959137.1
WATANABE ING LLP
MELVYN M. MIYAGI #1624-0
mmiyagi@wik.com
ROSS T. SHINYAMA #8830-0
rshinyama@wik.com
SUMMER H. KAIAWE #9599-0
skaiawe@wik.com
999 Bishop Street, Suite 1250
Honolulu, HI 96813
Telephone: (808) 544-8300
Facsimile: (808) 544-8399

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS, JR., *pro hac vice*
tboutrous@gibsondunn.com
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: 213.229.7000
Facsimile: 213.229.7520

Attorneys for Defendants CHEVRON CORPORATION and CHEVRON U.S.A., INC.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CITY AND COUNTY OF HONOLULU AND HONOLULU BOARD OF WATER SUPPLY, Plaintiffs, v. 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	CIVIL NO. 1CCV-20-0000380 (JPC) (Other Non-Vehicle Tort) **DEFENDANTS' JOINT MOTION TO DISMISS THE FIRST AMENDED COMPLAINT; JOINT MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION; JOINT MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM; NOTICE OF HEARING MOTION AND CERTIFICATE OF SERVICE** Hearing: Date: August 27, 2021 Time: 8:30 AM Judge: Honorable Jeffrey P. Crabtree Trial Date: None

COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; AND DOES 1 through 100, inclusive,

Defendants.

DEFENDANTS' JOINT MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Defendants move to dismiss Plaintiffs' First Amended Complaint, Dkt. 45, with prejudice, on multiple grounds, as follows:

Defendants Sunoco LP, Aloha Petroleum LLC, Exxon Mobil Corporation, ExxonMobil Oil Corporation, Royal Dutch Shell plc, Shell Oil Company, Shell Oil Products Company LLC, Chevron Corporation, Chevron USA Inc., BHP Group Limited, BHP Group plc, BP p.l.c., BP America Inc., Marathon Petroleum Corporation, ConocoPhillips, ConocoPhillips Company, Phillips 66, and Phillips 66 Company move to dismiss the First Amended Complaint 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 aspect of this motion is supported by the attached Joint Memorandum in Support of Defendants' Motion to Dismiss for Lack of Personal Jurisdiction, any supplemental briefs filed by one or more defendants, the entire record and files in this case, and all evidence and arguments that may be presented at the hearing of this motion. On these grounds, the First Amended Complaint should be dismissed with prejudice against the moving defendants because no amendment can overcome the lack of personal jurisdiction.

All Defendants also move to dismiss Plaintiffs' First Amended Complaint for failure to state a claim pursuant to Rules 7, 9, and 12(b)(6) 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 aspect of Defendants' motion is supported by the attached Joint Memorandum in Support of Defendants' Motion to Dismiss for

Failure to State a Claim,[1] the entire record and files in this case, and evidence or arguments as may be presented at the hearing of this motion. On these grounds, the First Amended Complaint should be dismissed, in its entirety, with prejudice because no amendment can cure Plaintiffs' inability to state any viable claim.[2]

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

/s/ Melvyn M. Miyagi
Melvyn M. Miyagi
Ross T. Shinyama
Summer M. Kaiawe
WATANABE ING LLP

Theodore J. Boutrous, Jr., *pro hac vice*
Andrea E. Neuman, *pro hac vice*
GIBSON, DUNN & CRUTCHER LLP

Erica W. Harris, *pro hac vice*
SUSMAN GODFREY LLP

Attorneys for Defendants Chevron Corporation and Chevron U.S.A. Inc.

/s/ Lisa Woods Munger
Lisa Woods Munger
Lisa A. Bail
David J. Hoftiezer
GOODSILL ANDERSON QUINN & STIFEL LLP

[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, one in support of Defendants' argument that the First Amended Complaint should be dismissed for failure to state a claim and the other in support of certain Defendants' argument that the First Amended Complaint should be dismissed for lack of personal jurisdiction, each memorandum not to exceed 45 pages).

[2] If Plaintiffs are given leave to amend, they must plead with particularity, as explained in the attached memorandum.

Matthew T. Heartney, *pro hac vice*
Jonathan W. Hughes, *pro hac vice*
John D. Lombardo, *pro hac vice*
ARNOLD & PORTER KAYE SCHOLER LLP

Attorneys for Defendants BP p.l.c. and BP America Inc.

/s/ Paul Alston
Paul Alston
Claire Wong Black
Glenn T. Melchinger
John-Anderson L. Meyer
DENTONS US LLP

Theodore V. Wells, Jr., *pro hac vice*
Daniel Toal, *pro hac vice*
Yahonnes Cleary, *pro hac vice*
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

Attorneys for Defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation

/s/ Margery S. Bronster
Margery S. Bronster
Lanson K. Kupau
BRONSTER FUJICHAKU ROBBINS

Victor L. Hou, *pro hac vice*
Boaz S. Morag, *pro hac vice*
CLEARY GOTTLIEB STEEN & HAMILTON LLP

Attorneys for Defendants BHP Group Limited, BHP Group plc, and BHP Hawaii Inc.

/s/ Joachim P. Cox
Joachim P. Cox
Randall C. Whattoff
COX FRICKE LLP

David C. Frederick, *pro hac vice*
James M. Webster, III, *pro hac vice*
Daniel S. Severson, *pro hac vice*
KELLOGG HANSEN TODD FIGEL & FREDERICK PLLC

Attorneys for Defendants Royal Dutch Shell plc, Shell Oil Company, and Shell Oil Products Company LLC

/s/ Crystal K. Rose
Crystal K. Rose
Adrian L. Lavarias
David A. Morris
BAYS, LUNG, ROSE & VOSS

Sean C. Grimsley, *pro hac vice*
Jameson R. Jones, *pro hac vice*
Daniel R. Brody, *pro hac vice*
BARTLIT BECK LLP

Steven M. Bauer, *pro hac vice*
Margaret A. Tough, *pro hac vice*
Katharine A. Rouse, *pro hac vice*
LATHAM & WATKINS, LLP

Attorneys for Defendants ConocoPhillips and ConocoPhillips Company

/s/ Crystal K. Rose
Crystal K. Rose
Adrian L. Lavarias
David A. Morris
BAYS, LUNG, ROSE & VOSS

Steven M. Bauer, *pro hac vice*
Margaret A. Tough, *pro hac vice*
Katharine A. Rouse, *pro hac vice*
LATHAM & WATKINS, LLP

Attorneys for Defendants Phillips 66, and Phillips 66 Company

/s/ C. Michael Heihre
C. Michael Heihre
Michi Momose
CADES SCHUTTE

J. Scott Janoe, *pro hac vice*
Megan Berge, *pro hac vice*
Sterling Marchand, *pro hac vice*
BAKER BOTTS LLP

Attorneys for Defendants Sunoco LP, Aloha Petroleum, Ltd., and Aloha Petroleum LLC

/s/ Ted N. Pettit
Ted N. Pettit
CASE LOMBARDI & PETTIT

Shannon S. Broome, *pro hac vice*
Shawn Patrick Regan, *pro hac vice*
Ann Marie Mortimer, *pro hac vice*
HUNTON ANDREWS KURTH LLP

Attorneys for Defendant Marathon Petroleum Corp.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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

Plaintiffs,

v.

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)

JOINT MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

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JOINT MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Defendants Sunoco LP, Aloha Petroleum LLC, Exxon Mobil Corporation, ExxonMobil Oil Corporation, Royal Dutch Shell plc, Shell Oil Company, Shell Oil Products Company LLC, Chevron Corporation, Chevron USA Inc., BHP Group Limited, BHP Group plc, BP p.l.c., BP America Inc., Marathon Petroleum Corporation, ConocoPhillips, ConocoPhillips Company, Phillips 66, and Phillips 66 Company (collectively, the "Defendants"),[1] by their undersigned attorneys and pursuant to Rules 7 and 12(b)(2) of the Hawai'i Rules of Civil Procedure and Rules 3, 7, and 7.1 of the Rules of the Circuit Courts of the State of Hawai'i, hereby submit this Joint Memorandum in Support of their Motion to Dismiss for Lack of Personal Jurisdiction. As set forth below, this Court does not have personal jurisdiction over these out-of-state Defendants, and Plaintiffs' claims against these Defendants should be dismissed with prejudice in their entirety.

I. INTRODUCTION

Plaintiffs, the City and County of Honolulu and the Honolulu Board of Water Supply, seek to hold 18 out-of-state Defendants liable for global climate change, including "global atmospheric and ocean warming, ocean acidification, melting polar ice caps and glaciers, more extreme and volatile weather, drought, and sea level rise." First Amended Complaint ("Complaint") ¶ 2, Dkt. 45. According to Plaintiffs, Hawai'i law permits them to seek damages and equitable relief from this select group of Defendants for harms allegedly resulting from over a century of energy consumption and climatic events around the world. The Complaint suffers from numerous fatal defects, including those addressed in Defendants' Joint Memorandum in Support of their Motion

[1] The majority of defendants (18 of 20) challenge this Court's personal jurisdiction over them. The two defendants that do not challenge personal jurisdiction are incorporated in Hawai'i. For ease of reference, the term "Defendants" is used throughout this Memorandum to refer to the 18 defendants challenging jurisdiction.

to Dismiss for Failure to State a Claim. This Motion focuses on one particular defect of Plaintiffs' Complaint: Defendants are not subject to personal jurisdiction for these claims in Hawai'i.

As an initial matter, this Court lacks general jurisdiction over Defendants because they are not incorporated or headquartered in Hawai'i, and thus none of them is "at home" in this forum. *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014). The Complaint does not allege otherwise.

In addition, this Court lacks specific personal jurisdiction over each of the Defendants for three separate reasons, each of which independently requires dismissal.

First, based on Plaintiffs' own allegations, Plaintiffs' claims do not "arise out of or relate to" Defendants' alleged contacts with Hawai'i. *See Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1025 (2021). To the contrary, Plaintiffs' claimed injuries are "*all due* to anthropogenic global warming," Compl. ¶ 10 (emphasis added), caused by the "increase in atmospheric CO_2 and other greenhouse gasses [sic]" from the worldwide combustion of oil and gas over the past century, *id.* ¶ 4. Plaintiffs allege that Defendants have "engaged in a coordinated, multi-front effort to conceal and deny their own knowledge of those threats" of climate change and contend that Defendants are responsible for global climate change and the past and future injuries Plaintiffs may suffer as a result because the "unrestricted production and use of fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate." *Id.* ¶ 1. But even accepting all of Plaintiffs' factual allegations as true for the purposes of this Motion, regardless of how much oil and gas Defendants are alleged to have refined or sold in Hawai'i, or how much marketing or advertising purportedly was directed at Hawai'i, Plaintiffs' alleged injuries suffered as a result of *global* climate change cannot legally, or logically, be said to "arise out of or relate to" those alleged *in-state activities*. Critically, the Complaint does not allege that Defendants' *in-state* conduct is directly or substantially related to *global* climate change. Nor

could it. In fact, total energy consumption in Hawai'i—of which at most a portion can be attributed to any individual Defendant—accounts for a tiny fraction of worldwide greenhouse gas emissions. Thus, the purported injuries are "merely incidental" to Defendants' conduct in Hawai'i, which is insufficient to confer specific personal jurisdiction. *See Shaw v. N. Am. Title Co.*, 76 Hawai'i 323, 328 (1994).

The United States Supreme Court recently stressed that the "arise out of or relate to" requirement has "real limits" and "does not mean anything goes." *Ford Motor*, 141 S. Ct. at 1026 (internal quotation marks omitted). If specific jurisdiction could be stretched to apply to Defendants under Plaintiffs' sweeping theory, every global business that allegedly contributes to climate change could be sued in virtually every forum. Because such an approach is inconsistent with United States and Hawai'i Supreme Court precedents, it should be rejected.

Second, Defendants did not have "clear notice," as due process requires, that by producing, promoting, or selling oil and gas in Hawai'i, they would become subject to jurisdiction in this forum for claims for injuries allegedly resulting, not from local consumption, but instead from the cumulative worldwide consumption of Defendants' products. *Ford Motor*, 141 S. Ct. at 1025. There are billions of contributors to greenhouse gas emissions across the world (including Plaintiffs themselves). *City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d 1017, 1026 (N.D. Cal. 2018) ("*Oakland I*") ("Everyone has contributed to the problem of global warming and everyone will suffer the consequences—the classic scenario for a legislative or international solution."), *vacated on other grounds*, 960 F.3d 570 (9th Cir. 2020). In fact, Plaintiffs concede that "it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere attributable to anthropogenic sources because such greenhouse gas molecules do not bear markers that permit tracing them to their source, and because greenhouse gasses [sic] quickly diffuse and comingle in

the atmosphere." *See, e.g.*, Compl. ¶ 171. Given the lack of any discernible link between emissions in Hawai'i attributable to Defendants' alleged in-state contacts and any local impacts of global climate change, Defendants had no way to anticipate—let alone have "clear notice"—that, taking Plaintiffs' allegations as true, producing, promoting, and selling oil and gas in Hawai'i, much less maintaining an interactive website or offering a proprietary credit card, might subject them to suit here for all the alleged past and future harms from global climate change that result from the undifferentiated conduct of countless individuals and entities that sold and consumed fossil fuel products around the world. Due process does not countenance such an unbounded exercise of jurisdiction.

