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BHP HAWAII INC.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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

Plaintiffs,

vs.

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

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

**REPLY MEMORANDUM OF LAW IN  
FURTHER SUPPORT OF  
DEFENDANTS BHP GROUP LIMITED  
AND BHP GROUP PLC'S MOTION TO  
DISMISS FOR LACK OF PERSONAL  
JURISDICTION; DECLARATION OF  
BOAZ S. MORAG; CERTIFICATE OF  
SERVICE**

Trial Date: None

Hearing Date: October 15, 2021  
Hearing Time: 8:45 a.m.

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

Defendants.

The Honorable Jeffrey P. Crabtree

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**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS BHP  
GROUP LIMITED AND BHP GROUP PLC'S MOTION TO DISMISS FOR LACK OF  
PERSONAL JURISDICTION**

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## I. INTRODUCTION

Plaintiffs continue to insist this case is about defendants’ deceptive marketing practices directed at Hawai‘i residents but acknowledge that to subject a foreign defendant to jurisdiction on such claims, it is not enough that the defendant sold oil into Hawai‘i. Nonetheless, following BHP Ltd.’s<sup>1</sup> factual challenge to Plaintiffs’ jurisdictional allegations, submission of a detailed declaration, production of thousands of pages of documents and deposition testimony in jurisdictional discovery, Plaintiffs offer *no* statements (deceptive or otherwise) by BHP Ltd. or any BHP Group entity directed at Hawai‘i from which Plaintiffs’ claims arise or to which they relate.<sup>2</sup>

Following such discovery, it is now Plaintiffs’ burden to establish by a preponderance of the record evidence—not based solely on the allegations of the Complaint—that BHP Ltd. is subject to jurisdiction here. *See* Mot. at 3-4 (citing *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986)). Plaintiffs fail to satisfy that burden. Indeed, in addition to *not* identifying any allegedly actionable statements, they point to *no* contacts that BHP Ltd. itself has ever had with Hawai‘i. Instead, they argue that BHP Ltd. may be sued here on the claims asserted in the Complaint because its indirect subsidiary, BHP Hawaii, had petroleum operations in, and other BHP Group entities sold crude oil into, Hawai‘i from the 1980s until 1998, and those contacts and activities should be imputed to BHP Ltd. However, Plaintiffs fail to prove that the corporate separateness between BHP Ltd. and its subsidiaries should be ignored: they do not even contend (let alone prove) that “failure to disregard” BHP Ltd. and BHP Hawaii’s “separate identities would result in fraud or injustice” or that BHP Ltd. exerts anything more than normal parental control over its subsidiaries such that the necessary “unity of interest” exists for an alter ego finding. *Opp.* [Dkt. 508] at 8. Plaintiffs fail to establish specific or general jurisdiction over BHP Ltd.

## II. ARGUMENT

### A. Plaintiffs Point To *No* Statements By *Any* BHP Entity Directed At Hawai‘i

Plaintiffs assert that their claims arise from a “decades-long campaign to discredit the science of global warming, to conceal the catastrophic dangers posed by [defendants’] fossil fuel-products, and to misrepresent their role in combatting the climate crisis.” *Opp.* at 1; *see also* Aug. 27, 2021 Tr. (Ex. C) at 108:12-16, 111:6-8, 110:12-111:1, 118:25-119:2. To establish jurisdiction

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<sup>1</sup> Capitalized terms not defined here have the meaning given them in the BHP Motion.

<sup>2</sup> Plaintiffs do not oppose BHP Group plc’s motion to dismiss for lack of personal jurisdiction. *See Opp.* at 1 n.1. Accordingly, this brief addresses only BHP Ltd.

over a foreign defendant with respect to such claims, Plaintiffs must demonstrate (not merely allege) that their claims arise from or relate to BHP Ltd.'s contacts with Hawai'i. Mot. at 5 (citing *Gordon v. Granstedt*, 54 Haw. 597, 603 (1973)). The very nature of Plaintiffs' claims thus make evidence of misleading statements or deceptive practices by BHP Ltd. directed at Hawai'i residents necessary to establish personal jurisdiction over BHP Ltd. in Hawai'i. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 778 (1984) (predicating personal jurisdiction in a libel action on the regular circulation of magazines containing the challenged article in the forum State). Plaintiffs' failure to produce evidence of objectionable statements directed to Hawai'i residents is fatal to Plaintiffs' efforts to establish jurisdiction over BHP Ltd. because without any such statements, Plaintiffs cannot establish that their claims arise from or relate to any contacts BHP Ltd. had with Hawai'i.

