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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI`I

COUNTY OF MAUI, Plaintiff, 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. 2CCV-20-0000283 (Other Non-Vehicle Tort) **DEFENDANTS' JOINT MOTION TO DISMISS; JOINT MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS; NOTICE OF HEARING MOTION AND CERTIFICATE OF SERVICE** **HEARING:** Date: August 18, 2022 Time: 8:30 a.m. The Honorable Judge Jeffrey P. Crabtree **NO TRIAL DATE SET**

DEFENDANTS' JOINT MOTION TO DISMISS

Pursuant to HRCP Rule 7, Defendants hereby move to dismiss Plaintiff's Complaint (Dkt. 1) with prejudice on multiple grounds under HRCP Rule 12(b)(2) and (6) (the "Motion"). Defendants hereby move to dismiss this action because:

1. The Court lacks jurisdiction over the Defendants Sunoco LP, Aloha Petroleum LLC, Exxon Mobil Corporation, ExxonMobil Oil Corporation, Shell plc (f/k/a Royal Dutch Shell plc), Shell USA, Inc. (f/k/a Shell Oil Company), and Shell Oil Products Company LLC, Chevron Corporation, Chevron USA Inc., BP plc, BP America Inc., Marathon Petroleum Corporation, ConocoPhillips, ConocoPhillips Company, Phillips 66, and Phillips 66 Company; and

2. The Complaint fails to state any claim on which relief can be granted against Defendants Sunoco LP, Aloha Petroleum LLC, Aloha Petroleum, Ltd., Exxon Mobil Corporation, ExxonMobil Oil Corporation, Shell plc (f/k/a Royal Dutch Shell plc), Shell USA, Inc. (f/k/a Shell Oil Company), and Shell Oil Products Company LLC, Chevron Corporation, Chevron USA Inc., BP plc, BP America Inc., Marathon Petroleum Corporation, ConocoPhillips, ConocoPhillips Company, Phillips 66, Phillips 66 Company, and BHP Hawaii Inc., including, but not limited to, because of Plaintiff's failure to comply with HRCP Rule 9(b); and
3. The claims against Chevron Corporation and Chevron USA Inc. are barred by applicable anti-SLAPP statutory law.

To facilitate full consideration of the issues presented in this Motion, by its Minute Order Regarding Expected Motions dated April 25, 2022 the ("Minute Order"), the Court has determined that the issues will be briefed in multiple filings submitted both jointly on behalf of all defendants and separately, on behalf of one or more individual defendants.

Pursuant thereto, in support of their arguments under HRCP 12(b)(6) Defendants hereby submit the attached joint memorandum seeking dismissal on the basis that Plaintiff has failed to state any claim on which relief can be granted. Further briefing on this Motion relating to Defendants' bases for seeking dismissal pursuant to HRCP 12 is being submitted today and will be submitted later in accordance with the Minute Order.

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DATED: Honolulu, Hawaii, May 25, 2022.

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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAIʻI

COUNTY OF MAUI,

Plaintiff,

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. 2CCV-20-0000283
(Other Non-Vehicle Tort)

DEFENDANTS' JOINT MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS

Action Filed: October 12, 2020

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I. INTRODUCTION

The County of Maui seeks an unprecedented expansion of state tort law in an attempt to impose liability on a select group of energy companies for injuries the County alleges will result from global climate change. While the state-law labels that Plaintiff attaches to its claims may be familiar, the actual contours of the claims, as pleaded, are without parallel and no court anywhere else in the country has permitted such claims to proceed. Every federal court to have reached the merits of these claims has dismissed them. And the more Plaintiff has tried to re-characterize its claims as solely based upon supposed "misrepresentations," the less recognizable as actual state-law torts they have become. Indeed, far from being the defining feature of Plaintiff's causes of action, "misrepresentation" is not an element of *any* of them. Fundamentally, Plaintiff seeks to expand state tort law beyond its permissible scope and usurp the proper role of the legislative and executive branches by developing and implementing climate policy—and to do so retrospectively and far beyond the geographic boundaries of this State. For these reasons—and more—Plaintiff's claims fail under Hawai'i law and should be dismissed, with prejudice.

Starting with the simplest basis for dismissal, Plaintiff's claims are barred by the statute of limitations. The Complaint fails to identify a single alleged misrepresentation within the two-year limitations period. In fact, the most recent alleged misstatement was made in 2000—*more than 20 years* before Plaintiff filed its Complaint. Since that time, many public sources, including several upon which Plaintiff belatedly relies, have widely publicized the risks that Plaintiff now alleges Defendants misrepresented or failed to disclose—that fossil fuel use poses climate-related risks. Yet, for decades, Plaintiff chose to sit back and do nothing, while continuing to reap the economic and financial benefits of widespread use and consumption of the petroleum products that the Hawai'i legislature, to this day, decrees "are essential to the health, welfare, and safety of the people of Hawaii." Haw. Rev. Stat. § 125C-1.

Plaintiff presumably sat on its supposed claims because it properly recognized that it had no legally cognizable claim under state tort law.

Plaintiff's claims also fail because Hawai'i law restricts counties such as Plaintiff—which are creatures of state law and possess only those powers that state law enumerates—to enacting and enforcing only *ordinances*, not common-law torts such as those in Plaintiff's Complaint.

And, in any event, the "torts" alleged are so disfigured when applied to the factual context at issue here—the global energy system as it affects the global atmosphere by virtue of the

productive and social choices of the world almost entirely outside of Hawai‘i—that those "torts" are unrecognizable. Plaintiff's grievances are quintessential public policy issues that are nonjusticiable under the political question doctrine. There is no way for this Court to resolve Plaintiff's claims without subjectively balancing competing society-wide policy interests such as economic growth, energy independence, and national security—but the power to engage in such balancing rests firmly within the state and national political branches, as numerous courts have found when dismissing similar claims. Plaintiff's nuisance claims, for example, require the balancing of benefits and costs of emissions-generating activities, and multiple courts have held that the courts lack judicially discoverable and manageable standards to make that sort of determination.

Further, Plaintiff lacks standing to bring these claims. In particular, the future injuries Plaintiff alleges are speculative. Indeed, under Plaintiff's theory, most of its alleged injuries will occur, if ever, only decades in the future, and those injuries cannot be redressed given Hawai‘i's strict limits on remedies for future injuries. Nor would any allegedly cognizable injuries be fairly traceable to any specific misrepresentations or deception alleged in the Complaint.

Finally, while the labels of the claims may be familiar, the Complaint fails to allege facts necessary to support the elements of those causes of action. Hawai‘i courts have never recognized a "public nuisance" claim based on the production, promotion, or sale of a lawful consumer product, let alone one deemed "essential." Even if they were to do so, Plaintiff does not, and cannot, allege facts showing that Defendants exercised control over the "instrumentality" allegedly causing the nuisance—*i.e.*, concentration of greenhouse gases in the Earth's atmosphere. The failure-to-warn claim similarly fails because Plaintiff seeks to impose an unprecedented duty to warn the world; moreover, Plaintiff has not alleged a "special relationship" giving rise to a duty to warn, and there is no duty to warn where, as here, the alleged danger of using a product is "open and obvious." Further, Hawai‘i law has never recognized a tort of "trespass" based on a purported "misrepresentation," and Plaintiff's claim fails because it does not allege that Defendants or their products unlawfully entered its property.[1]

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[1] Defendants also maintain that Plaintiff's claims are governed and barred by federal law and preserve those arguments for appeal. *See* Section IV.G, below.

In short, Plaintiff's claims represent a radical departure from well-established principles of tort law. This is why "[n]o plaintiff has ever succeeded in bringing a nuisance claim based on global warming." *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1023 (N.D. Cal. 2018), *vac'd on other grounds*, 960 F.3d 570 (9th Cir. 2020). Courts in numerous States have rejected similar attempts to transform the common law to punish the production, sale, and promotion of lawful consumer products. There is no good reason, nor legal basis, for this Court to depart from this long line of cases, especially where, as here, doing so would exceed the judicial writ and intrude on fundamental legislative and executive policy prerogatives. Plaintiff's claims should be dismissed.

II. BACKGROUND AND PLAINTIFF'S ALLEGATIONS

Plaintiff's lawsuit is another in a long series of ill-conceived 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. Federal courts have consistently, and properly, dismissed these claims. The first such lawsuit asserted nuisance claims against automobile companies for alleged contributions to climate change. *See People of the State of California v. Gen. Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (dismissing state and federal common-law nuisance claims 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 failed, too. *See Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*") (holding that claims seeking abatement of alleged public nuisance of climate change fail because the federal common law that necessarily governs claims for injuries caused by interstate emissions was displaced by the Clean Air Act); *Kivalina I*, 663 F. Supp. 2d at 863 (dismissing as nonjusticiable and for lack of standing federal common-law nuisance claims against energy companies, including claims that defendants "mislead the public with respect to the science of global warming," *see* 4:08-cv-01138 (N.D. Cal.), Dkt. 1, Compl. ¶ 269).

Here, Plaintiff has targeted an earlier step in the supply chain and resorted to climate-change claims against companies that supply the sources of energy that millions of people—including Plaintiff itself—use and depend on. 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 against energy companies seeking damages for the alleged impacts of climate change. So far, the only three federal 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 v. Chevron Corp.*, 993 F.3d 81, 92, 95 (2d Cir. 2021); *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018); *City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d at 1017. In each of these cases, the plaintiffs alleged, as Plaintiff does 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 Plaintiff here, the 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.

This Court, however, took a contrary view in the *Honolulu* action, holding that the plaintiffs' claims were not barred by federal law.[2] This motion, however, turns on a separate and distinct question: whether Plaintiff's claims are cognizable under *Hawai'i* law. The answer to that question, as explained below, is no.

The Complaint asserts five state-law causes of action: (1–2) public and private nuisance; (3–4) strict liability and negligent failure to warn; and (5) trespass. Plaintiff seeks compensatory damages, abatement of the alleged nuisance, disgorgement of profits, punitive damages, attorneys' fees and costs. Compl. at 134, Prayer for Relief. In the course of this litigation, Plaintiff has described its Complaint as based on a "campaign of denial and disinformation about the existence, cause, and adverse effects of global warming" that was purportedly intended to thwart "government regulation." Pls. Mot. to Remand at 4–5, *County of Maui v. Sunoco LP*, No. 20-cv-00470 (D. Haw. Nov. 25, 2020), Dkt. 74-1. In fact, Plaintiff has asserted that its claims are all "premised on a theory

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[2] *See* Order Denying Defendants' Mot. To Dismiss For Failure To State a Claim, *City and County of Honolulu, et al. v. Sunoco LP, et al.*, Civil No. 1CCV-20-0000380 (JPC) ("*Honolulu*"), Dkt. 589 (Feb. 22, 2022).

of misinformation and deception." Dkt. 272 at 1.

