IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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. Defendants.	CIVIL NO. 1CCV-20-0000380 (JPC) (Other Non-Vehicle Tort) **ORDER DENYING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** Hearing: Date: August 27, 2021 Time: 8:30 a.m. Judge: The Honorable Jeffrey P. Crabtree Trial Date: None.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Defendants' Motion to Dismiss for Failure to State a Claim, filed on June 2, 2021 (Dkt. 347), came for video hearing on August 27, 2021, at 8:30 a.m., before the Honorable Jeffrey P. Crabtree. All parties appeared through counsel. Theodore J. Boutrous argued for Defendants, and Victor M. Sher argued for Plaintiffs.

After considering the written submissions and the arguments of counsel, the files herein,

and other good cause appearing therefore, Defendants' Motion to Dismiss for Failure to State a Claim is DENIED for the following reasons. (Note: this order is the version submitted by Plaintiffs during the post-hearing Rule 23 process, with several of the changes requested by Defendants as well as editing by the court.)

1. Legal Standard.

A. This is a Rule 12(b)(6) motion. Such motions are viewed with disfavor and rarely granted in Hawai‘i. *Marsland v. Pang*, 5 Haw. App. 463, 474 (1985).

B. Review of a motion to dismiss is generally limited to the allegations in the complaint, which must be deemed true for purposes of the motion. *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 113 Hawai‘i 251, 266 (2007). However, the court is not required to accept conclusory allegations. *Civ. Beat L. Ctr. for the Pub. Int., Inc. v. City & Cty. of Honolulu*, 144 Hawai‘i 466, 474 (2019).

C. On a 12(b)(6) motion, the issue is not solely whether the allegations as currently pled are adequate. A complaint should not be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief under any set of facts *or any alternative theory*. *In re Estate of Rogers*, 103 Hawai‘i 275, 280-281 (2003); *Wright v. Home Depot U.S.A., Inc.*, 111 Hawai‘i 401, 406-07 (2006); *Malabe v. AOAO Exec. Ctr.*, 147 Hawai‘i 330, 338 (2020).

D. Hawai‘i is a notice pleading jurisdiction. Our Hawai‘i Supreme Court expressly rejected the federal "plausibility" pleading standard (Twombly/Iqbal) in *Bank of America v. Reyes-Toledo*, 143 Hawai‘i 249, 252 (2018).

2. This is an unprecedented case for any court, let alone a state court trial judge. But it is still a tort case. It is based exclusively on state law causes of action.

3. *City of New York*.

A. Defendants' motion relies heavily on *City of New York v. Chevron*, 993 F.3d 81 (2d Cir. 2021). This court spent extensive time reviewing that decision multiple times, and considered it carefully. This court respectfully concludes that *City of New York* has limited application to this case, because the claims in the instant case are both different from and were not squarely addressed in the *City of New York* opinion.

B. Plaintiffs emphasize repeatedly their state law tort claims include *failures to disclose and deceptive promotion*. State law tort claims traditionally involve four elements: duty, breach, causation, and harm or damages. Plaintiffs allege that Defendants had a *duty* to disclose and not be deceptive about the dangers of fossil fuel emissions, and *breached* those duties. As the court understands it, Plaintiffs claim Defendants thereby *exacerbated the costs* to Plaintiffs adapting to and mitigating impacts from climate change and rising sea levels (*causation*). Finally, Plaintiffs alleged harms include flooding, a rising water table, increased damage to critical infrastructure like highways and utilities, and the costs of prevention, mitigation, repair, and abatement – to the extent *caused* by Defendants' breach of recognized duties. Plaintiffs double-down on this theory of liability by expressly arguing that if Defendants make the disclosures and stop concealing and misrepresenting the harms, *Defendants can sell all the fossil fuels they are able to without incurring any additional liability*.[1]

[1] The court recognizes that nuisance, trespass, and failure to warn vary somewhat in terms of their specific elements. All of these claims, however, share the same basic structure of requiring that a defendant engage in tortious conduct that causes injury to a plaintiff. Moreover, as the court understands it, Plaintiffs are relying on the same basic theory of liability to prove each of their claims, namely: that Defendants' failures to disclose and deceptive promotion increased fossil fuel consumption, which – in turn – exacerbated the local impacts of climate change in Hawai'i.