Nor may Plaintiffs rely on BHP Ltd.'s alleged failure to warn, as a defendant's silence in the forum cannot form the basis for jurisdiction for the reasons set out in the ExxonMobil Reply [Dkt. 441] at 4 (citing cases) and Def. Supp. Br. [Dkt. 494] (discussing *Sulak v. American Eurocopter Corp.*, CV. No. 09-00135, 2009 WL 2849136 (D. Haw. Aug. 26, 2009)). Here, Plaintiffs do not establish any statements directed at Hawai'i or any other BHP Ltd. forum contact. Consequently, even pursuant to Plaintiffs' overly narrow reading of *Sulak* under which a defendant's silence in the forum cannot form the basis for jurisdiction "where a defendant's only contact with the forum is nothing more than its alleged failure to take some action there," see Pls. Resp. [Dkt. 504], there can be no jurisdiction over BHP Ltd. on a failure to warn theory.

#### **B. Plaintiffs Have Failed To Show BHP Limited And BHP Hawaii Are Alter Egos**

Plaintiffs argue that BHP Ltd. "is subject to general jurisdiction because ... BHP Hawaii is at home in the state, and its contacts may be imputed to its parent," i.e., that BHP Ltd. and BHP Hawaii are alter egos of one another. Opp. at 7-8. Plaintiffs do not make the requisite showing "(1) 'that there is such a unity of interest and ownership that separate personalities of the two entities no longer exists'; and (2) 'that failure to disregard their separate identities would result in fraud or injustice.'" Opp. at 8 (citing *Sheehan v. S. Foods Grp., LLC*, No. CV 18-00405 HG-KJM, 2019 WL 5406040, at \*4 (D. Haw. Oct. 22, 2019). "Courts apply the alter ego doctrine with great caution and reluctance" and "require exceptional circumstances before disregarding the corporate form." *Robert's Hawaii Sch. Bus, Inc. v. Laupahoehoe Transp. Co., Inc.*, 91 Haw. 224, 241 (1999).

Although both prongs of the alter ego test must be satisfied, Plaintiffs do not offer *any*

evidence or even argue—because they cannot—that respecting the corporate separateness between BHP Hawaii and BHP Ltd. would “sanction a fraud” or “promote injustice.” *Id.* at 241-45; *Katzir’s Floor & Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143, 1149 (9th Cir. 2004) (“The injustice that allows a corporate veil to be pierced is not a general notion of injustice; rather, it is the injustice that results only when corporate separateness is illusory.”). In *Chung v. Animal Clinic, Inc.*, for example, the Hawai‘i Supreme Court held that a veterinarian and his veterinary clinic were not alter egos even though the veterinarian was “the sole director, sole stockholder and president of the corporation” because it “violates no statutory requirement, is not opposed to public policy, and constitutes no fraud on creditors.” 63 Haw. 642, 645 (1981) (veterinarian not using clinic to “perpetuate a fraud or defeat a rightful claim”). This failure defeats Plaintiffs’ alter ego and general jurisdiction arguments.

As to the “unity of interest and ownership” prong, Plaintiffs contend that (1) “BHP Hawaii is now a mere shell, that exists to satisfy certain environmental obligations in Hawai‘i,” (2) “BHP [Ltd.] exercised control over BHP Hawaii,” and (3) “[t]here was a commingling of assets.” *Opp.* at 8-9. None of these contentions (in isolation or together) satisfies Plaintiffs’ high burden.

*First*, Plaintiffs’ purported evidence that BHP Hawaii is a “mere shell” is insufficient as a matter of law and defies common sense. *See Robert’s Hawaii*, 91 Haw. at 241-46. That BHP Hawaii ceased business operations two decades ago yet remains in existence does not render it a “mere shell.” Indeed, that BHP Hawaii has remained in existence for 20 years to satisfy its environmental obligations, including to the State of Hawai‘i, is powerful evidence that respecting BHP Hawaii’s separateness from BHP Ltd. would not perpetuate fraud and injustice, but to the contrary is what responsible corporations are supposed to do. *Cf. id.* at 243-45 (finding entities were alter egos because the parties created a shell corporation *in order to bypass state law*).