Plaintiff alleges, however, that its *injuries* are "caused by anthropogenic greenhouse gas *emissions*." Compl. ¶¶ 42–43 (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, and how to use them. *Emissions* are, to use Plaintiff's words, "[t]he mechanism" of the alleged injuries. *Id.* ¶ 42. According to Plaintiff, "greenhouse gas pollution, primarily in the form of CO_2, is far and away the dominant cause of global warming," *id.* ¶ 5, and its purported injuries are "*all due* to anthropogenic global warming," *id.* ¶ 10 (emphasis added). Hence, the theory underlying Plaintiff's 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.

Plaintiff alleges that Defendants' worldwide conduct—not conduct that occurred in Hawai‘i—caused its injuries. In fact, nowhere in its 130-plus page Complaint does Plaintiff identify a *single* misstatement or omission made in or directed at Hawai‘i. Plaintiff's failure to identify Hawai‘i conduct that is traceable to any alleged injuries is not an accident—it follows from the very nature of global climate change. As Plaintiff acknowledges, "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.* ¶¶ 220, 232, 244, 253.

III. LEGAL STANDARD

The Court must dismiss a complaint that "fail[s] to state a claim upon which relief can be granted." HRCP 12(b)(6). 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 its Dirs.*, 147 Haw. 330, 333–34 (2020). 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 & Cnty. of Honolulu*, 144 Haw. 466, 474 (2019).

IV. ARGUMENT

A. Plaintiff's Claims Are Barred By The Statute Of Limitations

Hawai‘i law establishes a two-year limitations period for "[a]ctions for the recovery of

compensation for damage or injury to persons or property[.]" Haw. Rev. Stat. § 657-7. This limitations period applies here because Plaintiff seeks damages for alleged injuries to its property. Compl. ¶¶ 194–201. The Complaint must be dismissed because it is based on conduct outside the limitations period.

According to Plaintiff, each of its claims is "premised on a theory of misinformation and deception." Dkt. 272 at 1. Plaintiff must, therefore, at a minimum, allege an act of deception within the two years before the Complaint was filed in October 2020, *i.e.*, since October 2018. *See, e.g.*, *Weidenbach v. Koolau Agr. Co., Ltd.*, 120 Haw. 254, 2009 WL 537098, at *6 (App. 2009) ("As the most recent tortious activity occurred in December 1992 and the initial complaint was filed in 1998, the two-year provision in HRS § 657–7 bars the [plaintiff's] claims sounding in tort.").

Plaintiff has failed to make any such allegations here. Plaintiff alleges a "campaign of deception" that started in approximately *1988*. *See* Compl. ¶¶ 97–99. To the extent Plaintiff even attempts to identify specific instances of purported deception, the bulk are alleged to have occurred in the 1990s. *See id.* ¶¶ 106–30. Indeed, the most recent misstatements alleged in the Complaint were made in 2000—*more than 20 years* before the Complaint was filed. *See* Compl. ¶ 116.[3] Because the most recent alleged misrepresentation occurred long before 2018, the Complaint must be dismissed in its entirety. *See Weidenbach*, 2009 WL 537098, at *6.

Moreover, Plaintiff has not, and cannot plead facts showing it lacked sufficient knowledge of the basis of its claims before October 2018. "The statute of limitations begins to run when the plaintiff knew *or in the exercise of reasonable care should have discovered* that an actionable wrong has been committed against his property." *Ass'n of Apartment Owners of Newtown Meadows v. Venture 15, Inc.*, 115 Haw. 232, 277 (2007) (cleaned up; emphasis added). But Plaintiff's own allegations make unmistakably clear that Plaintiff *did* have knowledge of—or unquestionably could have discovered—all of the pertinent facts upon which it now, belatedly, bases its claims.

As an initial matter, the Complaint alleges that the supposed misrepresentations were part of a "*public* campaign aimed at deceiving the *public*," so Plaintiff clearly knew about or had notice

[3] Plaintiff also alleges that Defendants are now engaging in so-called "greenwashing," but fails to identify any particular statements or allege how those statements are false or misleading. Compl. ¶ 152.

of the statements upon which its claims are based. Compl. ¶ 99 (emphasis added); *see also id.* ¶¶ 3 (Defendants "contributed to deceiving the public"). And Plaintiff's own allegations make clear that it also had knowledge about the potential effects that fossil fuel use may have on the climate well before 2018, and thus knew it could have brought a lawsuit if it believed that Defendants' public statements were false or misleading. *See, e.g.*, *id.* ¶ 123 (noting that polling in 2007 found 71% of Americans believed global warming was occurring).

The Complaint makes plain that Plaintiff had sufficient notice that fossil fuels may contribute to climate change for decades, let alone by 2018. Indeed, the Complaint asserts that "*[d]ecades of scientific research* has shown that pollution from Defendants' fossil fuel products plays a direct and substantial role in the unprecedented rise in emissions of greenhouse gas pollution." *Id.* ¶ 4 (emphasis added). And the Complaint acknowledges, in "December 2017, the Hawai'i Climate Change Mitigation and Adaptation Commission released a 304-page report detailing the expected effects and costs of climate change in the State of Hawai'i." *Id.* ¶ 192. The report's executive summary states that "rapid warming of the atmosphere and oceans, caused by two centuries of unabated carbon emissions, is causing increasing rates of sea level rise, unprecedented in human history, that threatens natural environments and development on low-lying coasts."[4] The report also notes that "the risks posed by climate change and sea level rise to Hawai'i were *recognized as early as 1984* by State Senate Resolution 137 that requested a study [sic] the worldwide greenhouse effect on Hawaii's coastal development." *Id.* at 4 (emphasis added). The Complaint further alleges that "[o]n March 2, 2018, the Maui County mayor signed a proclamation officially accepting that report" and "acknowledge[d] that climate change is real." Compl. ¶ 192.[5]

Hawai'i's 2017 report is just one of the more recent examples in a long line of widely reported, publicly available scientific reports calling attention to potential causes and consequences

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[4] Hawai'i Sea Level Rise Vulnerability And Adaptation Report, at iv, (2017), https://climateadaptation.hawaii.gov/wp-content/uploads/2017/12/SLR-Report_Dec2017.pdf.

[5] The Complaint also makes clear that Plaintiff knew it may have suffered injuries as a result of climate change. *See, e.g.*, Compl. ¶ 195 (discussing a $5.5 million project to construct an 1,100 foot rock mound revetment at the Wailuku-Kahului Wastewater Reclamation Facility that was underway in 2014).

of climate change. For example, in 2007, the Intergovernmental Panel on Climate Change ("IPCC"), upon which Plaintiff relies heavily, *e.g.*, *id.* ¶¶ 5, 45, 99(d), issued its Fourth Assessment Report highlighting for the world that "'there is *very high confidence* that the net effect of human activities since 1750 has been one of warming.'" *Id.* ¶ 124 (emphasis in original). In fact, that report asserted that "[m]ost of the observed increase in global average temperatures since the mid-20th century is *very likely* [greater than 90% chance] due to the observed increase in anthropogenic greenhouse gas concentrations. Discernible human influences now extend to other aspects of climate, including ocean warming, continental-average temperatures, temperature extremes and wind patterns."[6] Plaintiff also uses the more recent 2014 IPCC Fifth Assessment Report to support its theories of liability, alleging it shows "[a]nthropogenic greenhouse gas pollution … is far and away the dominant cause of global warming, resulting in severe impacts including, but not limited to, sea level rise." Compl. ¶ 5 & n.3. And indeed, that report states that "[t]he evidence for human influence on the climate system has grown since the IPCC Fourth Assessment Report (AR4). It is *extremely likely* that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by the anthropogenic increase in GHG concentrations and other anthropogenic forcings together."[7]

At a bare minimum, Plaintiff was on notice of its potential claims in 2017 when its outside counsel filed a well-publicized and virtually identical climate change-related lawsuit in California against many of the same Defendants here. *See County of San Mateo v. Chevron Corp., et al.*, Civil No. 17CIV03222, Dkt. 1 (Ca. Super. July 17, 2017), https://www.sheredling.com/wp-content/uploads/2020/08/2017-07-17-SMCO-Complaint-ENDORSED.pdf.[8] A review of the first paragraph of each complaint quickly reveals the striking similarities:

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[6] IPCC, *Climate Change 2007: The Physical Science Basis – Working Group I Contribution to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, 10 (2007), https://www.ipcc.ch/site/assets/uploads/2018/05/ar4_wg1_full_report-1.pdf.

[7] IPCC, *Climate Change 2014: Synthesis Report – Summary for Policymakers*, 5 (2014), https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf.

[8] The County of San Mateo's parallel suit was widely publicized. *See, e.g.*, John Schwartz, *Students, Cities and States Take the Climate Fight to Court*, (August 10, 2017), https://www.nytimes.com/2017/08/10/climate/climate-change-lawsuits-courts.html (reporting

San Mateo Complaint (2017)	Maui Complaint (2020)
Defendants, major corporate members of the fossil fuel industry, have known for nearly a half century that unrestricted production and use of their fossil fuel products create green-house gas pollution that warms the planet and changes our climate. They have known for decades that those impacts could be catastrophic and that only a narrow window existed to take action before the consequences would not be reversible. They have never-the less engaged in a coordinated, multi-front effort to conceal and deny their own know-ledge of those threats, discredit the growing body of publicly available scientific evidence, and persistently create doubt in the minds of customers, consumers, regulators, the media, journalists, teachers, and the public about the reality and consequences of the impacts of their fossil fuel pollution.	Defendants, major corporate members of the fossil fuel industry, have known for nearly half a century that unrestricted production and use of fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate. They have known for decades that those impacts could be catastrophic and that only a narrow window existed to take action before the consequences would be irreversible. They have nevertheless engaged in a coordinated, multifront effort to conceal and deny their own knowledge of those threats, discredit the growing body of publicly available scientific evidence, and persistently create doubt in the minds of customers, consumers, regulators, the media, journalists, teachers, and the public about the reality and consequences of the impacts of their fossil fuel pollution.