Third, the exercise of specific personal jurisdiction over Defendants would be unreasonable under the Due Process Clause. *See In Interest of Doe*, 83 Hawai'i 367, 374 (1996). Litigating this case in Hawai'i state court would contravene "the interstate judicial system's interest in obtaining the most efficient resolution of controversies" because Plaintiffs' claims implicate *global* conduct and are not localized to Hawai'i. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). And it would threaten the "interest of the several States in furthering fundamental substantive social policies" because, among other things, many states and the federal government promote the very energy production and policies that Plaintiffs seek to penalize through this lawsuit. *Id.* Moreover, it would impermissibly require nonresident Defendants to submit to the "coercive power" of an out-of-state tribunal with respect to conduct unconnected with the forum, leaving their national and even worldwide conduct subject to conflicting state rules. *See Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cnty.*, 137 S. Ct. 1773, 1780 (2017).

Because the factual allegations in Plaintiffs' Complaint, even accepted as true, do not provide a basis for exercising personal jurisdiction that comports with the Due Process Clause, and

no amendment can remedy the inherent flaws in Plaintiffs' jurisdictional theory, the Court should dismiss all claims against Defendants with prejudice.[2]

II. BACKGROUND AND PLAINTIFFS' ALLEGATIONS

Plaintiffs allege an attenuated causal chain between Defendants' allegedly tortious acts and Plaintiffs' purported injuries from global climate change. Among the links in Plaintiffs' causal chain are the decisions of countless third parties around the world to purchase, sell, refine, transport, and ultimately combust (i.e., use) Defendants' petroleum products. That combustion, in turn, may release greenhouse gas emissions (depending on the manner of the combustion and depending on whether the third party uses emissions-capturing technology). Compl. ¶ 88 (alleging that "normal *use* of Defendants' fossil fuel products" results in emission of anthropogenic greenhouse gases (emphasis added)). Those emissions—in addition to emissions originating from other sources—then increase the total amount of greenhouse gases in the global atmosphere. *Id.* ¶ 4. That change in atmospheric composition causes the atmosphere to trap heat, which increases global temperature, which, in turn, is alleged to raise global sea levels, among other things. *Id.* ¶¶ 34–41. Plaintiffs contend that their injuries flow from rising sea levels, as well as from other alleged effects of climate change. *Id.* ¶¶ 148–54.

Plaintiffs' Complaint contains very few allegations about any Defendant's *forum-related* conduct. Instead, Plaintiffs rely on vague, boilerplate allegations that constitute nothing more than legal conclusions with respect to each alleged "family" of corporations—that "a substantial portion

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[2] This Joint Memorandum argues that the broad assertion of personal jurisdiction by Plaintiffs fails on grounds common to all these Defendants. Pursuant to the parties' joint stipulation entered by the Court on May 4, 2021, Defendants BHP Group Limited, BHP Group plc, Exxon Mobil Corporation, and ExxonMobil Oil Corporation join this brief but have also filed separate briefs to address company-specific allegations. Individual defendants may have additional defenses to Plaintiffs' claims based on personal jurisdiction and the merits, and joinder in this Memorandum does not waive any of them.

of [its] fossil fuel products are or have been transported, traded, distributed, promoted, marketed, manufactured, sold, and/or consumed in Hawai'i, from which . . . [it] derived substantial revenue," and that "[it] has and continues to tortiously distribute, market, advertise, and promote its products in Hawai'i, with knowledge that those products have caused and will continue to cause climate crisis-related injuries in Hawai'i." *See* Compl. ¶¶ 20(h), 21(h), 22(h), 23(h), 24(h), 25(g), 26(g), 27(i).[3]

The Complaint's remaining jurisdictional allegations are equally insufficient to establish that Defendants are subject to jurisdiction in Hawai'i. Plaintiffs allege that some Defendants owned or operated storage or distribution facilities or refineries in Hawai'i, *id.* ¶¶ 23(h), 24(h); marketed fossil fuel products in Hawai'i through branded service stations, *id.* ¶¶ 21(h), 23(h), 24(h); maintained websites and smartphone applications accessible in Hawai'i and offered credit cards available to Hawai'i residents, *id.* ¶¶ 20(h), 22(h), 23(h), 25(g), 27(i); and are registered to do business and have registered agents in Hawai'i, *id.* ¶¶ 21(e), 22(e)-(f), 23(f), 25(e). But, critically, the Complaint does not allege that these activities in Hawai'i—individually or even collectively—were substantially connected to bringing about the global climate events that Plaintiffs allege caused their injuries.

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[3] The Complaint improperly conflates the activities of Defendants with the activities of their separately organized predecessors, subsidiaries, or affiliates. There is no factual basis alleged in the Complaint for imputing to any Defendant the alleged jurisdictional contacts of any other entity. And Defendants deny that their subsidiaries' fossil-fuel operations can be imputed to them for jurisdictional purposes. Nevertheless, Defendants assume *arguendo* Plaintiffs' (erroneous) imputation of forum-related contacts for the purpose of this Joint Motion. Even with this assumption, however, Plaintiffs' allegations provide an insufficient basis for personal jurisdiction. Defendants reserve all rights to challenge Plaintiffs' incorrect imputation theory and allegations about corporate relationships for any other purpose or proceeding.

III. LEGAL STANDARD

"[W]hether personal jurisdiction exists over an out-of-state defendant involves two inquiries: whether a forum state's long-arm statute permits service of process, and whether the assertion of personal jurisdiction would violate due process." *Haw. Airboards, LLC v. Nw. River Supplies, Inc.*, 887 F. Supp. 2d 1068, 1070 (D. Haw. 2012) (internal quotation marks omitted);[4] *see also Norris v. Six Flags Theme Parks, Inc.*, 102 Hawai'i 203, 207 (2003) ("Personal jurisdiction exists when (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."). "Because Hawaii's long-arm statute is co-extensive with federal due process requirements, the jurisdictional analyses under Hawaii law and federal law merge into one analysis." *Haw. Airboards*, 887 F. Supp. 2d at 1070; *see* Haw. Rev. Stat. § 634-35 (expanding the jurisdiction of Hawai'i courts to the extent permitted by the Due Process Clause of the Fourteenth Amendment).

In applying the Due Process Clause, courts have recognized two types of personal jurisdiction: general and specific. *Bristol-Myers Squibb*, 137 S. Ct. at 1779–80; *see also Hart v. Hart*, 110 Hawai'i 294, 298 (App. Mar. 3, 2006). General jurisdiction allows a court to adjudicate any claim against a defendant, regardless of the connection between the claim and the forum, so long as the defendant is "at home" in that forum. *Bristol-Myers Squibb*, 137 S. Ct. at 1779–80 (internal quotation marks omitted). Specific jurisdiction applies "only as to a narrower class of claims"—these claims "must arise out of or relate to the defendant's contacts" with the forum. *Ford Motor*, 141 S. Ct. at 1025 (internal quotation marks omitted).

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[4] Hawai'i courts regularly look to federal court decisions regarding personal jurisdiction as persuasive authority. *See In Interest of Doe*, 83 Hawai'i at 374; *Kawananakoa v. Marignoli*, 148 Hawai'i 278, 2020 WL 5814399, at *2–3 (App. Sept. 30, 2020) (SDO).

When a defendant moves to dismiss a complaint for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that jurisdiction is appropriate. *Victory Carriers, Inc. v. Hawkins*, 44 Haw. 250, 259 (1960). To carry that burden, Plaintiffs must allege facts sufficient to make out a "*prima facie*" case for personal jurisdiction. *Kawananakoa*, 2020 WL 5814399, *2. Further, Plaintiffs must establish personal jurisdiction over *each* defendant with respect to *each* claim. *Cisneros v. Trans Union, L.L.C.*, 293 F. Supp. 2d 1156, 1161 (D. Haw. 2003).

IV. ARGUMENT

Plaintiffs do not, and cannot, allege facts that support this Court's exercise of personal jurisdiction over Defendants for the claims asserted in the Complaint. There is no general jurisdiction over Defendants because none of them is "at home" in Hawai'i. Nor is there specific jurisdiction because (1) the Complaint avers, as it must, that Plaintiffs' alleged injuries arise out of and relate to *worldwide* conduct by countless actors, not Defendants' alleged contacts with Hawai'i; (2) Defendants did not have "clear notice" that as a result of their activities in Hawai'i they could be sued here for activity occurring around the world; and (3) exercising jurisdiction would be constitutionally unreasonable.

A. Defendants Are Not Subject to General Jurisdiction in Hawai'i.

Plaintiffs have not attempted to allege that Defendants are subject to general jurisdiction in Hawai'i. Plaintiffs concede that none of the Defendants is incorporated or headquartered in Hawai'i. Compl. ¶¶ 20(a), 20(f), 21(a), 21(f), 22(a), 22(f), 22(g), 23(a), 23(g), 24(a), 25(a), 25(f), 26(a), 27(a), 27(e), 27(f), 27(g). None of the Defendants is "at home" in this state. *Daimler*, 571 U.S. at 139 (citation omitted); *Yamashita v. LG Chem, Ltd.*, 2020 WL 4431666, at *7 (D. Haw. Jul. 31, 2020) (applying *Daimler* and holding that defendants were not "at home" in Hawai'i). And Defendants' business activities in Hawai'i do not create general jurisdiction because it "would be 'unacceptably grasping' to approve the exercise of general jurisdiction wherever a corporation

'engages in a substantial, continuous, and systematic course of business.'" *Hartford Mut. Ins. Co. v. Hoverzon, LLC*, 2021 WL 461760, at *2 (D. Md. Feb. 9, 2021) (quoting *Daimler*, 571 U.S. at 138). Therefore, the Court lacks general jurisdiction over Defendants in Hawai'i.

B. Defendants Are Not Subject to Specific Jurisdiction in Hawai'i.

Because none of the Defendants is subject to general jurisdiction in Hawai'i, Plaintiffs may proceed against Defendants in this forum only if they can establish specific jurisdiction over *each* Defendant, which they have not done, and cannot do. *See Cisneros*, 293 F. Supp. 2d at 1161. Specific jurisdiction exists only if: (1) the defendant purposefully availed itself of the privilege of conducting activities in the State; (2) the plaintiff's claims arise out of or relate to those activities directed at the State; ***and*** (3) the exercise of personal jurisdiction would be constitutionally reasonable. *In Interest of Doe*, 83 Hawai'i at 374. These jurisdictional restrictions "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States"; and a State's exercise of sovereign power "implie[s] a limitation on the sovereignty" of other States and even foreign nations. *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (alteration in original) (internal quotation marks omitted). Thus, "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *Id.* at 1780–81 (alteration in original) (quoting *World-Wide Volkswagen*, 444 U.S. at 294).

Here, Plaintiffs fail to allege a *prima facie* case of specific jurisdiction because, with respect to each Defendant, the Complaint, on its face, flunks the second and third requirements for specific jurisdiction—the claims asserted in the Complaint do not arise from or relate to

Defendants' alleged contacts with Hawai'i, and exercising personal jurisdiction in this case would be constitutionally unreasonable.[5]

1. Plaintiffs' Claims Do Not Arise Out of or Relate to Defendants' Alleged Contacts with Hawai'i.

Plaintiffs cannot establish specific jurisdiction over Defendants because the Complaint does not allege claims that "arise out of or relate to" Defendants' alleged forum contacts. *Ford Motor*, 141 S. Ct. at 1025 (quoting *Bristol-Myers Squibb*, 137 S. Ct. at 1780); *In Interest of Doe*, 83 Hawai'i at 374.

While claims based on general jurisdiction "may concern events and conduct anywhere in the world," "[s]pecific jurisdiction is different: It covers defendants less intimately connected with a State, but only as to *a narrower class of claims*." *Ford Motor*, 141 S. Ct. at 1024 (emphasis added). For there to be specific jurisdiction, "[t]he plaintiff's claims . . . 'must arise out of or relate to the defendant's contacts' with the forum." *Id.* at 1025 (quoting *Bristol-Myers Squibb*, 137 S. Ct. at 1780). "When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Bristol-Myers Squibb*, 137 S. Ct. at 1781. And "the phrase 'relate to' incorporates real limits." *Ford Motor*, 141 S. Ct. at 1026.

Consistent with the Supreme Court's approach, the Hawai'i Supreme Court has held that Defendants' forum contacts cannot be "*merely incidental*" to the cause of action. *Shaw*, 76 Hawai'i at 328 (emphasis added) (interpreting "related to" in the context of Hawai'i's long-arm statute). In *Shaw*, plaintiff sued the defendant, a California title company retained to provide

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[5] Because this Motion can be resolved based on Plaintiffs' failure to establish that their injuries arise from or relate to Defendants' alleged contacts with Hawai'i, or that exercising personal jurisdiction over Defendants would be reasonable, in deciding this Motion the Court need not consider whether Defendants are alleged to have purposefully availed themselves of the privilege of conducting business in Hawai'i. While not contesting the purposeful availment prong on this Motion, Defendants do not concede that prong is satisfied here, and reserve all rights to challenge purposeful availment at a later stage of this proceeding if necessary.

escrow services and title insurance for refinancing property located in California, after the defendant issued invalid checks to plaintiff and later reissued checks directly to plaintiff's creditors. *Id.* In analyzing personal jurisdiction under the Hawai'i long-arm statute, which "requires that the cause of action relate to the defendant's contacts in Hawaii," the court held that the defendant's forum contacts—including escrow documents, fax transmissions, telephone calls, and checks sent to Hawai'i—were "merely incidental" to the transaction that created the cause of action and were therefore insufficiently "related to" the action. *Id.*

Other courts have similarly held that the "relate to" requirement mandates that a defendant's in-state activities have a *direct*, *material*, or *substantial* connection with the plaintiff's claims—otherwise, this requirement would lose all meaning. *See, e.g.*, *Phillips v. Prairie Eye Ctr.*, 530 F.3d 22, 27 (1st Cir. 2008) ("There must be *more than just an attenuated connection* between the contacts and the claim, the defendant's in-state conduct must form an *important*, or [at least] *material*, element of proof in the plaintiff's case.") (emphases added) (internal quotation marks omitted); *CSR, Ltd. v. Taylor*, 983 A.2d 492, 503 (Md. 2009) (requiring that a cause of action be "*directly related* to[] the defendant's contacts with the forum state") (emphasis added); *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 585 (Tex. 2007) ("[T]here must be a *substantial connection* between [the forum] contacts and the operative facts of the litigation.") (emphasis added); *Keefe* v. *Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1270–71 (Colo. 2002) (using "substantial connection" language and requiring foreseeability). The Second Circuit goes further and requires that the "nucleus" or "focal point" of the plaintiff's claims must be the forum state. *See Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 340 (2d Cir. 2016); *see also Sullivan v. Barclays PLC*, 2017 WL 685570, at *44 (S.D.N.Y. Feb. 21, 2017) (rejecting personal jurisdiction where operative facts did not have "'nucleus' or 'focal point'" in the forum). In short,

at a minimum, there must be a "strong 'relationship among the defendant, the forum, and the litigation'" in order for an exercise of personal jurisdiction to be constitutionally appropriate. *Ford Motor Co.*, 141 S. Ct. at 1028 (quoting *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414 (1984)).