However, as an entity with no ongoing operations, it is also not surprising nor suggestive of malfeasance that BHP Hawaii has not had employees since 2000 (its limited business being able to be overseen by its officers and directors) or that it has not reported revenue since 2007. Neither do these facts, nor that “BHP Hawaii’s officers are employees of other BHP entities,” (though, significantly, not BHP Ltd.), *Opp.* at 8, in any way support an alter ego finding. *See Williams v. Progressive Cnty. Mut. Ins. Co.*, No. 17-cv-2282-AJB-BGS, 2019 WL 1434241, at \*2-3 (S.D. Cal. Mar. 29, 2019) (no alter ego finding even though (1) “Progressive presents itself in marketing and filings as one company”; (2) “County Mutual ‘has no employees ... and does not engage in any



activity or operations””; and (3) “TPC and the California subsidiaries’ share officers and directors”); *United States v. Bestfoods*, 524 U.S. 51, 57, 62, 69 (1998) (officers holding positions at both parent and subsidiary is “entirely appropriate” and does not evidence alter ego relationship).

Next, Plaintiffs’ complaints as to the maintenance of corporate formalities are meritless. That “BHP Hawaii’s board of directors is appointed by its direct parent,” Opp. at 8-9, and that its board “held no annual meetings for almost every year between 1994 and 2009,” Opp. at 9, but instead annually conducted the company’s affairs through unanimous written consents rather than in-person meetings, are corporate governance practices expressly contemplated and authorized by BHP Hawaii’s bylaws<sup>3</sup> and articles of incorporation<sup>4</sup> and fully consistent with Hawai‘i corporate law, *see* Haw. Rev. Stat. § 414-212(a).<sup>5</sup> Indeed, these facts fall short even of the facts alleged in *McGeachy v. Pinto Valley Mining Corp.*, 2:16-cv-03348 JWS, 2017 WL 3130639 (D. Ariz. July 24, 2017), where the court found the alter ego allegations insufficient to sustain jurisdiction over BHP Ltd.

*Second*, the control a parent company exercises over a wholly owned subsidiary in the ordinary course of business is not enough to support an alter ego finding, *Doe v. Unocal Corp.*, 248 F.3d 915, 927 (9th Cir. 2001), but that is all Plaintiffs can show here. *See* Opp. at 9 (arguing that (1) “BHP [Ltd.] made the decision to divest BHP Hawaii’s gas utility business,” and (2) BHP Hawaii’s sale of land was “conditioned on final approval of the senior management of” BHP Ltd.). Plaintiffs cite to *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1070 (9th Cir. 2015), but there, the Ninth Circuit held that even being “heavily involved” in the subsidiary’s operations by “exercis[ing] control” over its budget, “having approval authority over large purchases,” making “some hiring decisions,” and requiring some of the subsidiary’s employees to report to supervisors at the parent was not sufficient for an alter ego finding. *Id.* at 1074. Similarly, in *Kramer Motors, Inc. v. British Leyland, Ltd.*, the court found no alter ego relationship even though the parent had “guaranteed” the subsidiary’s obligations, “reviewed and approved its major policy decisions,” some of the parent’s directors sat on the subsidiary’s board, and the parent’s executives “work[ed] closely”

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<sup>3</sup> *See* Ex. D, BHP Hawaii 2009 By-laws, art. III, §§ 13, 14, 19; Matthew K. Edling Decl. [Dkt. 509] (“Edling”) Exs. 13-14, 16-18, 20-21, 24, 16, 28, 31.

<sup>4</sup> *See* Ex. E, BHP Hawaii Articles of Incorporation, art. V, § 2.

<sup>5</sup> As a wholly owned subsidiary, BHP Hawaii’s sole shareholder is its direct parent. *See, e.g.*, Edling Ex. 24 (“BHP Billiton Petroleum Holdings (USA) Inc., being the sole shareholder of BHP Hawaii Inc.”).