C. Defendants frame Plaintiffs' claims very differently, saying Plaintiffs actually seek to regulate global fossil fuel emissions, or alternatively, that the claims amount to *de facto* regulation. This framing also appears in the *City of New York* opinion, which expressly stated that New York City's claims targeted "lawful commercial activity," and Defendants would need to "cease global production" if they wanted to avoid liability. 993 F.3d at 87, 93 (cleaned up). The United States Court of Appeals for the Second Circuit added that the threat of such liability would "compel" Defendants to develop new pollution control measures, and therefore the City of New York's lawsuit would "regulate cross-border emissions." *Id.* at 93 (cleaned up). This conclusion was important to the ultimate holding that the claims in *City of New York* are preempted by federal law (whether federal common law or the Clean Air Act) (discussed further, below).

D. This court concludes that Plaintiffs' framing of their claims in this case is more accurate. The tort causes of action are well recognized. They are tethered to existing well-known elements including duty, breach of duty, causation, and limits on actual damages caused by the alleged wrongs. As this court understands it, Plaintiffs do not ask for damages for *all* effects of climate change; rather, they seek damages only for the effects of climate change allegedly *caused* by Defendants' breach of Hawai‘i law regarding failures to disclose, failures to warn, and deceptive promotion (without deciding the issue, presumably by applying Hawai‘i's substantial factor test, *see, e.g., Estate of Frey v. Mastroianni*, 146 Hawai‘i 540, 550 (2020)). Plaintiffs do not ask this court to limit, cap, or enjoin the production and sale of fossil fuels. Defendants' liability in this case, if any, results from alleged tortious conduct, and not from lawful conduct in producing and selling fossil fuels.

E. This court concludes that Plaintiffs' claims as pled here were not squarely addressed in *City of New York* given the way that opinion frames those claims. This is especially

true in the opinion's preemption analysis, which did not turn on any allegations that fossil fuel companies concealed or misrepresented the dangers of their products.[2]

4. Preemption.

A. Defendants argue that federal common law "governs" or preempts the claims in this case. The argument is that Plaintiffs seek to regulate out-of-state and international fossil fuel emissions, and therefore interfere with the need for a consistent national response to climate change. Defendants argue in the alternative that if Plaintiffs do not seek actual regulation, then Defendants' activity is *de facto* "regulated" by the threat of a damages award. To apply federal common law here, generally this court needs to answer "yes" to at least three questions: 1) is there a unique federal interest? 2) is there a "significant conflict" in this case between a federal policy or interest and applying state law? 3) do Plaintiffs' claims really seek to regulate out-of-state, national, and international greenhouse gas emissions? The court answers "no" to all three of these questions, as discussed below.

B. Unique federal interest. Federal common law does not apply in cases that fail to raise "uniquely federal interests." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020). This court concludes there is no unique federal interest in the alleged failure to disclose harms in this case, nor in the alleged deceptive promotion. States have a well-established "interest in ensuring the accuracy of commercial information in the marketplace." *Edenfield v. Fane*, 507

[2] The Second Circuit noted generally that fossil fuel companies allegedly "downplayed the risks" of their fossil fuel products (*City of New York*, 993 F.3d at 86-87). But the court's preemption analysis did not analyze a deception claim. Rather, the court's opinion stated that the claims sought "to impose strict liability for the damages caused by fossil fuel emissions no matter where in the world those emissions were released (or who released them)." *Id.* at 93. The deception-based claims asserted by Plaintiffs here were not squarely addressed. *See United States v. Shabani*, 513 U.S. 10, 16 (1994) ("[Q]uestions which merely lurk in the record are not resolved, and no resolution of them may be inferred." (cleaned up)).

U.S. 761, 769 (1993); *see also Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963) (identifying "the protection of consumers" as a traditional state interest); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–42 (2001) (noting that "advertising" is "a field of traditional state regulation" (cleaned up)); *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (underscoring "the long history of state common-law and statutory remedies against monopolies and unfair business practices"). Moreover, under our state-federal system, states have broad authority to protect residents' health, safety, property, and general welfare, and there is a strong presumption against federal preemption. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *see also In re MTBE Products Liability Litigation*, 725 F.3d 65, 96 (2d Cir. 2013) (*MTBE*) (state tort law fell within the state's historic powers to protect health, safety, and property rights, and therefore the presumption against preemption was "particularly strong"). States also have a legitimate interest in combatting the adverse effects of climate change. *Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007); *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018). In other words, any federal interest in the local impacts of climate change is an interest shared with the states – and is not unique to federal law.