Under Plaintiff's theory, because Plaintiff, and the general public, knew about the potential link between fossil fuels and climate change long before 2018, it also necessarily knew (or reasonably should have known) of the basis for its claims when any Defendant allegedly made any purportedly misleading public statement about the risks of climate change. Plaintiff therefore cannot accuse Defendants of "hiding" a material fact about something that was so publicly discussed—indeed, something that was being discussed, and even acted upon, by the federal government, international scientific community, *and* Hawai'i lawmakers for decades. Because Plaintiff fails to allege any actionable conduct within the two years before it filed suit, and, as demonstrated by the very sources cited in the Complaint, Plaintiff clearly had actual or constructive knowledge of its potential claims well before that time, its claims are barred by the statute of limitations and must be dismissed. *See Hays v. City & Cnty. of Honolulu*, 81 Haw. 391, 399 (1996) (holding § 657-7 barred claims brought seven years after injury).

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that the cases were "about the oil companies [] knowing that their industry would cause catastrophic climate change and covering up the evidence").

B. Plaintiff's Claims Are Barred By Laches

Plaintiff's claims are untimely for a second reason: laches. "The doctrine of laches reflects the equitable maxim that 'equity aids the vigilant, not those who slumber on their rights.'" *Adair v. Hustace*, 64 Haw. 314, 320 (1982), *abrogated in part on other grounds by Ass'n of Apartment Owners of Royal Aloha v. Certified Mgmt., Inc.*, 139 Haw. 229 (2016). The doctrine has "two components": "First, there must have been a delay by the plaintiff in bringing his claim, and that delay must have been unreasonable under the circumstances. . . . Second, that delay must have resulted in prejudice to defendant." *Adair*, 64 Haw. at 321. "[L]aches is a defense to any civil action, which includes both legal or equitable claims." *Royal Aloha*, 139 Haw. at 236.

Here, Plaintiff's delay was anything but reasonable. As explained above, Plaintiff's own allegations demonstrate that it has known for years the "facts and circumstances from which [it] should have concluded that a claim might exist." *Adair*, 64 Haw. at 322. Plaintiff alleges—as it must—that Defendants' supposed misrepresentations were "public" and that the risks from climate change have been widely studied and publicized for decades. Compl. ¶¶ 4, 103, 124, 192. Yet Plaintiff did not file its Complaint until 2020. Such a delay is patently "unreasonable." *See Royal Aloha*, 139 Haw. at 232 ("wait[ing] 10 years to file [a] Complaint" was "unreasonable").

Defendants may be prejudiced by Plaintiff's delay. Defendants maintain that they have not committed any wrongdoing and that Plaintiff is not entitled to any recovery. If, however, Plaintiff were to succeed on its claimed theories, Plaintiff could argue that Defendants' potential liability has increased as a result of events over the intervening fifteen-plus (and counting) years. According to Plaintiff's theory (as articulated in *Honolulu*), "[t]he local climate impacts caused by Defendants' tortious conduct grow by the day." Opp. to Mot. to File Interlocutory Appeal, *Honolulu*, Dkt. 649, at 17; *see also* Compl. ¶ 160 ("These adverse impacts will continue to increase in frequency and severity in the County."). By sitting on its hands for all these years, Plaintiff thus perversely increased its potential recovery—and Defendants' potential liability. This is exactly the kind of prejudice that the laches doctrine is meant to prevent. *See Adair*, 64 Haw. at 321 ("Common but by no means exclusive examples of such prejudice" include "changes in the value of the subject matter"). Allowing Plaintiff to commence a suit now would be fundamentally unfair and inequitable after it sat back idly for years while reaping the benefits of continued fossil-fuel use—including through its own oil and gas consumption, less-expensive and more-reliable energy

options for itself and its residents, increased tax revenue from oil and gas sold locally, and increased tourism by people arriving on airplanes every day, all of which generate emissions. Plaintiff's unreasonable delay in bringing its claims long after it had reason to know of their purported factual basis is prejudicial to Defendants. The doctrine of laches requires dismissal.

C. Plaintiff's Claims Are Not Authorized By State Law

Plaintiff does not have *authority* to bring the Complaint's claims under Hawai'i law. Plaintiff, a county in Hawai'i, is a "creation of the State" capable of exercising only those powers affirmatively granted to it by state law. *State v. Medeiros*, 89 Haw. 361, 365 (1999). The Hawai'i Constitution authorizes the State Legislature to create counties, and these counties possess only the powers expressly delegated to them by statute. *See* Haw. Const. art. VIII, § 1 ("Each political subdivision shall have and exercise such powers as shall be conferred under general laws."); *Marsland v. First Hawaiian Bank,* 764 P.2d 1228, 1232 (1988); *see also Syngenta Seeds, Inc. v. Cnty. of Kauai*, 842 F.3d 669, 675 (9th Cir. 2016) ("Hawai'i law is clear that counties lack inherent authority under the Hawaii Constitution.").

Plaintiff does not identify the authority permitting it to bring the ostensible common-law tort claims it pleads against Defendants. That is because there is no such authority. Counties do not have general power to bring common-law tort claims against private parties. *See id.* ("[C]ounties, unlike states, lack inherent or residual authority."). HRS § 46–1.5 authorizes counties to enact and enforce *ordinances*, including "ordinances necessary to prevent or summarily remove public nuisances" and *ordinances* covering "local police matters." But the Complaint does not seek to enforce any county ordinance. Indeed, there is *no* Maui County ordinance that addresses the type of nuisance, trespass, and failure-to-warn claims asserted by Plaintiff. Moreover, it is not clear whether Maui could enact an ordinance that would cover the conduct at issue in this lawsuit because a Maui ordinance could not police activities outside the County of Maui—which this suit unmistakably tries to do, as the Complaint does not claim that activities within the County caused its alleged injuries.

Putting aside the *Honolulu* action, every prior claim asserted by a Hawai'i county that Defendants have identified was either brought to enforce a contract or a particular statute or ordinance, *not* pursuant to common law. *See Cnty. of Hawaii v. Ala Loop Homeowners*, 123 Haw. 391 (2010), *abrogated by Tax Found. of Hawaii v. State*, 144 Haw. 175 (2019) (claiming nuisance

per se based on failure to seek government permit in violation of HRS § 607–25); *City & Cnty. of Honolulu v. Cavness*, 45 Haw. 232 (1961) (nuisance claim based on alleged violation of city and county building code); *Cnty. of Hawai'i v. Richards*, 2009 WL 8657104 (Cir. Ct. May 14, 2009) (condemnation proceeding following county council resolution); *Cnty. of Kaua'i v. Scottsdale Ins. Co., Inc.*, 90 Haw. 400 (1999) (contract claim arising out of defendants' refusal to contribute to settlement of negligence action against a county police officer).

Accordingly, Plaintiff lacks authority to bring these claims and they should be dismissed.

D. Plaintiff's Claims Raise Nonjusticiable Political Questions

Plaintiff's claims also fail because they would require the Court to usurp the powers of the political branches to set state and national energy and climate policy in violation of the political question doctrine. Under Hawai'i law, the political question doctrine preserves the "separation of powers" between the branches of government and reflects the fundamental principle that "certain matters are political in nature and thus inappropriate for judicial review." *Nelson v. Hawaiian Homes Comm'n*, 141 Haw. 411, 412 n.2, 414 (2018).

The Hawai'i Supreme Court has adopted the political question doctrine expounded by the U.S. Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962). *See id.*, 141 Haw. at 414. Under that exposition, Hawai'i courts must make a "'discriminating inquiry into the precise facts and posture of the particular case.'" *Trustees of Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 169 (1987) (quoting *Baker*, 369 U.S. at 216). Satisfying any one of the *Baker* factors suffices to establish a political question precluding judicial intervention. *See id.* at 170. Among those factors, "a political question is found" where there is "a lack of judicially discoverable and manageable standards for resolving it" or "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Nelson*, 141 Haw. at 414 (quoting *Baker*, 369 U.S. at 217). Where such policy choices predominate as to require a non-judicial policy discretion, as is the case with energy and climate policy, "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984). Indeed, the U.S. Supreme Court has explained that "[t]he appropriate amount of regulation in any particular greenhouse gas-producing sector" raises "questions of national or international policy" requiring an "informed assessment of competing interests." *AEP*, 564 U.S. at 427. For these

reasons, courts have repeatedly found that tort suits seeking relief for injuries related to climate change are nonjusticiable because they would require a court or jury to decide threshold policy questions of unprecedented and interminable complexity: what is an acceptable level of fossil fuel use and *who* should bear the cost of global warming.

The district court decision in *Kivalina I* is directly on point and should be followed here. There, as here, the plaintiffs alleged the defendant energy companies were "substantial contributors to global warming" and had "act[ed] in concert to create, contribute to, and maintain global warming and . . . *conspire[ed] to mislead the public* about the science of global warming." 696 F.3d at 854 (emphasis added). Also, like here, "Plaintiffs' global warming claim [was] based on the emissions of greenhouse gases from innumerable sources located throughout the world and affecting the entire planet and its atmosphere." 663 F. Supp. 2d at 875. And finally, just like here, "Plaintiffs acknowledge[d] that the global warming process involves 'common pollutants that are mixed together in the atmosphere that cannot be similarly geographically circumscribed.'" *Id.*

The court found that the plaintiffs' allegations and claims for relief (both of which Plaintiff tracks here) presented nonjusticiable political questions because the trier-of-fact would need to "balance the utility and benefit of the alleged nuisance against the harm caused" to resolve the claims. 663 F. Supp. 2d at 874. "Stated another way," the court explained, "resolution of the nuisance claim is not based on whether the plaintiff finds the invasion unreasonable, but rather 'whether reasonable persons generally, *looking at the whole situation* impartially and objectively, would consider it unreasonable." *Id.* To do this, "the factfinder w[ould] have to weigh, inter alia, the energy-producing alternatives that were available in the past and consider their respective impact on far ranging issues such as their reliability as an energy source, safety considerations and the impact of the different alternatives on consumers and business at every level." *Id.* The factfinder would "then have to weigh the benefits derived from those choices against the risk that increasing greenhouse gases would in turn increase the risk of causing flooding along the coast of a remote Alaskan locale." *Id.* at 874–75. The court concluded that "with respect to this aspect of their claim," plaintiffs there "fail[ed]," as Plaintiff does here, "to articulate any particular judicially discoverable and manageable standards that would guide the factfinder in rendering a decision that is principled, rational, and based on reasoned distinctions." *Id.* at 875. The court further held the plaintiffs' "nuisance claim requires the judiciary to make a policy decision about *who* should bear

the cost of global warming," a decision properly committed to the executive and legislative branches. *Id*. at 876–77.