with the subsidiary on pricing. 628 F.2d 1175, 1177 (9th Cir. 1980); *see also Corcoran v. CVS Health Corp.*, 169 F. Supp. 3d 970, 983-84 (N.D. Cal. 2016) (no alter ego finding where the two entities had overlapping officers and directors, parent presented itself as one integrated company on its website and in government filings for marketing purposes, and parent was involved in subsidiary's business decisions); *Fletcher v. AteX, Inc.*, 68 F.3d 1451, 1459 (2d Cir. 1995) (holding parental control over a subsidiary's expenditures and asset sales did not warrant an alter ego finding).<sup>6</sup> Plaintiffs also contend that "BHP Hawaii granted another BHP subsidiary the authority to conduct banking activities on its behalf" and "BHP [Ltd.] maintained policies imposing mandatory minimum performance requirements on its subsidiaries for various process functions." Opp. at 9. But this is evidence that corporate formalities were respected, not disregarded. *See* Edling Ex. 26 (BHP Hawaii board approved appointing a BHP subsidiary performing a treasury function as BHP Hawaii's agent for banking purposes because it was in the company's "best interest"); *Fletcher*, 68 F.3d at 1459 (subsidiary's "participation in [parent's] cash management system is consistent with sound business practice"); *Papa v. Katy Indus. Inc.*, 166 F.3d 937, 943 (7th Cir. 1999) ("The corporate veil is pierced, when it is pierced, not because the corporate group is integrated, but (in the most common case) because it has neglected forms intended to protect creditors from being confused about whom they can look to for the payment of their claims.").<sup>7</sup>

*Third*, Plaintiffs fundamentally misapprehend the concept of "commingling of funds" that would support an alter ego finding, as well as the relevant evidence. Plaintiffs point to financial transactions between BHP Hawaii and other BHP Group entities, including BHP Hawaii depositing its cash with a BHP treasury subsidiary,<sup>8</sup> as evidence that BHP Ltd. and BHP Hawaii

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<sup>6</sup> The documents Plaintiffs cite do not support the inferences Plaintiffs seek to draw from them. Plaintiffs point to BHP Ltd.'s 1997 annual report to argue that BHP Ltd. decided to sell BHP Hawaii's gas utility business, but as courts recognize, it is a commonly accepted practice for corporations to refer to multiple entities within the corporate group by a general corporate name (like "BHP") in marketing materials and securities filings, with it being understood that by doing so corporations are not waiving the legal separateness of each company within the group. *See Corcoran*, 169 F. Supp. 3d at 983-84.

<sup>7</sup> Plaintiffs also argue that BHP Ltd. asked BHP Hawaii if three of its directors would be willing to serve as directors of another company (not in Hawai'i) in which BHP Ltd. held a 50% interest, *see* Opp. at 9 n.8, but the U.S. Supreme Court has held that there is nothing inappropriate with directors of one subsidiary sitting on the board of another. *See Bestfoods*, 524 U.S. at 62, 69.

<sup>8</sup> To be clear, what Plaintiffs rely on is not a loan to BHP Hawaii (which would be booked as an intercompany payable on BHP Hawaii's balance sheet on which Plaintiffs rely) but rather a receivable, as explained by Mr. Stollery during his deposition and demonstrated by BHP Hawaii's

were improperly commingling funds. *See* Opp. at 9-10. Putting aside that none of these transactions involved BHP Ltd., they show that the BHP entities *were* documenting their transactions, following corporate formalities, and identifying which funds belonged to which entities in the Group—not improperly mixing and using other entities’ cash as one’s own, as would be suggestive of an alter ego relationship. *See* Edling Ex. 28, 31, 32. The mere existence of these types of inter-group documented and transparent financial transactions, without some malfeasance, is not evidence of an alter ego relationship. *See Albright v. Attorney’s Title Ins. Fund*, 504 F. Supp. 2d 1187, 1211 (D. Utah 2007) (shareholder’s infusion of capital is proof shareholder was *not* siphoning assets and “each of the transfers of cash ... were documented so as to respect the corporate differences between the two companies”) (citing authority); *Rice v. First Energy Corp.*, 339 F. Supp. 3d 523, 536 (W.D. Pa. 2018) (providing loan to subsidiary not evidence of alter ego).

### **C. Plaintiffs Fail To Establish BHP Limited Is Subject To Specific Jurisdiction**

As explained above, Plaintiffs’ failure to come forward with a false or deceptive statement by any BHP Group entity directed to Hawai‘i residents about climate change or fossil fuel use dooms their effort to establish specific jurisdiction over BHP Ltd. with respect to the claims they insist they are asserting. Moreover, a close examination of their specific jurisdiction arguments shows that, like their general jurisdiction arguments, they too depend on ignoring the distinction between, or conflating into one, multiple BHP Group entities. Thus, they are wholly insufficient to ground a finding of specific jurisdiction over BHP Ltd. in the absence of evidence of any challenged statements and absent any Hawai‘i contacts of BHP Ltd. itself.