Plaintiffs do not and cannot plead that Defendants' contacts with Hawai'i are anything more than "merely incidental" to claims based on *global* climate change. Plaintiffs' claims "depend on a global complex of geophysical cause and effect involving all nations of the planet." *City of Oakland v. BP p.l.c.*, 2018 WL 3609055, at *3 (N.D. Cal. Jul. 27, 2018) ("*Oakland II*"). In affirming dismissal of a materially similar climate change tort suit brought by the City of New York, the Second Circuit rejected the City's efforts to portray its claims as merely seeking remedies for local harms under state law, concluding that "[a]rtful pleading cannot transform [plaintiff's] complaint into anything other than a suit over *global* greenhouse gas emissions," with the goal being "to effectively 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)." *City of New York v. Chevron Corp.*, 993 F.3d 81, 91, 93 (2d Cir. 2021) (emphasis added).

Plaintiffs' Complaint asserts that the alleged injuries occurred or will occur only as a result of total, cumulative, worldwide greenhouse gas emissions from global combustion of fossil fuels produced and sold by Defendants as well as countless other sources. *See* Compl. ¶¶ 2, 40. In fact, Plaintiffs allege that their injuries are "***all due*** to anthropogenic global warming," *id.* ¶ 10 (emphasis added), caused by the "increase in atmospheric CO_2 and other greenhouse gasses [sic]" from the worldwide combustion of oil and gas over the past century, *id.* ¶ 4.

Plaintiffs have not articulated any theory demonstrating Defendants' alleged in-state activities are related to the increase in greenhouse gases that is alleged to cause climate change.

See Fidrych v. Marriott Int'l, Inc., 952 F.3d 124, 143 (4th Cir. 2020). To the contrary, such in-state activities are at most "merely incidental." *Shaw*, 76 Hawai'i at 328. That is because the Complaint's averments about service stations and facilities, websites, and credit cards in Hawai'i cannot erase the fact that *total* energy consumption in Hawai'i, with a population of fewer than 2 million people, indisputably accounts for a mere fraction of energy consumption in the United States and around the world. Greenhouse gas emissions resulting from the combustion of products Defendants produce, sell, or promote in Hawai'i thus make up, at most, a miniscule amount of the global greenhouse gas emissions that contribute to climate change, and, ultimately, Plaintiffs' alleged injury. Given the innumerable other worldwide contributors to climate change, Plaintiffs' vague assertions and legal conclusions merely reciting the elements of their claim cannot suffice to show that Defendants' Hawai'i contacts are more than "incidental" to their claims. *See Shaw*, 76 Hawai'i at 328; *see also Moki Mac River Expeditions*, 221 S.W.3d at 585 (no personal jurisdiction where defendants' in-state contacts were not the subject matter of the case and there was not a "sufficiently direct" connection between the forum and the operative facts).

The alleged effects of global climate change in Hawai'i also cannot be found to "arise from or relate to" Defendants' contacts with Hawai'i because, as other courts have recognized, "the undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time" mean that "there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 880 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). The Hawai'i Supreme Court similarly holds that "it is commonly understood that '[a]ir pollution is transient' and is 'heedless' of even 'state boundaries.'" *In re Application of Maui Elec. Co.*, 141 Hawai'i

249, 268 (2017). In other words, "it is not plausible to state which emissions—emitted by whom and at what time in the last several centuries *and at what place in the world*—'caused' Plaintiff[s'] alleged global warming related injuries." *Native Vill. of Kivalina*, 663 F. Supp. 2d at 881 (emphasis added). And, as Plaintiffs concede, "it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere attributable to anthropogenic sources because such greenhouse gas molecules do not bear markers that permit tracing them to their source, and because greenhouse gasses [sic] quickly diffuse and comingle in the atmosphere." *See, e.g.*, Compl. ¶ 171.

It is no answer for Plaintiffs to assert that their claims arise from Defendants' Hawai'i contacts on the theory that the "effects" of Defendants' out-of-state activities are foreseeably being felt, or will be felt, in Hawai'i. As the Supreme Court has repeatedly explained, "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause," even when it "was 'foreseeable' that the [product] would cause injury in" the forum state. *World-Wide Volkswagen*, 444 U.S. at 295; *Walden v. Fiore*, 571 U.S. 277, 290 (2014) ("[M]ere injury to a forum resident" is insufficient.); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (The "foreseeability of causing *injury* in another State . . . is not a 'sufficient benchmark' for exercising personal jurisdiction."); *Kailieha v. Hayes*, 56 Haw. 306, 312 (1975) ("Mere foreseeability of injury was not sufficient to establish the minimum contact necessary to satisfy the requirements of due process.").

Nor can Plaintiffs establish jurisdiction by characterizing their theory as premised exclusively on Defendants' purported deceptive conduct. *See, e.g.*, Plaintiff's Reply in Support of Motion to Remand at 13, *City and County of Honolulu v. Sunoco LP*, No. 1:20-cv-00163 (D. Haw. Oct. 30, 2020), ECF No. 121 (stating that the "the tortious conduct" at issue here is "Defendants'

campaign of deception and misleading promotion"). Regardless of how Plaintiffs characterize their claims, this case is undeniably about global greenhouse gas emissions, which are the mechanism of Plaintiffs' alleged injuries. *See City of New York*, 993 F.3d at 91, 93. The Complaint contains no non-conclusory factual allegations about misrepresentations or wrongful promotion by Defendants in or directed at Hawai'i. Indeed, the Complaint does not identify a single allegedly misleading publication or report that actually targeted Hawai'i. And, in any event, the Complaint fails to allege that any such deceptive conduct in Hawai'i could be anything more than incidental to Plaintiffs' purported climate change injuries.

The Supreme Court's recent decision in *Ford Motor* confirms there is no specific personal jurisdiction over Defendants for these claims. In *Ford Motor*, two individual consumers sued an automobile manufacturer in Montana and Minnesota state courts, asserting product liability claims stemming from allegedly defective automobiles that were manufactured and sold initially out of state but that caused accidents in the forum states. The Supreme Court held that the plaintiffs' product liability claims were sufficiently related to Ford's activities of selling, promoting, and servicing in the forum states the very same type of automobile that injured the plaintiffs in the forum states. *Ford Motor*, 141 S. Ct. at 1032. *Ford Motor* concluded that the "relate to" requirement "incorporates real limits" and "does not mean anything goes," but it is satisfied where "a company . . . [1] serves a market for a product in the forum State and [2] the product *malfunctions there*" "[3] *caus[ing] injury in the State* to one of its residents." *Id.* at 1022, 1026–27 (emphasis added).

Unlike in *Ford Motor*, Plaintiffs' alleged injuries in this matter are caused by a complex geophysical *global* phenomenon, which Plaintiffs allege is caused by all energy consumption and emissions across the world occurring over decades—not by any malfunction (or ordinary use) of

Defendants' products within Hawai'i. Put differently, this is not a case, like *Ford Motor*, where products that Defendants manufactured, marketed, or sold in Hawai'i "cause[d] injury in the State to one of its residents," since those activities simply would not have resulted in or meaningfully contributed to climate change or Plaintiffs' alleged injuries.

Having failed to allege that their claims "arise out of or relate to" Defendants' alleged contacts with Hawai'i, Plaintiffs have not established a *prima facie* case of specific personal jurisdiction, and their claims therefore should be dismissed.

2. Defendants Are Not on "Clear Notice" that Personal Jurisdiction Would Exist in Hawai'i for Suits Based on Global Climate Change.

In *Ford Motor*, the Supreme Court also held that the "fair[ness]" requirement of the Due Process Clause requires a defendant have "clear notice" that, in light of its activities in the forum, it is susceptible to a lawsuit in the State for the claims asserted by the plaintiff. *Id.* at 1025, 1030. Unlike in *Ford Motor*, where the Court found Ford had clear notice of potential lawsuits for harms caused by "product malfunctions" within the state, *id.* at 1027, the "clear notice" requirement is not met here.

Plaintiffs here did not suffer injury from a product malfunction in the forum state. Plaintiffs here do not allege—nor could they—that the use of Defendants' products in Hawai'i, or Defendants' promotion of those products in Hawai'i, gave rise to global climate change and thus to Plaintiffs' alleged injuries. To the contrary, Plaintiffs' theory is predicated upon extra-forum, *worldwide* conduct by Defendants and countless others. Even accepting all of Plaintiffs' allegations as true, Defendants did not have "clear notice" that they would become subject to jurisdiction in the State's courts for the alleged local effects of decades-long global climate change—a complex worldwide phenomenon resulting from the cumulative effects of global greenhouse gas emissions by countless individuals and entities (including Plaintiffs themselves).

Plaintiffs' attempt at "[a]rtful pleading" does not change the fact that this case is about *global* climate change. *City of New York*, 993 F.3d at 91, 93. Such claims inherently concern transboundary and global conduct, thus amounting to "an extraterritorial nuisance action." *Id.* at 91–92, 103.

Defendants had no way to anticipate that, by allegedly processing, marketing, and/or selling fossil fuel products in Hawai'i, they could be sued for alleged local environmental injuries resulting from the undifferentiated conduct of countless individuals and entities who consumed fossil fuel products around the world. This case is thus far afield from *Ford Motor*, where Ford should reasonably have expected to be sued for in-forum injuries resulting directly from in-forum use of specific products it sold widely in the forum states. Exercising personal jurisdiction over Defendants in this case would deprive Defendants of the "fair warning" that "a particular activity may subject [them] to the jurisdiction of a foreign sovereign," and thus would not comport with core principles of due process. *Burger King*, 471 U.S. at 472 (internal quotation marks omitted) (alteration in original); *see also In Interest of Doe*, 83 Hawai'i at 373. Such an unbounded exercise of jurisdiction exceeds the limits of due process.[6]

3. Exercising Personal Jurisdiction Over Defendants Would Be Unreasonable And Conflict With Federalism Principles.

Because Plaintiffs have not alleged, and cannot allege, facts that, if true, would show that their claims arise from or relate to Defendants' contacts with Hawai'i, the Court need not reach the reasonableness inquiry. Nonetheless, the unreasonableness of exercising jurisdiction here

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[6] The Supreme Court acknowledged in *Ford Motor* that that case's jurisdictional analysis does not necessarily apply in other settings. *See* 141 S. Ct. at 1028 n.4. For example, internet transactions "raise doctrinal questions of their own" and may require a more tailored approach. *Id.* So too here. Exercising specific jurisdiction in this novel context would exceed the bounds of due process recognized by the Court in *Ford Motor* and many other cases.

provides an additional reason to dismiss the Complaint. *See Bristol-Myers Squibb*, 137 S. Ct. at 1786 ("[T]he exercise of jurisdiction must be reasonable under the circumstances.").

In determining whether jurisdiction is reasonable under the Due Process Clause, courts consider "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Burger King*, 471 U.S. at 477 (quoting *Worldwide Volkswagen*, 444 U.S. at 292). The primary concern in assessing the reasonableness of personal jurisdiction is the burden of "submitting to the coercive power" of a court in light of the limits of interstate federalism on a court's ability to exercise jurisdiction. *Bristol-Myers Squibb*, 137 S. Ct. at 1780. *Id.* "[R]estrictions on personal jurisdiction 'are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.'" *Id.* at 1780 (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)). Indeed, the Supreme Court has admonished courts to take into consideration the interests of the "several States," and emphasized that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 115 (1987) (internal quotation marks omitted). A majority of the relevant considerations weigh decisively against the exercise of personal jurisdiction in this case.

First, exercising specific jurisdiction over these out-of-state Defendants for global climate change-related claims would expand the jurisdiction of this Court well beyond the limits of due process, burdening these Defendants and interfering with the power of each Defendant's home state's jurisdiction over its corporate citizens. This is not a case where one State has a more

"significant interest[]" in addressing climate change. *See Ford Motor*, 141 S. Ct. at 1030. Plaintiffs' position would resurrect the loose approaches to personal jurisdiction that the Supreme Court rejected in *Daimler* and *Bristol-Myers Squibb*, and would serve to make energy companies of any size operating in any capacity related to the production, distribution, promotion, or sale of energy products anywhere in the world targets for climate change suits in every forum in the country based on the barest of activity within the forum. As the Supreme Court explained in *Asahi*, a products liability case involving the sale and distribution of tires to California by out-of-state defendants:

> The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal interest in Government's foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State.