The Northern District of California reached a similar result in *California v. General Motors*, 2007 WL 2726871 (N.D. Cal. Sep. 17, 2007). In that case, California sued General Motors and other automakers for creating or contributing to climate change. *Id.* at *1–2. The court found that the state's claims "left [it] without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth's atmosphere, or in determining who should bear the costs associated with the global climate change that admittedly result from multiple sources around the globe." *Id.* at *15. The court also rejected the notion that global climate change cases are just like any other trans-boundary pollution case, explaining that the state sought to impose damages on an "unprecedented scale" that left the court no way to distinguish one emitter from another. *Id*.

Finally, the plaintiffs in *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 3d 849 (S.D. Miss. 2012), brought nuisance and trespass claims against a group of oil companies alleging their products "led to the development and increase of global warming, which produced the conditions that formed Hurricane Katrina, which damaged their property." *Id.* at 852. The court rejected these claims as requiring "the Court, or more specifically a jury, to determine without the benefit of legislative or administrative regulation, whether the defendants' emissions are 'unreasonable.'" *Id.* at 864. "Simply looking to the standards established by the Mississippi courts for analyzing nuisance, trespass, and negligence claims would not provide sufficient guidance to the Court or a jury." *Id.*

Plaintiff's claims present even greater hurdles to judicial resolution than those in *Kivalina I*, *General Motors*, and *Comer*. Plaintiff does not seek to hold Defendants liable for their own direct emissions, but rather for alleged misrepresentations that supposedly led unidentified *third parties* across the globe to use oil and gas products, thereby resulting in greenhouse gas emissions and, in accumulation with all other similar worldwide activities, contributing to global climate phenomena that allegedly will cause Plaintiff injuries. *See* Compl. ¶¶ 41–43. Under nuisance and negligence law, Plaintiff would have to prove that Defendants' actions were "unreasonable." But the concept of reasonableness provides no guidance for resolving the far-reaching economic, environmental, foreign policy, and national security policy issues raised by Plaintiff's claims. *See Vieth v.*

Jubelirer, 541 U.S. 267, 291 (2004) ("'Fairness' does not seem to us a judicially manageable standard.").[9]

Plaintiff's claims fail because it does not, and cannot, articulate standards that the Court could apply to differentiate between an acceptable and an unreasonable amount of emissions or emissions-generating activities. Indeed, under Plaintiff's theory, this Court would first need to determine what an "acceptable" level of greenhouse gas emissions is (and whether this level applies to the world, the United States, Hawai'i, or Maui), and then determine whether Defendants' alleged misrepresentations (as opposed to several other factors and activities) caused emissions to exceed that level. Those are quintessential political questions. Simply put, "Plaintiff's global warming nuisance tort claim seek[ing] to impose damages on a much larger and unprecedented scale by grounding the claim in pollution originating both within, and well beyond, the borders of the State" presents nonjusticiable political questions and should be dismissed. *General Motors*, 2007 WL 2726871, *15.

These political questions are not theoretical—the Hawai'i executive and legislative branches have had ample information about climate change for decades, including information regarding the alleged potential climate risks that Plaintiff claims Defendants should be held liable for failing to disclose, and have weighed the benefits and costs of fossil fuel use throughout in enacting policies they believe best serve their communities. For example, in 1984 Hawai'i lawmakers requested "a study of the worldwide greenhouse effect on Hawai'i's coastal developments." The State "initiated its Hawaii Climate Change Action Program in 1996, in recognition of the fact that Hawaii faces many potential consequences from global warming and climate change." State of Hawaii, Hawaii Energy Strategy 2000 (Jan. 2000), http://www.hawaiicleanenergyinitiative.org/storage/hes2000.pdf. In 1998, the State announced its

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[9] *See also, e.g., City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 384 (Ill. 2004) ("[A]n analysis of the harm caused by firearms versus their utility is better suited to legislative fact-finding and policymaking than to judicial assessment"); *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 731 (Okla. 2021) ("The district court's expansion of public nuisance law allows courts to manage public policy matters that should be dealt with by the legislative and executive branches; the branches that are more capable than courts to balance the competing interests at play in societal problems. . . . This Court defers the policy-making to the legislative and executive branches and rejects the unprecedented expansion of public nuisance law.").

Climate Change Action Plan to reduce carbon emissions. State of Hawaii, Hawaii Climate Change Action Plan (Nov. 1998, p. 1-1), https://planning.Hawaii.gov/wp-content/uploads/2016/06/HawaiiActionPlan1998.pdf. In 2007, acknowledging that "climate change poses a serious threat to the economic well-being, public health, natural resources, and the environment of Hawaii," the Hawai'i State Legislature passed the Global Warming Solutions Act, capping greenhouse gas emissions to the 1990 level by 2020. State of Hawai'i Office of Planning, Adapting to Climate Change (2007), https://planning.hawaii.gov/czm/initiatives/adapting-to-climate-change-2.

At the same time, Hawai'i policy has promoted, and continues to promote, the availability of petroleum products. In fact, state law makes it a felony punishable by up to five years in prison—to "[p]revent[], limit[], lessen[], or restrict[] the manufacture, production, supply, or distribution of petroleum products." Haw. Rev. Stat. Ann. 486B-3 (Unlawful Profiteering) & 486B-4 (Penalty). This reflects the legislature's recognition of the critical role that an affordable, abundant supply of petroleum products plays in modern society and the needs of Hawai'i residents in particular. In fact, this benefit is so great that the State's 1998 Climate Action Plan itself recognized that "[s]ignificant reductions in air travel would be an economic disaster" for the State. Hawai'i Climate Change Action Plan, pp. 1–8 (Nov. 1998), https://uccrnna.org/wp-content/uploads/2017/06/Hawaii_1998_Climate-Change-Action-Plan.pdf.

These issues are political questions that have been considered by the executive and legislative branches for decades, resolution of which belongs in their hands, not those of the courts.

E. Plaintiff Does Not Have Standing To Assert These Claims

Furthermore, Plaintiff also lacks standing to bring the asserted claims as a matter of Hawai'i law. To establish standing, a plaintiff must provide an affirmative answer to three questions: "(1) has the plaintiff suffered an actual or threatened injury as a result of the defendant's . . . conduct; (2) is the injury fairly traceable to the defendant's actions; *and* (3) would a favorable decision likely provide relief for plaintiff's injury." *Sierra Club v. Hawaii Tourism Auth. ex rel. Bd. of Directors*, 100 Haw. 242, 250 (2002). Plaintiff fails to adequately plead *any* of these three requirements.

1. Plaintiff Has Not Suffered An Actual Or Threatened Injury

To properly allege an "actual or threatened injury," Plaintiff must allege facts showing an injury that is "distinct and palpable . . . as opposed to abstract, conjectural, or merely hypothetical." *Hanabusa v. Lingle*, 119 Haw. 341, 347 (2008) (internal citations and quotation marks omitted).

Hawai‘i takes "guidance" from federal standing law, *Life of the Land v. Land Use Comm'n*, 63 Haw. 166, 173 (1981), which provides that, "[f]or an injury to be concrete, it 'must actually exist,'" *Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668, 674 (9th Cir. 2021). The U.S. Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending*' . . . and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphases in original). Moreover, the plaintiff *specifically*—not simply the environment—must be injured. *Sierra Club v. Dep't. of Transp.*, 115 Haw. 299, 322 (2007) (noting plaintiff must show he "is himself among the injured and not merely airing a political or intellectual grievance") (internal citation and quotation marks omitted).

Plaintiff primarily alleges mere threatened future injuries, and the Complaint falls far short of demonstrating that such injuries are "certainly impending." Indeed, virtually all of Plaintiff's alleged injuries are speculative:

- "More than $3.2 billion in assets, . . . are located within the Sea Level Rise Exposure area and are at risk of inundation and destruction due to sea level rise **estimated to occur by the year 2100**," Compl. ¶ 167 (emphasis added);
- "Areas that are **expected to be exposed** to chronic flooding include Mo‘omomi, Hale o Lono Harbor, and Kapa‘akea." *Id.* ¶ 168 (emphasis added);
- "Low lying, economically important areas, such as Hulopo‘e Bay and Mānele Bay **would experience** increased frequency and extent of flooding." *Id.* ¶ 169 (emphasis added);
- "Portions of many coastal roads, such as Honoapi‘ilani Highway, which connects West Maui and Central Maui, will become chronically flooded **by 2100** and lawmakers are already developing plans to relocate the highway." *Id.* ¶ 171 (emphasis added);
- "Critical transportation hubs and other critical infrastructure, such as the County's five commercial harbors and five airports, **will become** increasingly exposed to chronic flooding from sea level rise." *Id.* ¶ 172 (emphasis added);
- "Changes in air temperature, rain, and carbon dioxide concentrations in air **can lead to** more ozone, pollen, mold spores, fine particles, and chemicals that can irritate and damage the lungs and airways." *Id.* ¶ 183 (emphasis added);

- "This includes cultural sights on Lā'au Point that **may be flooded** as a result of sea level rise." *Id.* ¶ 186 (emphasis added);
- "Climate change **is expected to** exacerbate food and energy insecurity, which will affect those who are already struggling first and most intensely." *Id.* ¶ 189 (emphasis added).

To be sure, Plaintiff alleges that it has already incurred costs to mitigate the future effects of climate change. *See, e.g.*, *id.* ¶ 191 ("County officials, planners, and natural resource managers are incorporating climate adaptation into land management. But new planning and implementation actions come at significant cost to the County."); *id.* ¶ 193 ("The County is undertaking extensive planning efforts across County agencies, as well as funding independent efforts, to assess the County's vulnerability to a broad range of climate change-related impacts and to develop adaptation and resilience strategies."). But it is black-letter law that would-be plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm." *Clapper*, 568 U.S. at 416. As other courts have explained, "[w]hile it may be 'eminently reasonable' . . . 'to take measures to prevent or mitigate the harm' they may face due to possible future [events], [plaintiffs] cannot parlay actions taken in reaction to a risk of harm into the necessary 'certainly impending' injury." *Chamber of Com. of the United States of Am. v. City of Seattle*, 2016 WL 4595981, at *4 (W.D. Wash. Aug. 9, 2016); *see also City of Rohnert Park v. Harris*, 601 F.2d 1040, 1049 (9th Cir. 1979) (city lacked standing to bring "conjectural" and "hypothetical" claims based on "prospective injury to its proprietary interest"). Under this settled law, Plaintiff's allegation of future potential injuries, and costs allegedly incurred to forestall those potential future injuries, cannot establish standing.