*First*, Plaintiffs claim that “BHP Group” “sold crude oil to a refinery in Hawai‘i,” relying on talking points for BHP Ltd.’s CEO, a BHP Ltd. annual report, and Mr. Stollery’s deposition testimony. Opp. at 4-5. But Plaintiffs play fast and loose with the term “BHP Group,” which they define as only one entity, Defendant BHP Group Limited (defined herein as BHP Ltd.). The evidence does not establish that *BHP Ltd.* sold crude oil to Hawai‘i. Rather, as Mr. Stollery testified in his Declaration: “Starting in or around 1983–1984, *a subsidiary* of BHP Group Limited began selling a portion of its Australian crude oil production to the Kapolei refinery in Honolulu.” Mot., Ex. A ¶ 11 (emphasis added). And at his deposition, conducted in his personal capacity and not under Haw. R. Civ. P. 30(b)(6), Mr. Stollery testified that “the group *or subsidiaries of the*

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financial statements, *see* Edling Ex. 1 at 118:11-13, 119:18-20; Ex. 25. Even if this were a loan to BHP Hawaii, it was not a loan by BHP Ltd. and would not evidence an alter ego relationship.

group supplied 8.4 million barrels since 1983.” Edling Ex. 1 at 38:22-24 (emphasis added). In fact, the agreement by which Tesoro Refining, Marketing & Supply Company acquired crude oil for the Kapolei Refinery was with BHP Petroleum Trading and Marketing Proprietary Limited, *not* BHP Ltd.<sup>9</sup> Plaintiffs acknowledge that they do not know whether BHP Ltd. or a subsidiary sold the crude oil into Hawai‘i. *See* Opp. at 4 n.5. Accordingly, this point is not sufficient to establish jurisdiction over BHP Ltd. by a preponderance of the evidence as is Plaintiffs’ burden.

*Second*, Plaintiffs argue this Court can assert jurisdiction over BHP Ltd. because it “used its foothold in Hawai‘i through PRI/BHP Hawaii to market its crude oil in North America and across the Pacific Rim.” Opp. at 5 (emphasis added). However, Plaintiffs cannot refute that these are BHP Hawaii’s activities within the forum, not BHP Ltd.’s activities. Plaintiffs also cannot refute that such marketing activities were not on behalf of BHP Ltd., but rather other BHP Group entities in the petroleum business. Having failed to overcome the separateness of BHP Group entities, *supra* II.B, such activities are irrelevant to the jurisdictional analysis. Indeed, at bottom, Plaintiffs ask this Court to find that BHP Ltd. “purposefully availed itself of the privilege of conducting activities in Hawaii” simply because it formed an indirect subsidiary that is incorporated here. But that is patently insufficient to establish specific jurisdiction over a parent company. *See Moody v. Charming Shoppes of Delaware, Inc.*, No. C 07-06073 MHP, 2008 WL 2128955, at \*6-8 (N.D. Cal. May 20, 2008) (declining to assert jurisdiction in California over parent corporation, CSI, despite it having “a number of direct and indirect operating subsidiaries which own and operate retail stores in California” that sold products under the Lane Bryant brand).

Plaintiffs’ reliance on generic references to “BHP” in a handful of documents—including an internal presentation—that do not refer to BHP Ltd. specifically, are likewise insufficient to establish specific jurisdiction over BHP Ltd. Opp. at 4-5, 9 n.7 (citing Edling Ex. 3-4, 22-23). The court’s holding in *Moody* is instructive here too. There, the court declined to assert jurisdiction over the parent company, CSI, despite it stating that “‘we employed ... we hire ... *our* employees’ [in SEC filings, annual reports, and the website] when referring to employees of its subsidiaries,” “represent[ing] that it operates the [subsidiary’s] retail stores” and that its board of directors and management teams “have ‘[t]ightened inventory levels ... reducing same store inventories’” in SEC filings and press releases, and including hiring information for “*our* store associates” to work

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<sup>9</sup> *See* Ex. F, Crude Oil Supply Agreement between BHP Petroleum Trading and Marketing Pty Ltd. and Tesoro Refining, Marketing & Supply Company.

at the subsidiary's retail stores. 2008 WL 2128955, at \*2-3 (emphasis added); *see also Corcoran*, 169 F. Supp. 3d at 983-84.