Id. This problem is particularly pronounced with respect to foreign Defendants.[7] Under Plaintiffs' theory, *any* foreign energy company could be forced to appear before *any* court in the United States based on its alleged contribution to global climate change, so long as that company operates within that jurisdiction. If other nations adopted a similar rule, American companies could be sued on climate change-related claims in courts around the world. Well-settled principles of due process do not permit such a result.

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[7] As Plaintiffs acknowledge, Defendant Royal Dutch Shell plc is incorporated in England and Wales with its principal place of business in The Hague, Netherlands, Compl. ¶ 22(a); Defendant BHP Group Limited is registered in Australia and maintains its headquarters in Melbourne, Victoria, Australia, *id.* ¶ 24(a); Defendant BHP Group plc is registered in England and Wales and maintains its headquarters in London, England, *id.*; and Defendant BP p.l.c. is registered in England and Wales with its principal place of business in London, England, *id.* ¶ 25(a).

Second, the assertion of jurisdiction here would offend the principles underlying the interstate judicial system because Plaintiffs seek to use Hawai'i tort law to regulate Defendants' nationwide (indeed, worldwide) activities, including fossil fuel production and sale—activities heavily regulated by the federal government, all 50 States, and every other country in the world in which these companies operate. As the Second Circuit observed, "a substantial damages award like the one requested by the City would effectively regulate the Producers' behavior far beyond [the State]'s borders." *City of New York*, 993 F.3d at 92. The interests of the "interstate judicial system" are not served by requiring witnesses and counsel to litigate the same climate change actions simultaneously under different legal rules, especially given the substantial risk of inconsistent decisions. "The interest in obtaining the most efficient resolution of this controversy points away from Hawai'i." *In Interest of Doe*, 83 Hawai'i at 476.

Third, the "substantive social policies" Plaintiffs seek to advance—curbing energy production and the use of fossil fuels or allocating the downstream costs of consumer use to the energy companies to bear directly—are not shared across the various states and nations. Indeed, the Second Circuit recognized that "amicus briefs [filed by states] on both sides of this dispute aptly illustrate[] that this is an interstate matter raising significant federalism concerns." *City of New York*, 993 F.3d at 92; *see also id at* 93 ("[A]s states will invariably differ in their assessment of the proper balance between these national and international objectives, there is a real risk that subjecting the Producers' global operations to a welter of different states' laws could undermine important federal policy choices."); *Oakland I*, 325 F. Supp. 3d at 1026 ("[P]laintiffs would have a single judge or jury in California impose an abatement fund as a result of such overseas behavior. Because this relief would effectively allow plaintiffs to govern conduct and control energy policy on foreign soil, we must exercise great caution."). Plaintiffs' claims here similarly implicate the

interests of numerous other states and nations, and thus this Court cannot reasonably exercise jurisdiction over Defendants. *See Asahi*, 480 U.S. at 115–16 (holding in part that the "international context" and "substantive interests of other nations," compared with the "the slight interests of the plaintiff and the forum State," rendered the exercise of personal jurisdiction "unreasonable and unfair").

V. CONCLUSION

For the foregoing reasons, Plaintiffs' claims against the out-of-state Defendants should be dismissed in their entirety, with prejudice, for lack of personal jurisdiction.

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

/s/ Joachim P. Cox
Joachim P. Cox
Randall C. Whattoff
COX FRICKE LLP

David C. Frederick, *pro hac vice*
James M. Webster, III, *pro hac vice*
Daniel S. Severson, *pro hac vice*
KELLOGG HANSEN TODD FIGEL & FREDERICK PLLC

Attorneys for Defendants Royal Dutch Shell plc, Shell Oil Company, and Shell Oil Products Company LLC

/s/ Melvyn M. Miyagi
Melvyn M. Miyagi
Ross T. Shinyama
Summer M. Kaiawe
WATANABE ING LLP

Theodore J. Boutrous, Jr., *pro hac vice*
Andrea E. Neuman, *pro hac vice*
GIBSON, DUNN & CRUTCHER LLP

Erica W. Harris, *pro hac vice*
SUSMAN GODFREY LLP

Attorneys for Defendants Chevron Corporation and Chevron U.S.A. Inc.

/s/ Crystal K. Rose
Crystal K. Rose
Adrian L. Lavarias
David A. Morris
BAYS, LUNG, ROSE & VOSS

Sean C. Grimsley, *pro hac vice*
Jameson R. Jones, *pro hac vice*
Daniel R. Brody, *pro hac vice*
BARTLIT BECK LLP

/s/ Lisa Woods Munger
Lisa Woods Munger
Lisa A. Bail
David J. Hoftiezer
GOODSILL ANDERSON QUINN & STIFEL LLP

Steven M. Bauer, *pro hac vice*
Margaret A. Tough, *pro hac vice*
Katharine A. Rouse, *pro hac vice*
LATHAM & WATKINS, LLP

Attorneys for Defendants ConocoPhillips and ConocoPhillips Company

/s/ Crystal K. Rose
Crystal K. Rose
Adrian L. Lavarias
David A. Morris
BAYS, LUNG, ROSE & VOSS

Steven M. Bauer, *pro hac vice*
Margaret A. Tough, *pro hac vice*
Katharine A. Rouse, *pro hac vice*
LATHAM & WATKINS, LLP

Attorneys for Defendants Phillips 66, and Phillips 66 Company

/s/ C. Michael Heihre
C. Michael Heihre
Michi Momose
CADES SCHUTTE

J. Scott Janoe, *pro hac vice*
Megan Berge, *pro hac vice*
Sterling Marchand, *pro hac vice*
BAKER BOTTS LLP

Attorneys for Defendants Sunoco LP, and Aloha Petroleum LLC

/s/ Ted N. Pettit
Ted N. Pettit
CASE LOMBARDI & PETTIT

Shannon S. Broome, *pro hac vice*
Shawn Patrick Regan, *pro hac vice*
Ann Marie Mortimer, *pro hac vice*
HUNTON ANDREWS KURTH LLP

Attorneys for Defendant Marathon Petroleum Corp.

Matthew T. Heartney, *pro hac vice*
Jonathan W. Hughes, *pro hac vice*
John D. Lombardo, *pro hac vice*
ARNOLD & PORTER KAYE SCHOLER LLP

Attorneys for Defendants BP p.l.c. and BP America Inc.

/s/ Paul Alston
Paul Alston
Claire Wong Black
Glenn T. Melchinger
John-Anderson L. Meyer
DENTONS US LLP

Theodore V. Wells, Jr., *pro hac vice*
Daniel Toal, *pro hac vice*
Yahonnes Cleary, *pro hac vice*
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

Attorneys for Defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation

/s/ Margery S. Bronster
Margery S. Bronster
Lanson K. Kupau
BRONSTER FUJICHAKU ROBBINS

Victor L. Hou, *pro hac vice*
Boaz S. Morag, *pro hac vice*
CLEARY GOTTLIEB STEEN & HAMILTON LLP

Attorneys for Defendants BHP Group Limited, BHP Group plc, and 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,

v.

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)

JOINT MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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Defendants Sunoco LP, Aloha Petroleum, Ltd., Aloha Petroleum LLC, Exxon Mobil Corporation, ExxonMobil Oil Corporation, Royal Dutch Shell plc, Shell Oil Company, Shell Oil Products Company LLC, Chevron Corporation, Chevron USA Inc., BHP Group Limited, BHP Group plc, BHP Hawaii Inc., BP p.l.c., BP America Inc., Marathon Petroleum Corporation, ConocoPhillips, ConocoPhillips Company, Phillips 66, and Phillips 66 Company (collectively, the "Defendants"), by their undersigned attorneys and pursuant to Rules 7, 9, and 12(b)(6) of the Hawai'i Rules of Civil Procedure, and Rule 7 of the Rules of the Circuit Courts of the State of Hawai'i, hereby submit this Joint Memorandum in Support of their Motion to Dismiss for Failure to State a Claim. As set forth below, Plaintiffs have not stated a claim against Defendants and Plaintiffs' First Amended Complaint ("Complaint") should be dismissed with prejudice in its entirety.

I. INTRODUCTION

Plaintiffs the City and County of Honolulu and the Honolulu Board of Water Supply seek to hold 20 energy companies liable for the alleged effects of *global* climate change that have resulted from the worldwide accumulation of greenhouse gas emissions in the atmosphere since the beginning of the Industrial Revolution. Although Plaintiffs purport to bring their claims under Hawai'i law, their claims are not limited to harms caused by fossil fuels extracted, sold, marketed, or used in Hawai'i. Instead, Plaintiffs attempt to use state tort law to regulate the nationwide—indeed, worldwide—activities of energy companies whose lawful products are used by billions of people to heat their homes, power their schools, hospitals, and vehicles, produce and transport their food supplies, and manufacture countless products essential to the safety, wellbeing, and advancement of modern society. As one court recently noted in dismissing a similar climate change

case: "[E]very single person who uses gas and electricity—whether in travelling by bus, cab, Uber, or jitney, or in receiving home deliveries via FedEx, Amazon, or UPS—contributes to global warming." *City of New York v. Chevron Corp.*, 993 F.3d 81, 86 (2d Cir. 2021); *see also City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1023 (N.D. Cal. 2018), *vacated on other grounds*, 960 F.3d 570 (9th Cir. 2020) ("[T]he development of our modern world has literally been fueled by oil and coal. Without those fuels, virtually all of our monumental progress would have been impossible. All of us have benefitted."). For these reasons, Hawai'i law has—by statute—long recognized that oil and gas are "essential to the health, welfare, and safety of the people of Hawaii." Haw. Rev. Stat. § 125C-1. Despite the central importance of oil and gas to the safety, security and wellbeing of billions of consumers worldwide, including Plaintiffs, Plaintiffs here ask this Court to regulate the *global* production, promotion, distribution, and end-use emissions of fossil fuels by holding this select group of Defendants liable under *Hawai'i* law. This, they cannot do.

Plaintiffs' claims suffer from numerous defects that independently warrant their dismissal. At the pleading stage, however, the Complaint should be dismissed with prejudice for one simple reason: Plaintiffs' claims, which seek damages for the alleged impacts of global climate change, are exclusively governed and barred by federal law. This has been the holding of every court to address the merits of a tort case against an energy producer for harms allegedly caused by global greenhouse gas emissions and, accordingly, Plaintiffs' claims fail as a matter of law. *E.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 429 (2011) ("*AEP*"); *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018), *aff'd*, 993 F.3d 81; *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012) ("*Kivalina II*"); *City of Oakland*, 325 F. Supp. 3d at 1017.

Recently, on April 1, 2021, the United States Court of Appeals for the Second Circuit affirmed dismissal on the merits of nearly identical putative state-law claims. *City of New York*,

993 F.3d 81. In reaching this conclusion, the Second Circuit applied a straightforward three-step approach. *First*, the court looked past the state-law labels to consider whether plaintiff's claims were governed by federal or state law, and held that the City of New York's purportedly state-law claims "*must be brought under federal common law*" and thus are "federal claims." *City of New York*, 993 F.3d at 95 (emphasis added). As the court explained, "[g]lobal warming presents a uniquely international problem of national concern," and "therefore is not well-suited to the application of state law." *Id.* at 85–86. "The question before us is whether a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may proceed under New York law. Our answer is simple: no." *Id.* at 91. The court emphasized that, "[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." *Id.*

This decision reflects the Supreme Court's well-established rule of law that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *AEP*, 564 U.S. at 421 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*")). And, as the Supreme Court has repeatedly recognized, "if federal common law exists, . . . state law cannot be used." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*").

Second, the Second Circuit analyzed whether the City had a viable claim for harms allegedly suffered as a result of *domestic* emissions. Relying on decades of precedent, the court concluded that such a claim had been "extinguished" because "the Clean Air Act displaces federal common law claims concerned with domestic greenhouse gas emissions." *City of New York*, 993 F.3d at 95. The Second Circuit explained that "the City's claims, if successful, would operate as a *de facto* regulation of greenhouse gas emissions," and that, as the Supreme Court has ruled, "Congress has

already 'spoken directly to that issue' by 'empowering the EPA to regulate those very emissions.'" *Id.* at 96 (internal quotation marks, citation, and alterations omitted). Thus, "the issues raised in this dispute concerning domestic emissions are squarely addressed by the Clean Air Act" and "are displaced by statute." *Id.* at 98.

Third, the Second Circuit analyzed whether the City had a viable claim for harms allegedly suffered as a result of *foreign* emissions. The court concluded that such claims must fail because "condoning an extraterritorial nuisance action here would not only risk jeopardizing our nation's foreign policy goals but would also seem to circumvent Congress's own expectations and carefully balanced scheme of international cooperation on a topic of global concern." *City of New York*, 993 F.3d at 103 (citing *Jesner v. Arab Bank, PLC*, ___ U.S. ___, 138 S. Ct. 1386, 1402 (2018)). The court repeatedly emphasized "the need for judicial caution in the face of delicate foreign policy considerations," especially in light of the federal government's ongoing diplomatic efforts to secure a global solution to global climate change. *Id.*; *see id.* at 102 (courts should "avoid unintentionally stepping on the toes of the political branches").

