. Haw. Feb. 12, 2021) ("The principal problem with Defendants' arguments is that they misconstrue Plaintiffs' claims. More specifically, contrary to Defendants' contentions, Plaintiffs have chosen to pursue claims that target Defendants' alleged concealment of the dangers of fossil fuels, rather than the acts of extracting, processing, and delivering those fuels.")

Baltimore, 952 F.3d at 467.[5] So too here. Far from "conceding" any different approach in the state court records proffered by Appellants, a fair reading of the arguments of all counsel (including Appellants') only reveals consistency with this theory.

CONCLUSION

This Court may take judicial notice of the existence of the transcripts Appellants have proffered. The Court should not, and cannot, take notice that Appellees "conceded" any of the points Appellants now press. To do so would require improper inferences that are beyond the scope of judicial notice, and the record does not support those inferences in any event.

[5] Courts in a number of similar cases have recognized the same distinction and rejected similarly situated defendants' attempts to mischaracterize the plaintiffs' complaints. *See, e.g.*, *Rhode Island v. Shell Oil Prods Co. L.L.C.*, 979 F.3d 50, 60 (1st Cir. 2020), *vacated on other grounds*, 141 S. Ct. 2666 (2021) (the State "is alleging the oil companies produced and sold oil and gas products in Rhode Island that were damaging the environment and engaged in a misinformation campaign about the harmful effects of their products on the earth's climate"); *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656, at *10 (D. Minn. Mar. 31, 2021), *appeal pending*, No. 21-1752 (8th Cir.) ("[T]he State's claims are rooted not in the Defendants' fossil fuel production, but in its alleged misinformation campaign."); *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739, at *13 (D. Conn. June 2, 2021) ("Connecticut's claims seek redress for the manner by which ExxonMobil has interacted with consumers in Connecticut").

Respectfully submitted,

Dated: November 18, 2021

Sher Edling LLP

/s/ Victor M. Sher

Victor M. Sher
vic@sheredling.com
Matthew K. Edling
matt@sheredling.com
Martin D. Quiñones
marty@sherelding.com
100 Montgomery Street, Suite 1410
San Francisco, CA 94014
(628) 231-2500

Dana M.O. Viola
Corporation Counsel

Robert M. Kohn
Nicolette Winter
Jeff A. Lau
Deputies Corporation Counsel

Attorneys for Plaintiffs-Appellees City and County of Honolulu and the Honolulu Board of Water Supply

Moana M. Lutey
Corporation Counsel

Richelle M. Thomson
Keola R. Whittaker
Deputies Corporation Counsel

Attorneys for Plaintiff-Appellee the County of Maui

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Victor M. Sher*
Victor M. Sher