2. Plaintiff's Alleged Injuries Are Not Fairly Traceable To Defendants' Alleged Conduct

Even if the Complaint had alleged an injury-in-fact (it has not), Plaintiff would still lack standing under Hawai'i law because that injury is not fairly traceable to Defendants, much less Defendants' conduct in Hawai'i. "Under the second element of the test, [Plaintiff] must establish a causal connection between the injury suffered and the action at issue." *Sierra Club*, 100 Haw. at 252–53. The Hawai'i Supreme Court has explained that a plaintiff "fails to establish the necessary causal connection" where it "must rely on a chain of conjecture, ultimately resting on the independent actions of third parties." *Id.* at 254 (cleaned up). Indeed, "a protracted chain of

causation fails both because of the uncertainty of several individual links and because of the number of speculative links that must hold for the chain to connect the challenged acts to the asserted particularized injury." *Id.* at 253 (citation omitted). Under that analysis, Plaintiff's claims fail.

Plaintiff's alleged injury—*i.e.*, the effects of global climate change, including rising sea levels and increasingly frequent extreme weather events—is based on an extremely attenuated chain of events between Defendants' alleged misrepresentations and deception *in Hawai'i* and the billions of choices made by countless third parties *around the world* to purchase and combust oil and gas products, and the complex geophysical phenomena associated with global climate change. Plaintiff's misrepresentation theory is even more attenuated because the alleged misrepresentations are purportedly actionable *only* to the extent they caused increased emissions: "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." Compl. ¶ 2. Indeed, Plaintiff has not even attempted to allege whether and to what extent any misrepresentations *in Hawai'i* have contributed to increased greenhouse gas emissions and the resulting effect on global climate change.

The Northern District of California's "fairly traceable" analysis in *Kivalina I* is directly on point. There, the court held that the plaintiffs lacked standing to bring nuisance claims against 24 energy companies (many of which are Defendants here) based on "their alleged contribution to the excessive emission of carbon dioxide and other greenhouse gases which [plaintiffs] claim[ed] are causing global warming." 663 F. Supp. 2d at 868. As the court explained, "[i]n view of the Plaintiffs' allegations as to the undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time, the pleadings make[] clear 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." *Id.* at 880. Thus, "[e]ven accepting the allegations of the Complaint as true, . . . 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' Plaintiffs' alleged global warming related injuries." *Id.* at 880–81. The court therefore concluded that, "given the extremely attenuated causation scenario alleged in Plaintiffs' Complaint, it is entirely irrelevant whether any defendant 'contributed' to the harm

because a discharge [of greenhouse gases], standing alone, is insufficient to establish injury." *Id.* at 880, 881–82.

The Ninth Circuit affirmed *Kivalina I* without reaching the standing question presented in that case, but Judge Pro wrote a separate concurrence to "express [his] view that Kivalina lacks standing." *Kivalina II*, 696 F.3d at 858. Like the district court, Judge Pro found that "Kivalina ha[d] not met the burden of alleging facts showing Kivalina plausibly can trace their injuries to [the oil companies]" because "[b]y Kivalina's own factual allegations, global warming has been occurring for hundreds of years and is the result of a vast multitude of emitters worldwide whose emissions mix quickly, stay in the atmosphere for centuries, and, as a result, are undifferentiated in the global atmosphere." *Id.* at 868. It would be quite remarkable, Judge Pro explained, "to hold that a private party has standing to pick and choose amongst all the greenhouse gas emitters throughout history to hold them liable for millions of dollars in damages." *Id.* at 869.

The Ninth Circuit reached a nearly identical conclusion a year later in *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013). There, environmental groups alleged that Washington state agencies violated the Clean Air Act by failing to limit greenhouse gas emissions from oil refineries in the state. *Id.* at 1135. Relying on Judge Pro's concurrence in *Kivalina II*, the Ninth Circuit explained that:

> Plaintiffs' causal chain—from lack of [limits on greenhouse gas emissions] to Plaintiffs' injuries—consists of a series of links strung together by conclusory, generalized statements of 'contribution,' without any plausible scientific or other evidentiary basis that the refineries' emissions are the source of their injuries. While Plaintiffs need not connect each molecule to their injuries, simply saying that the Agencies have failed to curb emission of greenhouse gases, which contribute (in some undefined way and to some undefined degree) to their injuries, relies on an 'attenuated chain of conjecture' insufficient to support standing.

Id. at 1142–43. "Because a multitude of independent third parties are responsible for the changes contributing to Plaintiffs' injuries, the causal chain is too tenuous to support standing." *Id.* at 1144.

Plaintiff's alleged causal chain is even *more attenuated* than the ones asserted unsuccessfully in *Kivalina* and *Washington Environmental Council*. Instead of suing energy companies for their direct emissions, Plaintiff seeks to impose liability for alleged misrepresentations that, under Plaintiff's theory, supposedly caused an unspecified number of *third parties around the world* to purchase and combust more oil and gas products than they otherwise

would, resulting in global emissions that allegedly contributed to global climate change and thus to Plaintiff's alleged future injuries. *See* Compl. ¶¶ 41–43. To trace its alleged harms to this purported misconduct, Plaintiff must not only allege that particular emissions caused climate change-related harms in Hawai'i—which the plaintiffs in *Kivalina* and *Washington Environmental Council* could not allege—but *also* that those emissions were the result of misrepresentations made by Defendants in Hawai'i. *See, e.g.*, *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 489 (4th Cir. 2007) ("The principle that state laws may not generally operate extraterritorially is one of constitutional magnitude" that "reflects core principles of constitutional structure."); *cf. Sierra Club*, 100 Haw. at 253-54 (holding that"[t]he process of advertising and marketing described is but merely one step in a long chain of events" that "may be indefinite and uncertain" such that there could be "no discernable link fairly traceable" to satisfy standing). Plaintiff comes nowhere close to doing so.

3. Plaintiff's Alleged Injuries Are Not Redressable

The third prong of the standing inquiry asks whether "a favorable decision [will] likely provide relief for plaintiff's injury." *Sierra Club*, 100 Haw. at 250. The answer here is "no," for one simple reason: Plaintiff cannot recover damages for speculative future injuries. The Hawai'i Supreme Court has made clear "that speculative damages are not recoverable in actions arising under contract or in tort." *McDevitt v. Guenther*, 522 F. Supp. 2d 1272, 1287 (D. Haw. 2007) (citing *Roxas v. Marcos*, 89 Haw. 91, 140–41 n.33 (1998)); *see also infra*, Section IV.E. Because that is the only remedy Plaintiff seeks, even a favorable disposition on the merits would not yield meaningful redress for Plaintiff.

Perhaps recognizing this fatal flaw, Plaintiff tries to disguise its request for future damages by seeking an "abatement fund" now for potential harms that may arise later. But Hawai'i law has never recognized an abatement fund as an available remedy.[10] In any event, here Plaintiff does not seek to clean up, remediate, or "eliminate" the alleged nuisance (*i.e.*, accumulated greenhouse gases in the global atmosphere). It seeks damages for potential future occurrences—namely, "costs of dealing with global warming and its physical, environmental, social, and economic consequences."

[10] Defendants are not aware of any case in which a Hawai'i court, State or federal, has ordered an abatement fund as a remedy for a nuisance.

Compl. ¶ 15. An abatement fund is not to be "a thinly-disguised damages award, but rather an equitable remedy designed to eliminate the nuisance." *In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig.*, 497 F. Supp. 3d 552, 653 (N.D. Cal. 2020) (internal quotation omitted). Plaintiff's claims therefore cannot be redressed because no such "abatement fund" remedy exists under Hawai‘i law.

Moreover, an abatement fund is not appropriate for the additional and independent reason that it is beyond a court's power to grant or enforce. Plaintiff has not provided the specifics of the requested abatement fund, but to the extent Plaintiff would ask this Court to estimate its potential future damages resulting from global climate change over the next century and to oversee and administer this fund, that is not appropriate. This is precisely the sort of remedy the Ninth Circuit rejected in *Juliana v. United States*, 947 F.3d 1159, 1169–75 (9th Cir. 2020). There, the court found it is beyond the power of the court "to order, design, supervise, or implement the plaintiffs' requested remedial plan . . . [which] would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." *Id.* at 1171. Any such plan to "ameliorate" the "consequences of climate change" would improperly "entail a broad range of policymaking," likely including a "sustained commitment to infrastructure transformation over decades." *Id.* at 1170–72.

The same is true here. Administering an "abatement fund" of the kind sought here would "entail a broad range of policymaking," such as determining what infrastructure projects—from sea walls, to transit, to levees—were supposedly necessary to prevent climate change-related harm and how such projects should be prioritized. *Id.* at 1172. And "given the complexity and long-lasting nature of global climate change, the court would be required to supervise the [fund] for many decades," if not forever. *Id.*

Because Plaintiff fails to allege the necessary predicates for standing under Hawai‘i law, the Court should dismiss the Complaint without reaching the merits of its claims.

F. Plaintiff Fails To State A Claim Under State Law

The Complaint asserts five state-law causes of action: (1-2) public and private nuisance; (3-4) strict liability and negligent failure to warn; and (5) trespass. Each of these claims fail because Plaintiff has not adequately pleaded any of these causes of action under Hawai‘i law.

1. Plaintiff's Nuisance Claims Fail

Plaintiff's breathtaking attempt to expand the scope of state nuisance law has been rejected by multiple state and federal courts, and should be rejected here, too. First, Hawai'i courts have never recognized a nuisance claim based on the production, promotion, sale, and use of a lawful consumer product, let alone one that a State statute declares is "essential." Second, Plaintiff does not allege facts that, if taken as true, would show that Defendants exercised control over the instrumentality that allegedly caused the nuisance or Plaintiff's claimed injuries (*i.e.*, the concentration of greenhouse gases in the Earth's atmosphere).