In affirming dismissal, the Second Circuit also flatly rejected the City's attempt to re-cast its complaint as not concerning "the regulation of emissions." *City of New York*, 993 F.3d at 91. There, as here, plaintiff attacked "the production, promotion, and sale of fossil fuels," *id.*, and made the same misleading-promotion allegations as Plaintiffs here, *id.* at 86–87; *City of New York*, 325 F. Supp. 3d at 469 ("According to the amended complaint, . . . [d]espite their early knowledge of climate change risks, Defendants extensively promoted fossil fuels for pervasive use, while denying or downplaying these threats."). While the City admitted that "greenhouse gas emissions play[ed] a role in the case," it "insist[ed] that such emissions are only a link in 'the causal chain' of the City's damages." *City of New York*, 993 F.3d at 91. The court "disagree[d]," concluding that "[a]rtful

pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions. It is precisely *because* fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'—that the City is seeking damages." *Id.* (rejecting the City's framing of the case as "merely a local spat . . . which will have no appreciable effect on national energy policy"). The same is true here; regardless of how Plaintiffs characterize their claims, the "singular source" of their alleged injuries is the greenhouse gas emissions they allege cause global climate change. *Id.*; Compl. ¶¶ 39–40, 43–47.

This Court should apply the same three-step analysis, and reach the same result: (1) federal common law governs all of Plaintiffs' claims, which seek damages for the alleged impacts of global climate change, and applies regardless of Plaintiffs' attempt to bring their claims under state law; (2) Plaintiffs' claims based on domestic emissions are displaced by the Clean Air Act; and (3) Plaintiffs' claims based on foreign emissions are not actionable under federal common law. The Court should end its analysis here. In the alternative, even if Plaintiffs' common law claims could be governed by state law (which they cannot), Plaintiffs' claims must still be dismissed as preempted under the Clean Air Act (Part V.B). Because Plaintiffs' claims cannot proceed under well-established principles of federal law, the Complaint should be dismissed with prejudice (Part V.C). Finally, Plaintiffs' claims also fail to satisfy the pleading requirements of Rule 9(b) of the Hawai'i Rules of Civil Procedure (Part V.D).[1]

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[1] Defendants' Motion to Dismiss is predicated on multiple flaws in Plaintiffs' Complaint. This Memorandum covers the arguments that do not entail challenges to personal jurisdiction, which are covered in a separate Memorandum, pursuant to the parties' joint stipulation. Dkt. No. 167. This Memorandum is submitted subject to, and without waiver of, any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

II. BACKGROUND

Plaintiffs' lawsuit is another in a long series of climate change-related nuisance actions that "seek[] to impose liability and damages on a scale unlike any prior environmental pollution case." *Native Vill. of Kivalina v. ExxonMobil Corp.* ("*Kivalina I*"), 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009), *aff'd*, *Kivalina II*, 696 F.3d 849. Courts have consistently, and properly, dismissed each such claim. The first such lawsuit asserted nuisance claims against automobile companies for alleged contributions to climate change. *See California v. Gen. Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (dismissing state and federal common law nuisance claims brought against automakers based on emissions for failing to state a claim and because claims were not justiciable). After that failure, the next round of litigation brought claims against direct emitters such as power companies, but that strategy failed, too. *See AEP*, 564 U.S. 410 (holding that claims seeking abatement of alleged public nuisance of climate change fail because the federal common law of emissions was displaced by the Clean Air Act); *Kivalina I*, 663 F. Supp. 2d at 863 (dismissing federal common law nuisance claims against energy companies because they were nonjusticiable and for lack of standing).

Now, plaintiffs have resorted to climate change claims against companies that supply the energy people use—claims that other courts have already declared meritless. Over the past four years, States and municipalities across the country, largely represented by the same counsel, have brought more than two dozen nearly identical cases seeking damages for the alleged impacts of climate change. So far, the only two courts to have ruled on defendants' motions to dismiss have granted those motions and dismissed the cases on the merits. *See City of New York*, 993 F.3d 81; *City of Oakland*, 325 F. Supp. 3d at 1017. As noted above, the Second Circuit recently affirmed the dismissal order in *City of New York*. The other decision, dismissing a pair of cases brought by

the City and County of San Francisco and the City of Oakland, was issued by the United States District Court for the Northern District of California (Alsup, J.), and was later vacated on appeal on jurisdictional grounds, without a ruling on the merits. *See City of Oakland v. BP PLC*, 960 F.3d 570, 586 (9th Cir.), *opinion amended and superseded on denial of reh'g*, 969 F.3d 895 (9th Cir. 2020).[2]

In each of these cases, plaintiffs alleged, as Plaintiffs do here, that defendants "have known for decades that their fossil fuel products pose a severe risk to the planet's climate" and "that, despite that knowledge, the [defendants] downplayed the risks and continued to sell massive quantities of fossil fuels, which has caused and will continue to cause significant changes to the City's climate and landscape." *City of New York*, 993 F.3d at 86–87; *see, e.g.*, Compl. ¶¶ 1, 28, 87. Like Plaintiffs here, plaintiffs in those cases "suggest[ed] that a group of large fossil fuel producers are primarily responsible for global warming and should bear the brunt of these costs," even though "every single person who uses gas and electricity . . . contributes to global warming." *City of New York*, 993 F.3d at 86. And like Plaintiffs here, plaintiffs in those cases have repeatedly tried to recast their claims in an effort to avoid the application of federal law. But "artful pleading . . . does not change the substance of [such] claims," which are "a clash over regulating worldwide greenhouse gas emissions and slowing global climate change." *Id.* at 91, 97.

In affirming dismissal in *City of New York*, the Second Circuit acknowledged that "[g]lobal warming is one of the greatest challenges facing humanity today" and "there is near universal consensus that global warming is primarily caused, or at least accelerated, by the burning of fossil fuels, which emits greenhouse gases like carbon dioxide and methane into the atmosphere." *Id.*

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[2] The Ninth Circuit did not address the merits of defendants' motion to dismiss. The Ninth Circuit decision is the subject of a petition for writ of certiorari currently pending before the Supreme Court. *See Chevron Corp. v. City of Oakland*, No. 20-1089 (U.S.) (filed Jan. 8, 2021).

Similarly, the Northern District of California recognized that "fossil fuels have led to global warming and ocean rise and will continue to do so." *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d at 1022. But the courts also recognized that "the issue" before the court on defendants' motion to dismiss was "not over the science. . . . The issue is a legal one." *Id.* More specifically, "[t]he question before [the courts] is whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions." *City of New York*, 993 F.3d at 85. The Second Circuit "h[e]ld that the answer is 'no,'" "[g]iven the nature of the harm and the existence of a complex web of federal and international environmental law regulating such emissions." *Id.* Similarly, the Northern District of California found that "[e]veryone has contributed to the problem of global warming and everyone will suffer the consequences—the classic scenario for a legislative or international solution." *City of Oakland*, 325 F. Supp. 3d at 1026. Put simply, these courts concluded, in carefully reasoned decisions, that state tort law is not appropriate to resolve the "localized effects of an inherently global phenomenon." *Id.*

III. PLAINTIFFS' ALLEGATIONS

The Complaint alleges that "production and use of [Defendants'] fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate." Compl. ¶ 1. According to the Complaint, "[t]his dramatic increase in atmospheric CO_2 and other greenhouse gases is the main driver of the gravely dangerous changes occurring to the global climate." *Id.* ¶ 4. Plaintiffs allege that they "have suffered and will continue to suffer severe injuries" "[a]s a direct result of those and other climate crisis-caused environmental changes." *Id.* ¶ 11. Hence, the theory underlying Plaintiffs' Complaint is that Defendants' production and sale of oil and natural gas, and Defendants' allegedly deceptive public relations and lobbying activity, render them liable for

alleged climate change-related harms resulting from all global greenhouse gas emissions. *Id.* ¶¶ 1–12. The Complaint asserts five state-law causes of action: (1) public nuisance; (2) private nuisance; (3) strict liability failure to warn; (4) negligent failure to warn; and (5) trespass. Plaintiffs seek compensatory damages, abatement of the alleged nuisance, disgorgement of profits, punitive damages, attorneys' fees and costs. *Id.* at 115, Prayer for Relief.

The Complaint concedes that Defendants' production, promotion, and marketing of fossil fuel products did not cause Plaintiffs' alleged injuries; rather, the alleged injuries are "caused by anthropogenic greenhouse gas *emissions*." *Id.* ¶¶ 34–35 (emphasis added). These emissions are the result of billions of daily choices, over more than a century, by governments, companies, and individuals about what types of fuels to use, how to use them, and whether to employ measures to offset their emissions. This case is undeniably about global greenhouse gas emissions and the alleged impact those emissions have on the global climate. *Emissions* are the mechanism of Plaintiffs' alleged injuries. *Id.* ¶¶ 35–36. In fact, Plaintiffs allege that "all" of their purported injuries result from global climate change caused by increased emissions in the atmosphere. *Id.* ¶ 10. According to Plaintiffs, the "increase in atmospheric CO_2 and other greenhouse gases is the main driver of the gravely dangerous changes occurring to the global climate." *Id.* ¶ 4. Similarly, Plaintiffs allege that "greenhouse gas pollution, primarily in the form of CO_2, is far and away the dominant cause of global warming," *id.* ¶ 5, and that their purported injuries are "*all due* to anthropogenic global warming," *id.* ¶ 10 (emphasis added).

Plaintiffs concede that "it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere . . . because such greenhouse gas molecules do not bear markers that permit tracing them to their source, and because greenhouse gasses [sic] quickly diffuse and comingle in the atmosphere." *Id.* ¶¶ 171, 184, 196, 205. Accordingly, emissions in California,

China, India, or anywhere else in the world are just as likely to contribute to flooding and other climate events in Hawai'i as emissions released in Hawai'i. In fact, because the emissions from Hawai'i (much less Honolulu) are such an infinitesimally small proportion of the sum of worldwide emissions that only together cause global climate change, emissions or other activity in Hawai'i cannot possibly be found to substantially contribute to Plaintiffs' injuries.

IV. LEGAL STANDARD

Hawai'i Rule of Civil Procedure 12(b)(6) governs motions to dismiss complaints for failure to state a claim. When considering a Rule 12(b)(6) motion to dismiss, a court accepts the plaintiff's well-pleaded facts as true. *Malabe v. Ass'n of Apartment Owners of Exec. Ctr. by & through Bd. of Dirs.*, 147 Hawai'i 330, 333–34 (2020) (citing *Bank of America, N.A. v. Reyes-Toledo*, 143 Hawai'i 249, 257 (2018)). But a court need not accept "conclusory allegations on the legal effect of the events alleged." *Civ. Beat L. Ctr. for the Pub. Int., Inc. v. City & Cty. of Honolulu*, 144 Hawai'i 466, 474 (2019) (quoting *Hungate v. L. Off. of David B. Rosen*, 139 Hawai'i 394, 401 (2017)); *Bank of America*, 143 Hawai'i at 258 n.7. Where leave to amend would be futile, dismissal with prejudice is warranted. *Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Hawai'i 92, 112 (2008), *as corrected* (Jan. 25, 2008); *accord Justice v. Fuddy*, 125 Hawai'i 104, 113 (App. 2011).

Furthermore, Hawai'i Rule of Civil Procedure 9(b) requires that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity," and Hawai'i Rule of Civil Procedure 9(g) requires that any "items of special damages . . . be specifically stated."

V. ARGUMENT

A. Plaintiffs' Claims Are Barred By Federal Law

Plaintiffs' claims are necessarily governed and barred by federal law. These claims should all be dismissed on the pleadings, as a matter of law, under the three-step analysis that the Second Circuit and Northern District of California applied in dismissing similar climate change-related actions on the pleadings.[3] *First*, claims targeting interstate and international emissions, like those Plaintiffs assert here, are the exclusive preserve of federal law—whether common law or statutory. Given the claims' interstate character, state law does not and cannot apply. *Second*, federal common law claims related to *domestic* greenhouse gas emissions are displaced by the Clean Air Act, and that statutory framework does not provide Plaintiffs a remedy in tort for their emissions-based claims. *Third*, federal common law cannot sustain Plaintiffs' claims for *foreign* emissions, because such an application of United States law would be impermissibly extraterritorial. Therefore, Plaintiffs' claims, which all hinge on both domestic and foreign greenhouse gas emissions, must be dismissed.

1. Plaintiffs' Claims Are Exclusively Governed By Federal Law

Plaintiffs' claims are exclusively subject to federal—not state—law because they seek to regulate transboundary and international emissions and pollution. As the Second Circuit recently recognized in *City of New York*, "[g]lobal warming presents a uniquely international problem of national concern" that is "not well-suited to the application of state law." 993 F.3d at 85–86. "The question before" this Court, as it was before the Second Circuit, "is whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused by global

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[3] Hawai'i courts regularly look to federal court decisions "in instances where Hawai'i case law and statutes are silent." *Gold v. Harrison*, 88 Hawai'i 94, 104 (1998) (quoting *State v. Ontai*, 84 Hawai'i 56, 61 (1996)).

greenhouse gas emissions." *Id.* at 85. "Given the nature of the harm and the existence of a complex web of federal and international environmental law regulating such emissions," "the answer is 'no.'" *Id.* Despite their state-law labels, Plaintiffs' claims "must be brought under federal common law"—indeed, they are "federal claims." *Id.* at 94.