C. No "significant conflict." The court also concludes there is no "significant conflict" in this case between a federal policy or interest and the operation of Hawai‘i state law – a second "precondition" for applying federal common law. *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 87 (1994) (quotations omitted). Such a conflict is key to preemption, because federal and state policies and law can co-exist and supplement each other. This court is not aware of any doctrine where federal common law broadly replaces state-law tort claims, *per se*. To the contrary, federal preemption requires a real and significant conflict: e.g., the state-law duty requires Defendants to do something that federal law forbids. *See, e.g.*, *Mutual Pharm. Co. v. Bartlett*, 570

U.S. 472, 480 (2013) (finding preemption where "it was impossible for [defendant] to comply with both its state-law duty to strengthen the warnings on sulindac's label and its federal-law duty not to alter sulindac's label"); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 528 (1992) ("Our preemption analysis requires us to determine whether [the state-law] duty [at issue] is the sort of requirement or prohibition proscribed by [federal law]."). The federal policy or interest must be concrete and specific, and not judicially constructed, and not speculative. *See O'Melveny*, 512 U.S. at 88-89; *Miree v. DeKalb Cty*., 433 U.S. 25, 32-33 (1977). This court concludes there is no federal policy (whether common law or statutory) against timely and accurate disclosure of harms from fossil fuel emissions.

D. No "regulation." Defendants are correct that the claims here involve fossil fuel emissions, and the complexity of global climate change involves matters of federal concern. But at this stage of the litigation, there is no concrete showing that a damages award in this case would somehow regulate emissions. Black's Law Dictionary (11th ed. 2019) defines regulation as "*control* over something *by rule or restriction*," (emphasis added) and gives the example of federal regulation over the airline industry. How would a damages award actually "control" Defendants? Under the limits imposed by a Rule 12(b)(6) motion, how does a trial court make a "regulation" finding, and based on what criteria exactly? The court currently sees nothing in the record that tethers the claim of "regulation" (whether it be of emissions, disclosures, or something else) to a possible award of damages. The federal court opinions cited to this court do not clearly require that any potentially large damages award constitutes "regulation" for purposes of preemption. *See generally Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) (reaffirming that state-court judicial remedies do not "infring[e] on the policy choices of other States" when they are "supported by the [forum] State's interest in

protecting its own consumers and its own economy"). In any event, the damages claims made here focus on failures to disclose, failures to warn, and deceptive marketing. *See, e.g.*, *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW-RT, 2021 WL 531237, at *1 (D. Haw. Feb. 12, 2021) ("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"); *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 467 (4th Cir. 2020) ("[T]he Complaint clearly seeks to challenge the promotion and sale of fossil fuel products without warning and abetted by a sophisticated disinformation campaign"); *Minnesota v. Am. Petroleum Inst*., No. CV 20-1636 (JRT/HB), 2021 WL 1215656, at *10 (D. Minn. March 31, 2021) ("[T]he State's claims are rooted not in the Defendants' fossil fuel production, but in [their] alleged misinformation campaign"). Thus, as pleaded and repeatedly argued by Plaintiffs, this case does not prevent Defendants from producing and selling as much fossil fuels as they are able, as long as Defendants make the disclosures allegedly required, and do not engage in misinformation. The court does not agree that this amounts to control by rule or restriction of Defendants' lawful production and sale of fossil fuels.

E. Common law or statutory preemption? This court struggled with *City of New York*'s apparent reliance on both federal common law and statutory preemption under the Clean Air Act. This issue was discussed in the briefing, including supplemental briefing following the hearing (Dkt. 581 filed 2/9/22; and Dkt. 587 filed 2/17/22). The court agrees with Plaintiffs that the Clean Air Act supplants the federal common law invoked by Defendants, meaning that federal common law cannot govern or preempt Plaintiffs' claims. The Clean Air Act displaced any federal common law relating to greenhouse gas emissions. *See AEP*, 564 U.S. at 423 (holding that the Clean Air Act "displaced" any "federal common-law claim for curtailment of greenhouse gas

emissions"). Federal common law "disappears" once displaced by a federal statute. *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (*Milwaukee II*). Alternatively, as discussed above, even if federal common law still exists on these issues, it does not preempt the state law claims in this case. Although the court concludes the Clean Air Act replaces federal common law, this does not help Defendants. As with the test for federal common law, statutory preemption requires a significant and concrete conflict between a federal policy and the operation of state law. As discussed above, the court sees no such conflict here.