Further, Plaintiffs' acknowledgement that the last act in Hawai'i that they claim supports the exercise of specific jurisdiction over BHP Ltd. occurred in 1998 also has jurisdictional consequences. Opp. at 5-7. Although "courts examine defendants' contacts 'at the time of the events underlying the dispute,'" Opp. at 6 n.6 (citing *Steel v. U.S.*, 813 F.2d 1545, 1549 (9th Cir. 1987)), the exercise of jurisdiction based on an aggregation of contacts over time requires that at least one jurisdictionally significant contact occur within the limitations period. *See Skidmore v. Led Zeppelin*, 106 F. Supp. 3d 581, 588 (E.D. Pa. 2015) (concerts occurring seventeen years earlier were not "contacts upon which the Court may base its exercise of specific jurisdiction" when the statute of limitations was three years); *Ciulli v. Iravani*, 651 F. Supp. 2d 356, 369 (E.D. Pa. 2009) (defamatory conversation within the forum could not support specific jurisdiction when it occurred outside limitations period); *Wilder v. News Corp.*, No. 11 Civ. 4947(PGG), 2015 WL 5853763, at \*11 n.6 (S.D.N.Y. Oct. 7, 2015) (claims premised on statements that are time-barred "provide no basis for this Court to exercise specific personal jurisdiction"). Here, the relevant limitations period, Haw. Rev. Stat. § 657-7, is two years, rendering all claimed contacts with Hawai'i from 1983-1998 unavailing as a predicate for specific jurisdiction over BHP Ltd. today.

Finally, asserting jurisdiction over BHP Ltd. in Hawai'i would also be "unreasonable" and "offend traditional notions of fair play and substantial justice." *See In Interest of Doe*, 83 Haw. 367, 374 (1996) (stating standard to determine whether exercise of jurisdiction would be reasonable). All Plaintiffs have shown is that BHP Ltd. is an Australian company that has an indirect subsidiary that briefly engaged in the petroleum business in Hawai'i over two decades ago. As the Hawai'i Supreme Court noted in *Doe*, "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Id.* at 375 (citation omitted). Accordingly, "[w]here the defendant is from a foreign nation rather than another state, the reasonableness of exercising personal jurisdiction is significantly diminished." *Id.* Particularly here, the absence of any evidence that BHP Ltd. directed any deceptive statements at Hawai'i residents or had any other forum contacts fairly attributable to it, requires dismissal.

### **III. CONCLUSION**

Plaintiffs do not oppose the dismissal of BHP Group plc, and for all the foregoing reasons

and for the reasons stated in the Motion and Omnibus Jurisdictional Brief, BHP Group Limited should also be dismissed for lack of personal jurisdiction.

DATED: Honolulu, Hawai'i, September 30, 2021.

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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,

vs.

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

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

**DECLARATION OF BOAZ S. MORAG  
IN SUPPORT OF REPLY  
MEMORANDUM OF LAW IN  
FURTHER SUPPORT OF  
DEFENDANTS BHP GROUP LIMITED  
AND BHP GROUP PLC'S MOTION TO  
DISMISS FOR LACK OF PERSONAL  
JURISDICTION**

Trial Date: None

Hearing Date: October 15, 2021  
Hearing Time: 8:45 a.m.

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

Defendants.

The Honorable Jeffrey P. Crabtree

**DECLARATION OF BOAZ S. MORAG IN SUPPORT OF  
REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF  
DEFENDANTS BHP GROUP LIMITED AND BHP GROUP PLC'S  
MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

I, Boaz S. Morag, declare under penalty of perjury as follows:

1. I am Counsel with the law firm Cleary Gottlieb Steen & Hamilton LLP, attorneys for Defendants BHP Group Limited, BHP Group PLC, and BHP Hawaii Inc. in this action. I am an attorney licensed to practice in the State of New York and have been admitted *pro hac vice* to practice before this Court in this case.

2. I respectfully submit this declaration in support of the Reply Memorandum of Law in Further Support of Defendants BHP Group Limited and BHP Group PLC's Motion to Dismiss for Lack of Personal Jurisdiction, filed contemporaneously herewith.

3. On June 2, 2021, BHP Group Limited and BHP Group Plc (the "BHP Group Movants") filed a separate Motion to Dismiss for Lack of Personal Jurisdiction, Dkt. 353 (June 2, 2021) ("BHP Motion"), raising a factual challenge to the jurisdictional allegations against the BHP Group Defendants in the Plaintiffs' Complaint. The BHP Motion was supported by the Declaration of Jamie Stollery, Head of Disputes (Legal) for the BHP Movants. Since submitting the Declaration, Mr. Stollery's title has changed to Vice President of Disputes and Regulatory.