The Supreme Court has consistently held that "where there is an overriding federal interest in the need for a uniform rule of decision," *Milwaukee I*, 406 U.S. at 105 n.6, "state law cannot be used," *Milwaukee II*, 451 U.S. at 313 n.7. Interstate pollution is one such area. "For over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." *City of New York*, 993 F.3d at 91 (collecting cases). Courts have repeatedly held that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Id.* (quoting *Milwaukee I*, 406 U.S. at 103). As the Supreme Court explained: "Federal common law and not the varying common law of the individual States is . . . necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." *Milwaukee I*, 406 U.S. at 107 n.9. In fact, because these claims "implicat[e] the conflicting rights of [s]tates [and] our relations with foreign nations, this case poses the *quintessential example* of when federal common law is needed." *City of New York*, 993 F.3d at 92 (emphasis added) (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)). "[T]he basic scheme of the Constitution . . . demands" that federal common law apply in these circumstances. *AEP*, 564 U.S. at 421.

The Supreme Court has squarely held that claims asserting global warming-related injuries resulting from emissions of greenhouse gases—such as the claims asserted by Plaintiffs here—are governed by federal law. *See AEP*, 564 U.S. at 421–22. In *AEP*, eight States and various other plaintiffs sued five electric utility companies, contending that "the defendants' carbon-dioxide

emissions" had substantially contributed to global warming, thereby "creat[ing] a 'substantial and unreasonable interference with public rights,' in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law." 564 U.S. at 418. The Supreme Court held that such claims necessarily require "federal law governance" and that "borrowing the law of a particular State would be inappropriate" for such claims. *AEP*, 564 U.S. at 421, 422.

Most recently, in affirming dismissal, on the merits, of claims nearly identical to Plaintiffs' claims here, the Second Circuit held that federal law applies to these types of claims because they implicate two federal interests that are incompatible with the application of state law: "(i) the 'overriding . . . need for a uniform rule of decision' on matters influencing national energy and environmental policy, and (ii) 'basic interests of federalism.'" *City of New York*, 993 F.3d at 91–92 (quoting *Milwaukee I*, 406 U.S. at 105 n.6). The court found that New York City's lawsuit was no different from that brought in *AEP* because "[t]o state the obvious the City does not seek to hold the Producers liable for the effects of emissions released in New York, or even in New York's neighboring states." *Id.* at 92. Instead, New York "request[ed] damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet." *Id.* Indeed, the "scope of plaintiffs' theory is breathtaking" as it "would reach the sale of fossil fuels anywhere in the world, including all past and otherwise lawful sales." *City of Oakland*, 325 F. Supp. 3d at 1022. The Second Circuit held that "[s]uch a sprawling case is simply beyond the limits of state law." *City of New York*, 993 F.3d at 92.

Here, just as in *City of New York*, "[i]t is precisely *because* fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'—that [Plaintiffs] [are] seeking damages." 993 F.3d at 91. "The harm alleged . . . remains a harm caused by fossil fuel *emissions*, not the mere extraction or even sale of fossil fuels." *City of Oakland*, 325 F. Supp. 3d at 1024. Plaintiffs will

argue that federal law does not apply because the Complaint does not seek to impose liability for any of Defendants' emissions, but rather Defendants' production, promotion, and/or marketing activities. The City of New York made the same argument, asserting that its claims "concern[ed] only 'the production, promotion, and sale of fossil fuels,' not the regulation of emissions." *City of New York*, 993 F.3d at 91.[4] But the Second Circuit squarely rejected this theory, emphasizing that "[a]rtful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions." *Id.* at 91. "Put differently, the City's complaint whipsaws between disavowing any intent to address emissions and identifying such emissions as the singular source of the City's harm. But the City cannot have it both ways." *Id.* The same is true here. Even a cursory look at the Complaint makes plain that the "singular source" of Plaintiffs' alleged injuries is greenhouse gas emissions. Indeed, Plaintiffs allege that "[a]nthropogenic greenhouse gas pollution, primarily in the form of CO_2, is far and away *the dominant cause* of global warming," Compl. ¶ 5 (emphasis added), and that their injuries are "*all due* to anthropogenic global warming," *id.* at ¶ 10 (emphasis added).

Moreover, Plaintiffs do not seek to hold Defendants liable only for the "effects of emissions released" exclusively in Honolulu, Hawai'i, or even the United States. *City of New York*, 993 F.3d at 92. Rather, Plaintiffs "intend[] to hold [Defendants] liable," under Hawai'i law, "for the effects of emissions made around the globe over the past several hundred years." *City of New York*, 993

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[4] *See also* Br. for Appellants, *City of New York v. Chevron Corp., et al.*, 2018 WL 5905772, at *27 (2d. Cir.) ("[F]or decades, Defendants promoted their fossil-fuel products by concealing and downplaying the harms of climate change, profited from the misconceptions they promoted as to the cause of climate change, and knowingly shifted the cost of these harms to cities like New York."); Br. in Opp. to Motion to Dismiss, *City of New York v. BP p.l.c.*, 2018 WL 8064046 (S.D.N.Y.) ("Defendants are different from other contributors to climate change because of their . . . commercial promotions of fossil fuels as beneficial despite their knowledge to the contrary [and] efforts to protect their fossil fuel market by downplaying and casting doubt on the risks of climate change.")

F.3d at 92; *see* Compl. ¶ 2 ("Defendants have promoted and profited from a massive increase in the extraction and consumption of oil, coal, and natural gas, which has in turn caused an enormous, foreseeable, and avoidable increase in *global* greenhouse gas pollution") (emphasis added). "In other words, the [Plaintiffs] request[] damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet"—an interstate, indeed international, proposed tort. *City of New York*, 993 F.3d at 92.

"Since '[g]reenhouse gases once emitted become well mixed in the atmosphere' . . . 'emissions in [Hawai'i] may contribute no more to flooding in [Hawai'i] than emissions in China.'" *Id.* (quoting *AEP*, 564 U.S. at 422) (internal citations omitted). The total energy consumption in Hawai'i accounts for only a tiny fraction of worldwide total greenhouse gas emissions. Plaintiffs do not, and cannot, allege that such a small proportion of global emissions caused their injuries. And, as Plaintiffs acknowledge, it would not be possible to determine which emissions arose from Hawai'i—or anywhere else—"because such greenhouse gas molecules do not bear markers that permit tracing them to their source, and because greenhouse gases quickly diffuse and comingle in the atmosphere." Compl. ¶¶ 171, 184, 196, 205. Thus, notwithstanding the state-law label Plaintiffs put on their claims, "[i]t remains proper for the scope of plaintiffs' claims to be decided under federal law, given the international reach of the alleged wrong and given that the instrumentality of the alleged harm is the navigable waters of the United States." *City of Oakland*, 325 F. Supp. 3d at 1028–29. "To permit this suit to proceed under state law would further risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *City of New York*, 993 F.3d at 93. If successful, "a substantial damages award . . . would effectively

regulate the [Defendants'] behavior far beyond [the] borders [of Hawai'i]." *Id.* at 92. For these reasons, Plaintiffs' claims "must be brought under federal common law." *Id.* at 94.

2. Plaintiffs' Claims Targeting Domestic Emissions Are Displaced By The Clean Air Act

Although claims based on global greenhouse gas emissions are necessarily subject to federal law, that answers only the first aspect of the inquiry. The second aspect is whether Plaintiffs have a potentially meritorious cause of action under federal law. They do not. The Supreme Court, the Ninth Circuit, and the Second Circuit have all held that a tort-law claim for greenhouse gas emissions arising under federal common law *necessarily* fails because Congress displaced any such federal tort remedies when it excluded them from the regulatory scheme established in the Clean Air Act. *AEP*, 564 U.S. at 423–29; *Kivalina II*, 696 F.3d at 856–58; *City of New York*, 993 F.3d at 98. "[F]ederal common law does not provide a remedy" "when federal statutes directly answer the federal question." *Kivalina II*, 696 F.3d at 856. "[F]ederal common law claims concerning domestic greenhouse gas emissions are displaced by statute." *City of New York*, 993 F.3d at 98.

The Second Circuit held that federal common law claims for harms caused by greenhouse gas emissions are displaced "[f]or many of the same reasons that federal common law preempts state law." *Id.* at 93. "Congress displaces federal common law when it passes a statute that 'speaks directly to the question' that the judge-made rule was designed to answer." *Id.* (quoting *AEP*, 564 U.S. at 424). The Second Circuit explained that "[s]uch displacement requires a showing that 'Congress has provided a sufficient legislative solution to the particular [issue] to warrant a conclusion that [the] legislation has occupied the field to the exclusion of federal common law.'" *Id.* (quoting *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 777 (7th Cir. 2011)). Congress did just that by enacting the Clean Air Act, which speaks directly to domestic transboundary

emissions claims, and, as a result, "the Clean Air Act displaces federal common law claims concerned with domestic greenhouse gas emissions." *Id.*

In *AEP*, the Supreme Court recognized that because greenhouse gas emissions "qualify as air pollution subject to regulation under the [Clean Air] Act" *id.* (citing *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007)), "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants," *id.* at 424.

In *Kivalina II*, the Ninth Circuit concluded that, because *AEP* established that "Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law," *AEP* required dismissal of public nuisance claims brought by local governmental entities against a broad array of oil, gas, and coal producers (many of which are named as Defendants here), 696 F.3d at 856–58. This is so even where plaintiffs seek "damages, rather than abatement," *City of New York*, 993 F.3d at 96; *Kivalina II*, 696 F.3d at 853. "[W]hen *AEP* concluded that the Clean Air Act preempted 'common law public nuisance abatement actions,' it also 'extinguished [the *Kivalina* plaintiff's] federal common law public nuisance damage action.'" *City of New York*, 993 F.3d at 97 (quoting *Kivalina II*, 696 F.3d at 853). Under *AEP* and *Kivalina II*, Plaintiffs' claims are plainly governed and precluded by federal law. *See AEP*, 564 U.S. at 421–22; *Kivalina II*, 696 F.3d at 856.

The Second Circuit, relying on *AEP* and *Kivalina II*, held that the City of New York's claims based on greenhouse gas emissions were "extinguished" because the Clean Air Act displaced any such federal common law claims. *See City of New York*, 993 F.3d at 95–97. The same result follows here: Plaintiffs' claims are displaced and extinguished by the Clean Air Act. Just as in *City of New York*, *AEP*, and *Kivalina II*, Plaintiffs are suing for injuries allegedly caused by

excessive worldwide *emissions*. *See, e.g.*, Compl. ¶¶ 34–35. Such claims are exclusively governed by federal law, but any federal common law claim is displaced by the Clean Air Act.

Plaintiffs' claims here "hinge[] on the link between the release of greenhouse gases and the effect those emissions have on the environment." *City of New York*, 993 F.3d at 97. The "adjudication of [Plaintiffs'] claim[s]" would "require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development" dependent on fossil fuels. *Gen. Motors*, 2007 WL 2726871, at *8, *15. But that determination "ha[s] been entrusted by Congress to the EPA." *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013) (quoting *AEP*, 564 U.S. at 428). Accordingly, "[t]he judgments the [Plaintiff] would commit" to this Court "cannot be reconciled with the decisionmaking scheme Congress enacted." *AEP*, 564 U.S. at 429. Because Congress has "designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions," *id.* at 428, Plaintiffs' concerns "must rest in the hands of the legislative and executive branches of our government, not the federal common law," *Kivalina II*, 696 F.3d at 858. The proper response to the "worldwide problem of global warming should be determined by our political branches, not by our judiciary." *City of Oakland*, 325 F. Supp. 3d at 1029; *see also Juliana v. United States*, 947 F.3d 1159, 1171 (9th Cir. 2020) (dismissing climate change-related claims because, *inter alia*, climate change solutions require a "host of complex policy decisions entrusted . . . to the wisdom and discretion" of the federal political branches and recognizing the "[m]any resolutions and plans [that] have been introduced in Congress . . . to tackl[e] this global problem," all of which entail "the exercise of discretion, trade-offs, international

cooperation, private-sector partnerships, and other value judgments"), *rehearing en banc denied*, 986 F.3d 1295 (9th Cir. Feb. 10, 2021).[5]

As the Second Circuit explained in *City of New York*, "[t]hat Congress chose to preempt the federal common law of nuisance with a well-defined and robust statutory and regulatory scheme of environmental law is by no means surprising." 993 F.3d at 97. Indeed, "[n]umerous courts have bemoaned the 'often . . . vague and indeterminate standards' attached to nuisance law." *Id.* (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987)). Plaintiffs here seek to hold Defendants liable for the effects of climate change based on a nuisance theory. The Second Circuit found that "[s]uch an elastic standard is especially ill-suited to address 'the technically complex area of environmental law,' particularly since it would be administered by judges who 'lack the scientific, economic, and technological resources' to 'cop[e] with issues of this order.'" *Id.* at 98–99 (quoting *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981); *AEP*, 564 U.S. at 428). Rather than allowing the law of nuisance to dictate the balance between the costs and benefits of oil and gas consumption, courts must "'entrust[ ] [the] complex balancing' of interests that climate change demands to an 'expert agency' such as the EPA." *City of New York*, 993 F.3d at 99 (quoting *AEP*, 564 U.S. at 427–28).