F. States' rights. A broad doctrine that damages awards in tort cases impermissibly regulate conduct and are thereby preempted would intrude on the historic powers of state courts. Such a broad "damages = regulation = preemption" doctrine could preempt many cases common in state court, including much class action litigation, products liability litigation, claims against pharmaceutical companies, and consumer protection litigation.

5. Out-of-state and international activities. Out-of-state and international events do not mean preemption is automatically appropriate. Without the power to hold tortfeasors liable under state law for out-of-state conduct that causes in-state injuries, municipalities such as Honolulu could be hard-pressed to seek redress. *See Young v. Masci*, 289 U.S. 253, 258-59 (1933) ("The cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it."); *Watson v. Emps. Liab. Assur. Corp*., 348 U.S. 66, 72 (1954) ("As a consequence of the modern practice of conducting widespread business activities throughout the entire United States, this Court has in a series of cases held that more states than one may seize hold of local activities which are part of multistate transactions and may regulate to protect interests of its own people, even though other phases of the same transactions might justify regulatory legislation in other states."). There are limits on state law

claims involving out-of-state activity (e.g., choice of law, foreign affairs preemption, due process limits on punitive damages, and due process limits on personal jurisdiction, among others). In fact, Defendants have asked this court to dismiss most of the Defendants for lack of personal jurisdiction/due process concerns. These issues are not part of the instant Rule 12(b)(6) motion, and will be decided by separate order(s). Not among those limitations, however, is a federal common law doctrine that preempts state law claims simply because they involve some out-of-state conduct. *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) (en banc) ("[A] dispute . . . cannot become 'interstate,' in the sense of requiring the application of federal common law, merely because the conflict is not confined within the boundaries of a single state.").

6. HRCP 9(b) & 9(g). Defendants also argue dismissal is warranted for alleged shortcomings under HRCP Rules 9(b) and 9(g). The court disagrees. Hawai'i is a notice-pleading jurisdiction and Plaintiffs are not required to cite every bad act in their operative complaint. Defendants clearly have reasonably particular notice of the misconduct alleged and the remedies sought. (See Plaintiffs' opposition to this motion, Dkt. 375, especially pages 38-45.) To the extent more details can be fleshed out, that is for discovery and standard motions practice.

7. The common law adapts. Defendants argue (and the *City of New York* opinion expresses) that climate change cases are based on "artful pleading." Respectfully, we often see "artful pleading" in the trial courts, where new conduct and new harms often arise:

> The argument that recognizing the tort will result in a vast amount of litigation has accompanied virtually every innovation in the law. Assuming that it is true, that fact is unpersuasive unless the litigation largely will be spurious and harassing. Undoubtedly, when a court recognizes a new cause of action, there will be many cases based on it. Many will be soundly based and the plaintiffs in those cases will have their rights vindicated. In other cases, plaintiffs will abuse the law for some unworthy end, but the possibility of abuse cannot obscure the need to provide an appropriate remedy.

Fergerstrom v. Hawaiian Ocean View Estates, 50 Haw. 374, 377 (1968) (opinion by Levinson, J.) Here, the causes of action may seem new, but in fact are common. They just seem new due to the unprecedented allegations involving causes and effects of fossil fuels and climate change. Common law historically tries to adapt to such new circumstances.

Dated: Honolulu, Hawai‘i March 29, 2022.

/s/ Jeffrey P. Crabtree

JEFFREY P. CRABTREE
JUDGE OF THE ABOVE-ENTITLED COURT

RE: First Circuit Court, State of Hawai‘i

RE: City & County of Honolulu and BWS v. Sunoco, LP, et al;
Civ. No. 1CCV-20-0000380 (JPC)

RE: Ruling on Defendants' Motion to Dismiss for Failure to State a Claim
(motion filed 6/2/21; Dkt. 347)