Hawai'i law has never recognized a nuisance claim based on production, promotion, and sale of a consumer product. To the contrary, Hawai'i courts, like courts in other states across the country, have recognized only nuisances based on the defendant's *use of land*. *See Marsland v. Pang*, 5 Haw. App. 463 (App. 1985) (seeking to enjoin property from being used to facilitate criminal activity including gambling); *see also State v. Miller*, 54 Haw. 1 (1972) (public nudity); *Ching v. Dung*, 148 Haw. 416 (2020) (interference with a neighbor's easement); *Littleton v. State*, 66 Haw. 55 (1981) (failure to maintain shores and beaches in a sanitary condition); *Haynes v. Haas*, 146 Haw. 452 (2020) (permitting homeless individuals to live in a storage facility); *Akau v. Olohana Corp.*, 65 Haw. 383 (1982) (blocking public beach access); *Pavsek v. Sandvold*, 127 Haw. 390 (App. 2012) (allowing property to be used for illegal rentals), *abrogated on other grounds by Bank of America, N.A. v. Reyes-Toledo*, 143 Haw. 249, 258 (2018).

Multiple courts in other jurisdictions have found that "nuisance cases 'universally' concern the use or condition of [*the defendant's*] property, not products." *City of San Diego v. U.S. Gypsum*, 30 Cal. App. 4th 575, 586 (1994) (citing *Detroit Board of Education v. Celotex Corp.*, 493 N.W.2d 513, 521 (1992)). As the Oklahoma Supreme Court recently explained in overturning a public nuisance judgment arising from a manufacturer's deceptive sale and promotion of opioids, public nuisance "has historically been linked to the use of land by the one creating the nuisance." *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 724 (Okla. Nov. 8, 2021). Similarly, the New Jersey Supreme Court rejected attempts to expand nuisance law to cover the sale and promotion of lead paint because "essential to the concept of a public nuisance tort … is the fact that it has historically been linked to the use of land by the one creating the nuisance." *In re Lead Paint Litig.*, 924 A.2d 484, 495 (N.J. 2007). The Rhode Island Supreme Court concurred, explaining that "[t]he

law of public nuisance never before has been applied to products, however harmful." *State v. Lead Indus. Ass'n*, 951 A.2d 428, 456 (R.I. 2008); *see also State ex rel. Jennings v. Purdue Pharma L.P.*, No. N18C-01-223, 2019 WL 446382, at *12 (Del. Super. Ct. Feb. 4, 2019) ("public nuisance claims have not been recognized for products."). And in affirming dismissal of public nuisance claims related to the production and sale of asbestos products, the Eighth Circuit explained that "cases applying the state's nuisance statute all appear to arise in the classic context of a landowner or other person in control of the property conducting an activity on his land in such a manner as to interfere with the property rights of a neighbor." *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993).

For these reasons, the highest courts in numerous States have dismissed similar attempts by government entities to expand common-law public nuisance claims to cover the production, sale, or promotion of consumer products including lead paint, asbestos, prescription opioids, firearms, and tobacco. Courts have long recognized that, to avoid turning nuisance law into "a monster that would devour in one gulp the entire law of tort," *Tioga Pub. Sch. Dist.*, 984 F.2d at 921, the boundaries between products liability and nuisance must be respected. As the Rhode Island Supreme Court explained: "Public nuisance focuses on the abatement of annoying or bothersome activities," whereas claims based on the defendant's sale or distribution of an allegedly harmful product sound in products liability, which is "designed specifically to hold manufacturers liable for harmful products." *Lead Indus. Ass'n*, 951 A.2d at 456. Accordingly, trial courts "refus[e] to apply" nuisance law "in the context of injuries caused by defective product design and distribution." *City of Phila. v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 909 (E.D. Pa. 2000). And "courts have enforced the boundary between the well-developed body of product liability law and public nuisance law." *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001). Otherwise, plaintiffs would be able to circumvent important "requirements that surround a products liability action," which have developed over decades to ensure a careful policy balance. *See id.*; *see also* Schwartz & Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 552 (2006); Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 767 (2003).

The New Jersey Supreme Court's reasoning in a lead paint case is instructive. There, the court declined to allow a nuisance claim based on the sale and promotion of lead pigment,

notwithstanding the harmful effects of lead poisoning because doing so would "stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance." *In re Lead Paint*, 924 A.2d at 494. Similarly, the Oklahoma Supreme Court's recent decision overturning the lower court's award of damages based on the production, distribution, and deceptive marketing of opioids is on point. *Hunter*, 499 P.3d at 721. Comparable to the claims asserted by Plaintiff here, "the central focus" of those complaints was that the defendants "failed to warn about the dangers" of their products when they "promot[ed] and market[ed]" them. *Id.* at 725. The court held that "public nuisance is fundamentally ill-suited to resolve claims against product manufacturers," *id.* at 726, and "extending public nuisance law to the manufacturing, marketing, and selling of products . . . would allow consumers to convert almost every products liability action into a [public] nuisance claim." *Id*. at 729–30. Indeed, applying nuisance law "to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers," which is why the "court has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products." *Id.* at 725. In reaching its conclusion, the court recognized the "clear national trend to limit public nuisance to land or property use." *Id.* at 730.

Here, Plaintiff does not allege (and cannot allege) that Defendants' use of their land or property in Hawai‘i caused or contributed to global warming. On the contrary, Plaintiff has insisted that its nuisance claims are based on a theory that Defendants engaged in deception and misrepresentation unconnected from any real property in Hawai‘i. But Hawai‘i case law has never recognized such a non-property basis for a nuisance action and the "clear national trend" is to resist extending nuisance to cover the production and promotion of consumer products. This Court should decline Plaintiff's invitation to upend centuries of established nuisance law by "creat[ing] a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of [] nuisance." *In re Lead Paint Litig.*, 924 A.2d at 494.

Moreover, to the extent Plaintiff purports to characterize its claims as "premised on a theory of misinformation and deception," Dkt. 272 at 1, that characterization forecloses Plaintiff from stating a *public* nuisance claim because it precludes Plaintiff from pleading the essential element of interference with a *public* right. "A nuisance is common or public where it affects the rights enjoyed by citizens as a part of the public, that is, the rights to which every citizen is entitled." *Territory v.*

Shuji Fujiwara, 33 Haw. 428, 429 (1935); *see* Restatement (Second) of Torts § 821B ("A public nuisance is an unreasonable interference with a right common to the general public."). Public rights thus include "shared resources such as air, water, or public rights of way." *Lead Indus. Ass'n*, 951 A.2d at 455. Deceptive statements, however, do not interfere with any such "shared resources"—they interfere instead with the *individual* right to not be defrauded. As the Restatement makes clear, "[a] public right is one common to all members of the general public. It is collective in nature *and not like the individual right that everyone has not to be . . . defrauded*." Restatement (Second) of Torts § 821B, cmt. g (emphasis added); *Lead Indus. Ass'n*, 951 A.2d at 454 ("[T]he individual right that everyone has not to be … defrauded … is not a public right"); *see also Hunter*, 499 P.3d at 726 ("[A] public right is more than an aggregate of private rights by a large number of injured people."). Plaintiff's theory—that its alleged harms flow solely from Defendants' purportedly misleading (but unidentified) statements about fossil fuels—collides head on with this settled principle of public nuisance doctrine.

Plaintiff's nuisance claims also fail because Defendants did not control the instrumentality alleged to cause the nuisance. Control of the instrumentality causing the nuisance is an essential element of a nuisance claim in Hawai'i and in many other States across the country. *See Territory v. Henriques*, 21 Haw. 50, 52 (1912) (setting aside nuisance conviction because defendant did not control the instrumentality of the nuisance); *see also, e.g., In re: Paraquat Prods. Liab. Litig.*, 2022 WL 451898, at *11 (S.D. Ill. Feb. 14, 2022) (dismissing nuisance claims under laws of all 11 States involved in multidistrict litigation requiring control of instrumentality causing alleged nuisance). Plaintiff asserts that alleged impacts of global climate change constitute a nuisance caused by the combustion of oil and gas products that release emissions into the atmosphere. Compl. ¶¶ 5, 207, 218. Indeed, Plaintiff alleges that "[t]he primary cause of the climate crisis is the *combustion of coal, oil, and natural gas*," and "the increased *burning of fossil fuels*." *Id.* ¶¶ 5, 48 (emphases added). But Plaintiff does not, and cannot, allege that Defendants control the time, place or rate of combustion of oil and gas products that are used by third parties worldwide. Under nuisance law, it "would run contrary to notions of fair play" to hold sellers liable when "they lack direct control over how end-purchasers use" the product. *City of Phila.*, 126 F. Supp. 2d at 911. For these reasons, "courts have refrained from applying public nuisance doctrine

in cases where the instrument of the nuisance is a lawfully sold product which has left the manufacturer's control." *Id.*[11]

The Rhode Island Supreme Court decision in *Lead Industries* is particularly instructive. In that case, the court rejected Plaintiff's public nuisance claim because "no set of facts alleged in the state's complaint . . . could have demonstrated that . . . defendants had control over the product causing the alleged nuisance *at the time*" plaintiff was injured. 951 A.2d at 455 (emphasis added). "[L]iability in a public nuisance action turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance . . . at the time that the damage occurred." *Id.* at 449 (quotation marks and citation omitted). The court explained that "control at the time the damage occurs is critical in public nuisance cases, especially because the principal remedy for the

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[11] *See also, e.g., State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 727–28 (Okla. 2021) ("Another factor in rejecting the imposition of liability for public nuisance . . . is that J&J, as a manufacturer, did not control the instrumentality alleged to constitute the nuisance at the time it occurred."); *Lead Indus. Ass'n*, 951 A.2d at 449 ("As an additional prerequisite to the imposition of liability for public nuisance, a defendant must have *control* over the instrumentality causing the alleged nuisance *at the time the damage occurs*." (emphases in original)); *In re Lead Paint Litig.*, 924 A.2d 484, 499 (2007) ("[A] public nuisance, by definition, is related to conduct, *performed in a location within the actor's control*, which has an adverse effect on a common right." (emphasis added)); *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 422 (3d Cir. 2002) ("[A]s defendants lack the requisite control over the interference with a public right, we will affirm the district court's dismissal of plaintiffs' public nuisance claim" alleging harm from gun violence); *Detroit Bd. of Educ. v. Celotex Corp.*, 196 Mich. App. 694, 712–13 (1992) ("Defendants gave up ownership and control of their [asbestos] products when the products were sold to plaintiffs. Defendants now lack the legal right to abate whatever hazards their products may pose; ownership and possession lie exclusively with plaintiffs. If the defendants exercised no control over the instrumentality, then a remedy directed against them is of little use."); *Tioga Public School Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) (explaining in asbestos case that "liability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the nuisance."); *State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382, at *13 (Del. Super. Ct. Feb. 4, 2019) ("The State has failed to allege control by Defendants over the instrumentality of the nuisance at the time of the nuisance. Thus, all Defendants' Motions to Dismiss the [opioid-related] nuisance claims must be granted."); *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989) ("Since the pleadings do not set forth facts from which it could be concluded that [defendant] retained the right to control the PCBs beyond the point of sale . . . , we agree with the district court that [defendant] cannot be held liable on a nuisance theory.").

harm caused by the nuisance is abatement." *Id.* In *Lead Industries*, the nuisance the State defined was old paint deteriorating for lack of maintenance. Years after the trial judge denied defendants' motion to dismiss, the supreme court reversed because the lead pigment manufacturers did not control the buildings where the deteriorating paint was present. *Lead Indus.*, 951 A.2d at 456–58.