As the United States argued to the Supreme Court in *AEP*, allowing common-law public nuisance actions to address "appropriate levels for the reduction of carbon-dioxide emissions" "would inevitably entail multifarious policy judgments, which should be made by decisionmakers

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[5] Should Plaintiffs argue, as the plaintiff in *City of New York* did, that, once federal common law has been displaced, Plaintiffs' state-law claims "may snap back into action unless specifically preempted by statute," 993 F.3d at 98, this Court should reject that argument. Such a theory does not "square with the fact that federal common law governed this issue in the first place." *Id.* "[S]tate law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *Id.* As the Second Circuit noted in rejecting this argument, "[s]uch an outcome is too strange to seriously contemplate." *Id.* at 98–99.

who are politically accountable, have expertise, and are able to pursue a coherent national or international strategy." Br. for the TVA as Resp't Supporting Pet'rs, *AEP*, 564 U.S. 410 (No. 10-174), 2011 WL 317143, at *18–19 (Jan. 31, 2011). "[T]he myriad questions associated with developing a judgment about reasonable levels of greenhouse-gas emissions . . . are more properly answered by EPA," which "is, after all, the regulatory agency charged by Congress with the responsibility for setting standards for air-pollutant emissions and with significant expertise in the scientific disciplines that must be brought to bear in establishing appropriate limitations on emissions." *Id.* at 19–20.

The result is no different for Plaintiffs' failure to warn and trespass claims because they too are aimed at harms allegedly caused by the accumulation of greenhouse gas emissions. *See* Compl. ¶¶ 34–35. As the Second Circuit explained, "displacement of federal common law is an *all-or-nothing proposition*, which does not depend on the remedy sought." *City of New York*, 993 F.3d at 96 (emphasis added). And the Supreme Court made clear in *AEP* that Congress had delegated emissions-regulating authority to the EPA, and that this delegation "is what displaces federal common law." 564 U.S. at 426. Because Plaintiffs' claims are *all* based on injuries purportedly caused by greenhouse gas emissions, they have *all* been displaced by the Clean Air Act.

Seeking to avoid established law rejecting prior climate change suits, Plaintiffs here pursue a theory of injury *even more attenuated* than the theory asserted unsuccessfully in *AEP* and *Kivalina II*. Instead of suing companies for their own emissions (such as from power plants), Plaintiffs here have sued companies that produce or sell fossil fuels that eventually are combusted by billions of end users around the world (including Plaintiffs themselves), resulting in the global emissions that allegedly contribute to climate change and caused Plaintiffs' injuries. The Second Circuit quickly rejected this argument, holding that no matter what aspect of Defendants' conduct Plaintiffs profess

to target in their Complaint, Plaintiffs' alleged injuries are necessarily caused by cumulative global greenhouse gas emissions. *City of New York*, 993 F.3d at 97. "Artful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions. It is precisely *because* fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'—that the City is seeking damages." *Id.* at 91. Thus, unsurprisingly, both courts to have reached the merits of these new claims have dismissed them. *See City of New York*, 325 F. Supp. 3d at 468; *City of Oakland*, 325 F. Supp. 3d at 1019. The same result is required here. Regardless of Plaintiffs' attempts to characterize their claims as focused on Defendants' production and sale, or on their alleged "campaign of deception," supposed "greenwashing," or other artful pleading, Compl. ¶ 3, Plaintiffs' alleged harms are the result of global greenhouse gas emissions.

Because Plaintiffs seek to hold oil and gas producers "liable for emissions by third parties in addition to" their own, as was the case in *City of New York*, the Clean Air Act dictates that Defendants "cannot be sued under the federal common law," and thus Plaintiffs' claims must be dismissed. *City of New York*, 993 F.3d at 97 (quoting *City of Oakland*, 325 F. Supp. 3d at 1024).

3. Plaintiffs' Claims Targeting Foreign Emissions Are Impermissibly Extraterritorial

Plaintiffs' claims of injury based on *foreign* emissions are also barred. Although the Clean Air Act displaces Plaintiffs' claims for *domestic* emissions, there is no "clear indication" that the Clean Air Act was meant to apply *outside* of the territorial jurisdiction of the United States. *City of New York*, 993 F.3d at 100 (citations omitted). "But," as the Second Circuit held, "that does not mean that those claims may proceed as a matter of federal common law." *Id.* The Second Circuit made clear that "a federal common law cause of action targeting emissions emanating from beyond our national borders" is not viable—"foreign policy concerns foreclose" any such claims. *Id.*

Judicial restraint is necessary when addressing foreign emissions because of "concerns over separation of powers, intrusion on the political branches' monopoly over foreign policy, and judicial caution with respect to creating (or extending) federal common law causes of action." *Id.* at 102. To hold Defendants "accountable for purely foreign activity . . . would require them to internalize the costs of climate change and would presumably affect the price and production of fossil fuels abroad," "bypass[ing] the various diplomatic channels that the United States uses to address" climate change. *Id.* at 103. The Second Circuit found that "[s]uch an outcome would obviously sow confusion and needlessly complicate the nation's foreign policy, while clearly infringing on the prerogatives of the political branches." *Id.* And "[a]ffording extraterritorial effect to federal common law here would be all the more out of place given that Congress created a comprehensive scheme designed to address greenhouse gas emissions—the Clean Air Act—which it declined to extend beyond our borders." *Id.* In fact, the Clean Air Act explicitly "contemplates the need for foreign nations to promulgate reciprocal legislation." *Id.* (citing 42 U.S.C. § 7415(c)). "As a result, condoning an extraterritorial nuisance action here would not only risk jeopardizing our nation's foreign policy goals but would also seem to circumvent Congress's own expectations and carefully balanced scheme of international cooperation on a topic of global concern." *Id.* Accordingly, "the need for judicial caution in the face of delicate foreign policy decisions" dictates that Plaintiffs cannot state a claim for foreign emissions under federal common law. *City of New York*, 993 F.3d at 104 (citing *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Jesner*, 138 S. Ct. at 1386). Plaintiffs' claims based on foreign emissions must therefore be dismissed.

B. In The Alternative, Plaintiffs' Common Law Claims Are Preempted By The Clean Air Act

Even if Plaintiffs could state claims under state law, they would be preempted by the Clean Air Act because they functionally would regulate out-of-state-sources of greenhouse gas emissions.

"Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law," or "when there is outright or actual conflict between federal and state law." *Kawamata Farms, Inc. v. United Agri Prod.*, 86 Hawai'i 214, 232 (1997) (citations omitted). "Whether a state law establishing a cause of action is preempted in a given case is a question of congressional intent." *Id.* (quoting *Norris v. Hawaiian Airlines, Inc.*, 74 Haw. 235, 245–46 (1992)). State law must yield to federal law if compliance with both federal and state regulations would be impossible or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399–400 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). This is such a case.

The Supreme Court held more than thirty years ago that the Clean Water Act preempts state common law claims for injury from interstate water pollution where the plaintiff seeks to apply one state's law to sources outside that state. *See Ouellette*, 479 U.S. at 493–94. The Court held that "the CWA precludes a court from applying the law of an affected State against an out-of-state source," because regulation of out-of-state discharges would "upset[] the balance of public and private interests so carefully addressed by the Act." *Id.* at 494; *cf. Healy v. Beer Inst.*, 491 U.S. 324, 332 (1989) ("a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid"). Because the structure of the Clean Air Act parallels the structure of the Clean Water Act, including containing an analogous savings clause, courts have consistently construed *Ouellette* to mandate that the Clean Air Act preempts state law claims challenging air pollution originating out-of-state. *See Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015) ("claims based on the common law of a non-source state . . . are preempted by the [Clean Air Act]"); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 194–96 & n.6 (3d Cir. 2013) (same); *N.C. ex rel Cooper v. TVA*, 615 F.3d 291, 301, 306 (4th Cir. 2010)

(same). Plaintiffs' alleged injuries undisputedly result from the cumulative effect of global emissions, including countless out-of-state sources, and are therefore preempted.

C. The Court Should Dismiss The Complaint With Prejudice

The foregoing defects in Plaintiffs' Complaint are fatal and the Court therefore should dismiss Plaintiffs' Complaint in its entirety. It is clear that Plaintiffs cannot amend their pleading to cure these defects, because any allegations in support of an emissions-related tort claim could not overcome the fact that such claims are barred as a matter of law. Thus, the Court should dismiss the Complaint with prejudice. *See Kamaka*, 117 Hawai'i at 112 (holding that "futility" is proper grounds to deny leave to amend); *Justice*, 125 Hawai'i at 113 (affirming dismissal with prejudice); *see also City of New York*, 325 F. Supp. 3d at 476 (dismissing with prejudice).

D. The Complaint Does Not Satisfy Hawai'i Rules of Civil Procedure 9(b) and 9(g)

Plaintiffs have asserted that "the tortious conduct" at issue here is "Defendants' campaign of deception and misleading promotion," and have repeatedly attempted to characterize their claims as targeting deceptive promotion. *See, e.g.*, Pltf.'s Reply in Support of Mot. to Remand at 13, *City and County of Honolulu v. Sunoco LP, et al.*, No. 1:20-cv-00163 (D. Haw. Oct. 30, 2020), ECF No. 121 ("Remand Reply"); *cf.* Plaintiff Cnty. of Maui's Position on Transfer to The Environmental Court at 2, *Cnty. of Maui v. Sunoco LP, et al.*, No. 2CCV-20-0000283(3) (Haw. Cir. Ct. May 28, 2021) (stating that "the County's tort claims . . . are premised on a theory of misrepresentation and disinformation" (quotations omitted)). As explained above , Plaintiffs' alleged harms are all the result of global greenhouse gas emissions, and this is so even if Plaintiffs say those emissions increased due to Defendants' alleged "campaign of deception." Compl. ¶¶ 3. But, even accepting this characterization of their claims, Plaintiffs' claims must be dismissed because the Complaint fails to satisfy the pleading requirements of Rule 9(b) of the Hawai'i Rules of Civil Procedure.

Rule 9(b) requires that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Specifically, it requires plaintiffs to allege "who made the false representations" and to "specify the representations made." *Larsen v. Pacesetter Sys., Inc.*, 74 Haw. 1, 30–31 (1992) (citing *Ellis* v. *Crockett*, 51 Haw. 45, 59 (1969)); *see also Jou v. Siu*, 2013 WL 1187559, at *7 (Haw. App. Mar. 22, 2013) (A plaintiff "must allege the time, place and content of the fraudulent representation; conclusory allegations do not suffice." (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1042 (9th Cir. 2010)). Further, any detrimental reliance on the allegedly false representations also must be pleaded with particularity. *See Xia Bi v. McAuliffe*, 927 F.3d 177 (4th Cir. 2019) ("How and whether a party relied on a misstatement is every bit as much a 'circumstance[ ] constituting fraud' as any other element."); Wright & Miller, 5A Fed. Prac. & Proc. Civ. § 1297 (4th ed.) ("Courts have held that the language of Rule 9(b) requires a complaint in an action based on fraud . . . to allege all the substantive elements of fraud. . . . [which include] the detrimental reliance upon the false representation . . . by the person claiming to have been deceived."); *Davis v. Vancil*, 136 Hawai'i 24, at *6 (Ct. App. 2015) (detrimental reliance is a required element of fraud under Hawai'i law).

Rule 9(b) is implicated by factual allegations that "necessarily constitute fraud (even if the word 'fraud' is not used)." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003). Even where plaintiffs do not assert a fraud cause of action, or where fraud is not a necessary element of the claims alleged, if a plaintiff alleges "a unified course of fraudulent conduct in support of a claim" the claims are thus "'grounded in fraud' or . . . 'sound in fraud,' and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b)." *Id.* at 1103–04; *see also id.* at 1107 ("When an entire complaint, or an entire claim within a complaint, is grounded in fraud

and its allegations fail to satisfy the heightened pleading requirements of Rule 9(b), a district court may dismiss the complaint or claim.").[6]

Aquilina v. Certain Underwriters, 407 F. Supp. 3d 1051 (D. Haw. 2019), is instructive. There, plaintiffs alleged that defendants engaged in a deceptive and fraudulent "scheme"—including misrepresentations, concealment, and omissions—to "steer" plaintiffs into purchasing a product. *See* 407 F. Supp. 3d at 1065. The court concluded that these allegations underlay all of plaintiffs' claims and were all "based on 'a unified course of fraudulent conduct.'" *Id.* Because the complaint as a whole sounded in fraud, the court reviewed "all the allegations under Rule 9(b)'s more stringent standard," including claims (such as bad faith and unjust enrichment) that were not labeled as fraud claims and "[did] not require a fraudulent element." *Id.* at 1065–67.

Here, too, Plaintiffs have asserted that their Complaint relies on a theory that Defendants engaged in a "campaign of deception" and misrepresentation, thereby triggering the pleading requirements of Rule 9(b). Plaintiffs repeatedly allege that Defendants engaged in a "coordinated," "multi-front effort" to "conceal and deny" information regarding greenhouse gas emissions. *See, e.g.*, Compl. ¶ 1 (alleging Defendants "engaged in a coordinated, multi-front effort" to "conceal and deny," discredit the growing body of evidence, and "persistently create doubt" in the minds of customers regarding pollution); ¶¶ 8–9, 12 (Defendants "concealed" dangers and promoted "false and misleading information"); ¶¶ 92–117 (detailing a "decades-long campaign" of "concealing, discrediting, and/or misrepresenting information"); ¶ 30 (alleging Defendants acted in concert and engaged in a conspiracy). Likewise, the Complaint repeatedly alleges the Defendants engaged in "deceptive" conduct. *See, e.g., id.* ¶ 4 (alleging Defendants engaged in "campaign of deception");

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[6] "As the Federal Rules of Civil Procedure are substantially similar to the HRCP, [Hawai'i courts] look to federal case law for guidance." *Stallard v. Consol. Maui, Inc.*, 103 Hawai'i 468, 475 (2004).