4. On June 10, 2021, the Plaintiffs sent the BHP Group Movants a Request for Production of Documents identifying the categories of documents Plaintiffs were seeking as



jurisdictional discovery in connection with the BHP Motion. The BHP Group Movants provided comments on Plaintiffs' Document Requests on June 23, 2021. Attached hereto as Exhibit A is a true and correct copy of Plaintiffs' Request for Production of Documents to BHP dated June 10, 2021, as modified by BHP Group Defendants on June 23, 2021. Plaintiffs also indicated their intention to take the deposition of Mr. Stollery, the declarant in support of the BHP Motion.

5. The 30 agreed categories of Document Requests included, but were not limited to:

Document Request 27. All non-print advertisements by BHP Group Limited, BHP Group Plc, and/or BHP Hawaii Inc. directed at the State of Hawai'i, between 1993 and 2014 and documents sufficient to show the date of those advertisements and where and how said advertisements were placed.

Document Request 28. All print advertisements by YOU directed at the State of Hawai'i between from 1993 to 2014.

6. Jurisdictional discovery was completed on August 18, 2021. Starting on July 17, 2021, the BHP Group Movants produced over 10,000 pages of documents in response to the agreed Document Requests. As part of jurisdictional discovery, the BHP Group Defendants conducted a search for advertisements in Hawai'i and produced to Plaintiffs what it was able to locate. Plaintiffs have not raised any complaint that the discovery responses of the BHP Group Movants was deficient in any way.

7. On August 17, 2021, the Plaintiffs deposed Jamie P. Stollery. Attached hereto as Exhibit B is a true and correct copy of the Notice of Deposition of Jamie Stollery, dated August 3, 2021 pursuant to Hawai'i R. Civ. P. 30(a)(1)

8. Attached hereto as Exhibit C is a true and correct copy of excerpts from the transcript of the August 27, 2021, hearing on the Defendants' Joint Motion to Dismiss the First Amended Complaint [Dkt. 347] and the Chevron's Defendants Special Motion to Strike and/or Dismiss the Complaint Pursuant to California's Anti-SLAPP Law [Dkt. 349].

9. Attached hereto as Exhibit D is a true and correct copy of the amended By-Laws of BHP Hawaii Inc., adopted as of December 31, 2009, Bates-stamped BHP\_JUR\_00000089 to BHP\_JUR\_00000102.

10. Attached hereto as Exhibit E is a true and correct copy of the Restated Articles of Incorporation of Pacific Resources, Inc., as amended on July 21, 1989, produced to Plaintiffs and Bates-stamped BHP\_JUR\_00000071 to BHP\_JUR\_00000088.

11. Attached hereto as Exhibit F is a true and correct copy of Exhibit 1.1(e) of the Stock Stale Agreement between BHP Hawaii Inc., BHP Petroleum Pacific Islands, Inc., and Tesoro Refining, Marketing & Supply Company, dated March 18, 1998 – the Crude Oil Supply Agreement by and between BHP Petroleum Trading and Marketing Pty Ltd. and Tesoro Refining, Marketing & Supply Company, produced to Plaintiffs and Bates-stamped BHP\_JUR\_00008884 to BHP\_JUR\_00008919.

12. Attached hereto as Exhibit G is a true and correct copy of a January 25, 1995, advertisement in the Honolulu Star-Bulletin, downloaded on June 9, 2021, produced to Plaintiffs and Bates-stamped BHP\_JUR\_00010102.

13. Attached hereto as Exhibit H is a true and correct copy of a September 7, 1995, advertorial by Jim Yates that appeared in the Honolulu Star-Bulletin, downloaded on June 9, 2021, produced to Plaintiffs and Bates-stamped BHP\_JUR\_00010099.

14. Attached hereto as Exhibit I is a true and correct copy of a document depicting the organizational structure of BHP Hawaii Inc. as at January 1, 2021, produced to Plaintiffs and Bates-stamped BHP\_JUR\_00007846, and which was marked by Plaintiffs as Ex. 4 to the Stollery Deposition.

Executed on September 30, 2021, in New York, New York.

/s/ Boaz S. Morag  
BOAZ S. MORAG

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAII

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

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vs.

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

Defendants.

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

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, on September 30, 2021 and by the method of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

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