Here, Plaintiff's suit hinges on the premise that its purported harms flow not from any single source of fossil fuel emissions, but from the overall cumulative concentration of greenhouse gases in the Earth's atmosphere caused by, *inter alia*, the "combustion of . . .fossil fuel products." Compl. ¶ 5. In other words, the "instrumentality" causing Plaintiff's alleged harms is the combustion of fossil fuels that releases greenhouse gas emissions. But combustion, and the resulting emissions, are not alleged to have occurred while Defendants controlled or possessed these fossil fuel products. The emissions from Defendants' products of which Plaintiff complains occurred after Defendants relinquished control over these fossil fuels to third parties. Ultimately, it was consumers that combusted these fossil fuels, causing the emissions. Plaintiff does not and cannot allege that Defendants controlled the fossil fuel products when third parties (overwhelmingly outside of Hawai‘i) combusted fossil fuels, much less controlled the resulting greenhouse gas emissions. Plaintiff further alleges that it is "*the buildup* of CO_2 in the atmosphere that drives global warming and its physical, environmental, and socioeconomic consequences, including those affecting the County," Compl. ¶ 8 (emphasis added), and that "*global* atmospheric greenhouse gas concentrations" cause "disruptions to the environment[] and consequent injuries to the County," *id.* ¶ 54 (emphasis added). Plainly, Defendants lack control over the concentration of greenhouse gases in the Earth's atmosphere—where such gases take "thousands of years" to dissipate, *id.* ¶ 137, and where the overall concentration of such gases is determined "by fossil fuel emissions no matter where in the world those emissions were released (or who released them)," and by "a complex web of federal and international environmental law regulating such emissions," *City of New York*, 993 F.3d at 85, 93. Imposing nuisance liability on the handful of Defendants named here for such extraordinarily far-reaching atmospheric processes—which knows no geographic boundary, is not limited to emissions flowing from Defendants' fossil fuel products, and which goes back thousands of years—would eviscerate the control requirement. *See City of Phila.*, 126 F. Supp. 2d at 911 ("[C]ourts have refrained from applying public nuisance doctrine in cases where the instrument of the nuisance is a lawfully sold product which has left the manufacturer's control."). Accordingly,

just as the Rhode Island Supreme Court concluded in *Lead Industries*, Plaintiff cannot establish that Defendants controlled the instrumentality causing the alleged nuisance. *Lead Indus.*, 951 A.2d at 456.

2. Plaintiff's Failure To Warn Claims Fail Because Defendants Had No Duty To Warn Of Widely Publicized Alleged Risks

It is well established that "to be liable for failing to provide an appropriate warning," a defendant must be "*subject to a legal duty to warn*." *Tabieros v. Clark Equip. Co.*, 85 Haw. 336, 370 (1997) (emphasis added). And the Hawai'i Supreme Court is "'reluctant to impose a new duty upon members of our society without any logical, sound, and compelling reasons taking into consideration the social and human relationships of our society.'" *Birmingham v. Fodor's Travel Publ'ns, Inc.*, 833 P.2d 70, 76 (Haw. 1992) (quoting *Johnston v. KFC Nat'l Mgmt. Co.*, 788 P.2d 159, 161 (Haw. 1990)). Plaintiff's failure-to-warn claims fail as a matter of law because Plaintiff has not alleged that Defendants had such a legal duty. Plaintiff seeks to impose a duty to warn so broad that no Hawai'i court has ever recognized it—a duty to warn the world. And Plaintiff's own allegations make clear that Defendants did not have a duty to warn because the potential dangers associated with fossil fuel use on the climate have been open and obvious for decades.

Plaintiff Does Not Allege a Special Relationship and Duty to Warn. This is not a typical failure-to-warn claim where a plaintiff alleges it was injured from *its own use* of a product; rather, Plaintiff alleges that it was harmed as a result of the cumulative fossil fuel use by countless third parties around the world. Plaintiff does *not* allege Defendants' failure to warn *Plaintiff* about the possible dangers of fossil fuel use caused *Plaintiff* to consume more fossil fuels and *Plaintiff's* use caused *its* injury. Rather, Plaintiff's novel theory is that Defendants failed to warn innumerable *third-party users* of fossil fuels around the world and the use and combustion of fossil fuels by these third parties caused Plaintiff to be injured. *See, e.g.*, Compl. ¶¶ 227, 239 ("Defendants breached their duty of care by failing to adequately warn any consumers.").

Plaintiff's proposed duty cannot be found in case law dealing with "special relationships," either. Under Hawai'i law there is no duty to control a third party's conduct so as to prevent injury to another absent a "special relationship" between the defendant and either the plaintiff or the third party. *See Schwenke v. Outrigger Hotels Hawaii, LLP*, 122 Haw. 389, 391 (App. 2010) (for defendant to have "a duty to protect [plaintiff] from the acts of [another], there must have been a

special relationship"); *see also Acoba v. General Tire, Inc.*, 92 Haw. 1, 18 (1999) (no duty to warn about products the manufacturer did not control). A special relationship arises out of the following four situations—(1) a common carrier is under a duty to its passengers to take reasonable action, (2) an innkeeper is under a similar duty to his guests, (3) a possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation, and (4) one who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other. *Winfrey v. GGP Ala Moana LLC*, 130 Haw. 262, 274 (2013) (adopting Restatement (Second) of Torts § 314A). None of those situations apply here.

Plaintiff does not even attempt to allege that it had or has a special relationship with any Defendant, much less that Defendants had a special relationship with any of the billions of unidentified third parties who used their products over the past decades. Defendants therefore owed no legal duty to Plaintiff to warn of the purported risks of climate change resulting from the combustion of fossil fuels by third parties around the world. *Cuba v. Fernandez*, 71 Haw. 627, 633 (1990) (absent special relationship, such as common carrier-passenger, innkeeper-guest, or custodian-inmate, possessor of land owes no duty to warn or protect persons on its land from criminal conduct of third persons); *Birmingham*, 73 Haw. at 366 ("The existence of a duty . . . is entirely a question of law."). Accordingly, Plaintiff's failure-to-warn claims must be dismissed.

Plaintiff Acknowledges The Alleged Risks Of Using Fossil Fuels Were Open and Obvious for Decades. It is black-letter law in Hawai'i that a defendant does not have a duty to warn against an open and obvious danger presented by its products. The Hawai'i Supreme Court has held that a "manufacturer need not provide a warning when the danger, or potentiality of a danger, is generally known and recognized." *Tabieros*, 85 Haw. at 364. (quoting *Maneely v. Gen Motors Corp.*, 108 F.3d 1176, 1179 (9th Cir. 1997)). Appellate courts in Hawai'i "have repeatedly recognized that a 'manufacturer's duty to warn only extends to known dangers which the user of the manufacturer's product would not ordinarily discover.'" *Id*. at 370 (quoting *Wagatsuma v. Patch*, 10 Haw. App. 547, 570 (1994)); *see also Ontai v. Straub Clinic & Hosp. Inc.*, 66 Haw. 237, 248 (1983) (same) (citation omitted). "[I]f the law required suppliers to warn of all obvious dangers inherent in a product, the list . . . warned against would be so long, it would fill a volume." *Id*. (quoting *Plante v. Hobart Corp.*, 771 F.2d 617, 620 (1st Cir. 1985)). "Whether a product presents an open and

obvious danger barring recovery is, in the first instance, a question of law for the court." *Id.* (quoting *Toney v. Kawasaki Heavy Indus., Ltd.*, 975 F.2d 162, 166–67 n.2 (5th Cir, 1992) (internal alteration omitted)). And Plaintiff's own allegations establish that the potential climate impacts of fossil fuel emissions have been well known and widely reported for decades. As a result, Plaintiff's failure-to-warn claims fail as a matter of law and must be dismissed.

Plaintiff expressly alleges that the link between the combustion of oil and gas products and global climate change has been well-understood for at least half a century. To take just a few examples, Plaintiff alleges that:

- "Decades of scientific research has shown that pollution from Defendants' fossil fuel products plays a direct and substantial role in the unprecedented rise in emissions of greenhouse gas pollution and increased atmospheric CO2 concentrations that have occurred since the mid-20th century. This dramatic increase in atmospheric CO2 and other greenhouse gases is the main driver of the gravely dangerous changes occurring to the global climate and environment." Compl. ¶ 4.
- "By 1965, concern over the potential for fossil fuel products to cause disastrous global warming reached the highest levels of the United States' scientific community. In that year, President Lyndon B. Johnson's Science Advisory Committee's Environmental Pollution Panel reported that a 25% increase in carbon dioxide concentrations could occur by the year 2000, that such an increase could cause significant global warming, that melting of the Antarctic ice cap and rapid sea level rise could result, and that fossil fuels were the clearest source of the pollution." *Id.* ¶ 60.
- "In 1988, National Aeronautics and Space Administration (NASA) scientists confirmed that human activities were actually contributing to global warming. On June 23rd of that year, NASA scientist James Hansen's presentation of this information to Congress engendered significant news coverage and publicity for the announcement, including coverage on the front page of the *New York Times*. In that Congressional hearing Hansen asserted 'with 99% confidence' that global warming was already occurring." *Id.* ¶ 99(a).
- "The United Nations began preparing for the 1992 Earth Summit in Rio de Janeiro, Brazil, a major, newsworthy gathering of 172 world governments, of which 116 sent their heads of state. The Summit resulted in the United Nations Framework Convention on Climate Change (UNFCCC), an international environmental treaty providing protocols for future negotiations aimed at 'stabiliz[ing] greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.'" *Id.* ¶ 99(e).
- "Those world events marked a shift in public discussion of climate change and its consequences, and the initiation of international efforts to curb anthropogenic

> greenhouse emissions—developments that had stark implications for, and would have diminished the profitability of, Defendants' fossil fuel products." *Id.* ¶ 100.