¶ 12 (Defendants engaged in public deception campaigns); ¶ 45 (Defendants engaged in efforts to deceive and in campaigns based on falsehoods, omissions, and deceptions); ¶¶ 137–143 (detailing a "coordinated campaign of disinformation and deception" through "greenwashing").

The fact that Plaintiffs did not bring a standalone claim for "fraud" and even carefully avoided using the word "fraud" makes no difference here. Plaintiffs cannot evade Rule 9(b)'s heightened pleading standard through artful pleading where, as here, they themselves have unequivocally asserted that this case is about a "campaign of deception and misleading promotion." Remand Reply at 13; *see also* Plaintiff's Memorandum of Law in Support of Motion to Remand at 1, *City and County of Honolulu v. Sunoco LP*, No. 1:20-cv-00163 (D. Haw. Sep. 11, 2020), ECF No. 116-1 ("The City seeks to vindicate the local injuries within its jurisdiction caused by Defendants' decades-long campaign to discredit the science of global warming, to conceal the catastrophic dangers posed by their fossil-fuel products, and to misrepresent their role in combatting the climate crisis."). Therefore, it is clear that, under Plaintiffs' "deception theory," the Complaint is premised on an alleged "unified course of fraudulent conduct."

Notwithstanding that the Complaint as characterized by Plaintiffs themselves sounds in fraud, Plaintiffs failed to comply with Rule 9(b) and have not purported to comprehensively identify, let alone with particularity, all of the allegedly deceptive statements on which they base their claims. Rule 9(b) requires that Plaintiffs identify each and every alleged misstatement, by each and every Defendant, that—under Plaintiffs' theory—they claim to have inflated global demand for fossil fuels, yet instead Plaintiffs impermissibly rely on conclusory group pleading and a few scattershot examples. *See, e.g.*, Compl. ¶¶ 92–94, 97, 108. In fact, the Complaint does not identify any purported misstatements made by certain Defendants *at all.*

Just as critically, if not more so, Plaintiffs fail to specify how and whether they or anyone else detrimentally relied on any (let alone each) Defendant's alleged misrepresentations, deceptions, or concealment. *See Larsen*, 74 Haw. at 31 (dismissing claim where complaint failed to allege element of reliance with particularity, in violation of Rule 9(b)). In fact, the words "rely," "relied," and "reliance" appear nowhere in Plaintiffs' Complaint.

Blanket accusations of deception are exactly what Rule 9(b) was designed to protect against—generalized allegations that do not provide Defendants with notice or allow them "to prepare an effective defense to a claim which embraces a wide variety of potential conduct." *See id.* at 30 (citation omitted); *see also Shoppe* v. *Gucci Am.*, 94 Haw. 368, 386 (2000) (general allegations of fraud are insufficient because "[f]raud is never presumed"). Plaintiffs themselves assert that Defendants' alleged deception misled Plaintiffs and others, thus increasing demand for fossil fuels and increasing global emissions. Such a theory necessarily requires Plaintiffs to show the allegedly deceptive statements Plaintiffs and consumers in Hawai'i allegedly relied on in making decisions about energy consumption, and that such reliance increased global demand for fossil fuels beyond what it otherwise would have been absent the alleged deception. But the Complaint is devoid of any such allegations. The Complaint does not allege, much less with any particularity, that Plaintiffs or consumers more generally actually were aware of and relied on Defendants' supposed misrepresentations, let alone how such awareness affected global demand for fossil fuels. The Complaint thus falls short of the requirements of Rule 9(b) and should be dismissed.

Relatedly, Plaintiffs failed to plead their request for "abatement" with sufficient specificity under Hawai'i Rule of Civil Procedure 9(g). *See* Compl. at 115 (Prayer for Relief). Rule 9(g) requires that all "items of special damages . . . be specifically stated." HRCP Rule 9(g). As

explained by the Hawai'i Supreme Court, "[t]he law divides damages into two broad categories -- general and special. . . . [S]pecial damages are those damages which are *of a relatively unusual kind* and which, without specific notice to the adversary, may not be understood to be part of the claim." *Ellis*, 51 Haw. at 50–51 (1969) (emphasis added). Plaintiffs' vague request for an "abatement of the nuisances complained of herein in and near the County," Compl. at 115 (Prayer for Relief), is not well-defined, could take many forms and would have incredibly far-reaching implications, including global economic ramifications on oil and gas production.[7] Such damages would be "of a relatively unusual kind" and therefore require specificity under Rule 9(g). Accordingly, Plaintiffs' request for "abatement" should be dismissed or, in the alternative, Plaintiffs should provide a more definite statement of the special damages sought.

VI. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Honorable Court grant this motion and dismiss Plaintiffs' Complaint in its entirety with prejudice.

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

/s/ Joachim P. Cox
Joachim P. Cox
Randall C. Whattoff
COX FRICKE LLP

David C. Frederick, *pro hac vice*
James M. Webster, III, *pro hac vice*
Daniel S. Severson, *pro hac vice*
KELLOGG HANSEN TODD FIGEL & FREDERICK PLLC

/s/ Melvyn M. Miyagi
Melvyn M. Miyagi
Ross T. Shinyama
Summer M. Kaiawe
WATANABE ING LLP

Theodore J. Boutrous, Jr., *pro hac vice*
Andrea E. Neuman, *pro hac vice*
GIBSON, DUNN & CRUTCHER LLP

Erica W. Harris, *pro hac vice*
SUSMAN GODFREY LLP

[7] To give just one example, Plaintiffs assert that Defendants' alleged acts "are indivisible causes of Plaintiffs' injuries." *See, e.g.*, *id.* ¶ 184. But if such acts are "indivisible," it is obvious that they cannot be abated without affecting emissions from production on federal enclaves, or production for the federal government, or indeed worldwide production.

Attorneys for Defendants Royal Dutch Shell plc, Shell Oil Company, and Shell Oil Products Company LLC

/s/ Crystal K. Rose
Crystal K. Rose
Adrian L. Lavarias
David A. Morris
BAYS, LUNG, ROSE & VOSS

Sean C. Grimsley, *pro hac vice*
Jameson R. Jones, *pro hac vice*
Daniel R. Brody, *pro hac vice*
BARTLIT BECK LLP

Steven M. Bauer, *pro hac vice*
Margaret A. Tough, *pro hac vice*
Katharine A. Rouse, *pro hac vice*
LATHAM & WATKINS, LLP

Attorneys for Defendants ConocoPhillips and ConocoPhillips Company

/s/ Crystal K. Rose
Crystal K. Rose
Adrian L. Lavarias
David A. Morris
BAYS, LUNG, ROSE & VOSS

Steven M. Bauer, *pro hac vice*
Margaret A. Tough, *pro hac vice*
Katharine A. Rouse, *pro hac vice*
LATHAM & WATKINS, LLP

Attorneys for Defendants Phillips 66, and Phillips 66 Company

/s/ C. Michael Heihre
C. Michael Heihre
Michi Momose
CADES SCHUTTE

J. Scott Janoe, *pro hac vice*

Attorneys for Defendants Chevron Corporation and Chevron U.S.A. Inc.

/s/ Lisa Woods Munger
Lisa Woods Munger
Lisa A. Bail
David J. Hoftiezer
GOODSILL ANDERSON QUINN & STIFEL LLP

Matthew T. Heartney, *pro hac vice*
Jonathan W. Hughes, *pro hac vice*
John D. Lombardo, *pro hac vice*
ARNOLD & PORTER KAYE SCHOLER LLP

Attorneys for Defendants BP p.l.c. and BP America Inc.

/s/ Paul Alston
Paul Alston
Claire Wong Black
Glenn T. Melchinger
John-Anderson L. Meyer
DENTONS US LLP

Theodore V. Wells, Jr., *pro hac vice*
Daniel Toal, *pro hac vice*
Yahonnes Cleary, *pro hac vice*
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

Attorneys for Defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation

/s/ Margery S. Bronster
Margery S. Bronster
Lanson K. Kupau
BRONSTER FUJICHAKU ROBBINS

Victor L. Hou, *pro hac vice*

Megan Berge, *pro hac vice*
Sterling Marchand, *pro hac vice*
BAKER BOTTS LLP

Attorneys for Defendants Sunoco LP, Aloha Petroleum, Ltd., and Aloha Petroleum LLC

Boaz S. Morag, *pro hac vice*
CLEARY GOTTLIEB STEEN & HAMILTON LLP

Attorneys for Defendants BHP Group Limited, BHP Group plc, and BHP Hawaii Inc.

/s/ Ted N. Pettit
Ted N. Pettit
CASE LOMBARDI & PETTIT

Shannon S. Broome, *pro hac vice*
Shawn Patrick Regan, *pro hac vice*
Ann Marie Mortimer, *pro hac vice*
HUNTON ANDREWS KURTH LLP

Attorneys for Defendant Marathon Petroleum Corp.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CITY AND COUNTY OF HONOLULU, Plaintiff, 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 (Other Non-Vehicle Tort) **NOTICE OF HEARING MOTION and CERTIFICATE OF SERVICE**

NOTICE OF HEARING MOTION

TO: **DANA M.O. VIOLA, ESQ.**
Corporation Counsel Designate
ROBERT M. KOHN, ESQ. robert.kohn@honolulu.gov
NICOLETTE WINTER, ESQ. nwinter@honolulu.gov
JEFF ATSUSHI LAU, ESQ. jlau3@honolulu.gov
Deputies Corporation Counsel
Department of Corporation Counsel
Honolulu Hale, Room 110
530 South King Street
Honolulu, Hi 96813

Attorneys for Plaintiff
CITY AND COUNTY OF HONOLULU

JOACHIM P. COX, ESQ. jcox@cfhawaii.com
RANDALL C. WHATTOFF, ESQ. rwhattoff@cfhawaii.com
Cox Fricke LLP
800 Bethel Street, Suite 600
Honolulu, HI 96813

Attorneys for Defendants
ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, AND SHELL OIL PRODUCTS COMPANY LLC

MARGERY S. BRONSTER, ESQ. mbronster@bfrhawaii.com
LANSON K. KUPAU, ESQ. lkupau@bfrhawaii.com
Bronster Fujichaku Robbins
1003 Bishop Street
Suite 2300
Honolulu, HI 96813

Attorneys for Defendants
BHP GROUP LIMITED, BHP GROUP PLC, AND BHP HAWAII INC.

CRYSTAL K. ROSE, ESQ. crose@legalhawaii.com
ADRIAN L. LAVARIAS, ESQ. alavarias@legalhawaii.com
DAVID A. MORRIS, ESQ. dmorris@legalhawaii.com
Bays, Lung, Rose & Holma
Topa Financial Center
700 Bishop St Ste 900
Honolulu, HI 96813

Attorneys for Defendants
CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, AND PHILLIPS 66

C. MICHAEL HEIHRE, ESQ. mheihre@cades.com
MICHI MOMOSE, ESQ. mmomose@cades.com
Cades Schutte LLP
Cades Schutte Building
1000 Bishop Street 12th Floor
Honolulu, HI 96813

Attorneys for Defendants
SUNOCO LP, ALOHA PETROLEUM, LTD. and ALOHA PETROLEUM LLC

LISA WOODS MUNGER. ESQ. lmunger@goodsill.com
LISA A. BAIL, ESQ. lbail@goodsill.com
DAVID J. HOFTIEZER, ESQ. dhoftiezer@goodsill.com
Goodsill Anderson Quinn & Stifel LLP
First Hawaiian Center
999 Bishop St., Suite 1600
Honolulu, HI 96813

Attorneys for Defendants
BP PLC AND BP AMERICA INC.

PAUL ALSTON, ESQ. paul.alston@dentons.com
CLAIRE WONG BLACK, ESQ. claire.black@dentons.com
GLENN T. MELCHINGER, ESQ. glenn.melchinger@dentons.com
JOHN-ANDERSON L. MEYER, ESQ. john-anderson.meyer@dentons.com
Dentons US LLP
1001 Bishop Street, 18th Floor
Honolulu, HI 96813

Attorneys for Defendants
EXXON MOBIL CORPORATION and EXXONMOBIL OIL CORPORATION

TED N. PETTIT, ESQ. tnp@caselombardi.com
Case Lombardi & Pettit
737 Bishop Street Suite 2600
Honolulu, HI 96813

Attorneys for Defendant
MARATHON PETROLEUM CORP.

NOTICE IS HEREBY GIVEN that Defendants' Joint Motion to Dismiss the First Amended Complaint filed herein on June 2, 2021, shall come on for hearing before the Honorable, Judge Jeffrey P. Crabtree, Judge of the above-entitled Court on August 27, 2021 at 8:30 a.m., via Webex Video Hearing. The parties are directed to refer to an Order Setting Motion for Video Conference Hearing to be filed by the court which will provide instructions for joining the hearing.

DATED: Honolulu, Hawaii, June 2, 2021.

/s/ Melvyn M. Miyagi
MELVYN M. MIYAGI
ROSS T. SHINYAMA
SUMMER H. KAIAWE
Attorneys for Defendants
CHEVRON CORPORATION
and CHEVRON U.S.A., INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the aforementioned document was duly served on the above-referenced parties through their respective attorneys at their last known address by electronic service via JEFS, as provided by Rule 5(b), HRCP or by depositing it in the U.S. Mail, postage prepaid , for those parties or their counsel not registered with JEFS on the date below.

DATED: Honolulu, Hawaii, June 2, 2021.

/s/ Melvyn M. Miyagi
MELVYN M. MIYAGI
ROSS T. SHINYAMA
SUMMER H. KAIAWE
Attorneys for Defendants
CHEVRON CORPORATION
and CHEVRON U.S.A., INC.