These allegations leave no doubt that the general public—including Plaintiff—was on notice of the possible effects and consequences of consuming fossil fuel products for decades, yet nevertheless chose to continue using them. Accordingly, these claims fail as a matter of law because Defendants had no duty to warn about the "generally known and recognized" potential "dangers" of fossil fuels. *Tabieros*, 85 Haw. at 364.

3. Plaintiff Fails To State A Claim For Trespass

Plaintiff's claim for trespass fares no better. To adequately plead a claim for trespass under Hawai'i law, Plaintiff must allege that Defendants "intentionally: (a) enter[ed] land in the possession of [Plaintiff], or cause[d] a thing or third person to do so, or (b) remain[ed] on the land, or (c) fail[ed] to remove from the land a thing which he is under a duty to remove." *Spittler v. Charbonneau*, 145 Haw. 204, 210 (App. 2019). Plaintiff does not allege facts that, if true, would establish any of these elements.

Plaintiff does not allege that Defendants unlawfully entered Plaintiff's land, remained on Plaintiff's land, or failed to remove anything from Plaintiff's land. Indeed, Plaintiff does not allege that Defendants, *or even their products*, intruded upon any Plaintiff-owned property. Plaintiff does not even allege that Defendants somehow caused a "thing or third person" to enter Plaintiff's land. Plaintiff's trespass claim, like all its other claims, is "premised on a theory of misinformation and deception," Dkt. 272 at 1, but nowhere in its Complaint does Plaintiff allege that any "misrepresentation and deception" entered Plaintiff's land. To the contrary, Plaintiff alleges that the only consequence of the alleged "misinformation and deception" was to "unduly inflate the market for fossil fuel products." Compl. ¶ 52.

Nor does Plaintiff's allegation that Defendants have "caused flood waters, extreme precipitation, saltwater, and other materials, to enter the County's real property," Compl. ¶ 249, suffice. There is no precedent in Hawai'i law to support the audacious assertion that weather events constitute a trespass, and the suggestion that one could be liable under trespass for the weather is belied by the Restatement, which provides that an actor may be held liable for causing an object to trespass upon another's property where, "without himself entering the land, [he] may invade another's interest in its exclusive possession *by throwing, propelling, or placing a thing* either on

or beneath the surface of the land or in the air space above it." Restatement (Second) of Torts § 158 (emphasis added).

And Plaintiff does not allege that Defendants *intentionally* caused this intrusion. Nor could it. Hawai'i law is clear that a party cannot be held liable for trespasses by an instrumentality that lies far beyond an actor's direct control, as the weather most certainly does. *See, e.g., Spittler*, 145 Haw. at 211 ("[A] person whose plant, located on the person's property, drops leaves, flowers, or fruit onto neighboring property . . . is not liable to the neighboring property owner for trespass."); *see also Helix Land Co. v. City of San Diego*, 82 Cal. App. 3d 932, 950 (1978) ("The risk of future flooding is not an act.") (citation and internal quotation marks omitted).

Because Plaintiff has not alleged an intentional or direct invasion of Plaintiff's property, the Court should dismiss Plaintiff's trespass claim. As one court put it, "modern courts do not favor trespass claims for environmental pollution" and courts should resist efforts "to torture old remedies to fit factual patterns not contemplated when those remedies were fashioned." *In re Paulsboro Derailment Cases*, 2013 WL 5530046, at *8 (D.N.J. Oct. 4, 2013) (internal citation and quotation marks omitted).

4. Plaintiff Has Not Suffered Cognizable Damages

Plaintiff's claims also fail as a matter of Hawai'i law because damages are not available for prospective harms. Actual damages are an essential element of each of Plaintiff's claims. *See Haynes*, 146 Haw. at 458 ("A nuisance has been variously defined to mean that which unlawfully annoys or does damage to another, anything that works hurt, inconvenience, or damage . . . .") (citation omitted); *see also Tabieros*, 85 Haw. at 354 (with respect to a failure to warn claim, plaintiff must prove, among other things, "a causal connection between the defect and [the] plaintiff's injuries.") (citation omitted); *Spittler*, 145 Haw. at 210–11 n.18 (finding no liability for trespass where there was no allegation of property damage). Accordingly, Plaintiff's claims should be dismissed to the extent they seek future damages that have not actually been incurred.

"The Hawai'i Supreme Court has noted that speculative damages are not recoverable in actions arising under contract or in tort." *McDevitt v. Guenther*, 522 F. Supp. 2d 1272, 1287 (D. Haw. 2007) (citing *Roxas*, 89 Haw. at 140–141 n.33). This is because "an award of damages is retroactive, applying to past conduct," such that "for damages to be awarded significant harm must have been *actually incurred*." *Haynes*, 146 Haw. at 461 (quoting Restatement (Second) of Torts

§ 821B cmt. I) (emphasis added); *see also Helix Land*, 82 Cal. App. 3d at 950 ("[Plaintiff] may not recover damages for potential, future injuries arising from the threat of nuisance. The risk of future flooding is not an act. It does not give rise to a cause of action for damages."). Where, as here, Plaintiff's claims are based almost exclusively on speculative future harms, damages are not recoverable. Accordingly, to the extent Plaintiff's claims are based on *future* harms, *see, e.g.*, Compl. ¶¶ 167–69, 171–72, 183–84, 186, 189, Plaintiff cannot recover, and its claims should be dismissed.

G. Plaintiff's Claims Are Barred By Federal Law

Finally, Plaintiff's claims seeking damages attributable to global climate change are necessarily governed—and barred—by federal law.[12] The Court rejected this argument in *Honolulu*, but in doing so, it understood Defendants to be arguing that federal law governs merely because the claims would effectively regulate out-of-state emissions, when in fact Defendants asserted that federal law governs as a matter of *constitutional structure*—necessarily precluding the application of state law even if federal law does not provide plaintiffs with a remedy.[13] Based on this misunderstanding, the Court disposed of the issue by finding that "the Clean Air Act supplants federal common law, and that the Clean Air Act does not forbid the duties alleged at the heart of this case." *See* Order, *Honolulu*, Dkt. 589, at 6. Defendants briefly present their federal law arguments here in order to preserve them for appeal.

First, Plaintiff's claims are governed exclusively by federal—not state—law, not merely because they seek to regulate transboundary and international emissions, but also because they seek redress for harms allegedly caused by transboundary emissions. The Supreme Court has held that the "*basic scheme of the Constitution* … demands" that "federal common law" govern claims involving "air and water in their ambient or interstate aspects." *AEP*, 564 U.S. at 421 (emphasis added). This is so irrespective of whether federal law provides a remedy, as "our federal system

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[12] Defendants incorporate by reference their motion to dismiss briefing in *Honolulu*. *See* Defendants' Joint Motion to Dismiss the First Amended Complaint, *Honolulu*, Dkts. 347, 439, 489–492, 515.

[13] *See* Defendants' Joint Reply ISO Motion to Dismiss the First Amended Complaint, Honolulu, Dkt. 439 (August 18, 2021).

does not permit [a] controversy [of this sort] to be resolved under state law." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Only "[f]ederal common law and not the varying common law of the individual States" can govern claims involving interstate emissions. *Illinois v. City of Milwaukee*, 406 U.S. 91, 108 n.9 (1972). As the Second Circuit explained in holding that materially identical claims are necessarily governed by federal law notwithstanding the absence of a federal remedy, "state 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." *City of New York*, 993 F.3d at 98. Rather, "[s]uch a sprawling case is simply beyond the limits of state law." *Id.* at 92, 95.

Plaintiff's claims seek redress for alleged harms from interstate and international emissions. Compl. ¶¶ 41–50. The Complaint alleges 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 Plaintiff's injuries are "*all due* to anthropogenic global warming," *id.* ¶ 10 (emphasis added). Plaintiff's misrepresentation theory does not alter this conclusion, because the alleged misrepresentations are purportedly actionable *only* to the extent they caused increased emissions: "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." *Id.* ¶ 2. Emissions are, in Plaintiff's words, "[t]he mechanism" of the alleged harm. *Id.* ¶ 42. As a result, Plaintiff's claims are not only governed by federal common law, but are categorically beyond the scope of state law. Indeed, Plaintiff's claims are also barred by several other constitutional principles, including the Commerce Clause, and limitations on the application of U.S. law extraterritorially.

Second, Plaintiff's federal common-law claims are displaced by the Clean Air Act insofar as they target domestic emissions. The Supreme Court, the Ninth Circuit, and the Second Circuit have all held that federal tort claims involving greenhouse gas emissions are not cognizable because Congress displaced federal common law in this area when it enacted the Clean Air Act ("CAA"). *AEP*, 564 U.S. at 423–29; *Kivalina II*, 696 F.3d at 856–58 ("[F]ederal common law does not provide a remedy" "when federal statutes directly answer the federal question."); *City of New York*, 993 F.3d at 98 ("[F]ederal common law claims concerning domestic greenhouse gas emissions are

displaced by statute."). Because of this displacement, there is no remedy under federal common law available to the Plaintiff, but this failure of remedy does not lead to state law applying.

Third, Plaintiff's claims are barred by the foreign affairs doctrine and extraterritoriality concerns insofar as they target international emissions. The Second Circuit expressly so held when it noted that even "a federal common law cause of action targeting emissions emanating from beyond our national borders" is not viable because "foreign policy concerns foreclose" any such claims. *City of New York*, 993 F.3d at 100. Other courts are in accord. *See, e.g.*, *California v. BP P.L.C.*, 2018 WL 1064293, at *4 (N.D. Cal. Feb. 27, 2018) (holding that "foreign emissions are out of the EPA and Clean Air Act's reach"), *vac'd on other grounds*, 969 F.3d 895 (9th Cir. 2020).

Because Plaintiff's claims are precluded by federal law, and because federal law does not provide a remedy for alleged harms attributable to global climate change, the Court should dismiss the Complaint.

Alternatively, even if Plaintiff could otherwise properly state its claims under state law, those claims would be preempted by the Clean Air Act. "Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law." *Kawamata Farms, Inc. v. United Agri Prod.*, 86 Haw. 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)). The Supreme Court held more than thirty years ago that the Clean Water Act preempted state common-law claims for injury from water pollution where one state's law is applied to sources of pollution located outside of that state. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 499 (1987). 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). In this case, Plaintiff's alleged injuries undisputedly result from the cumulative effect of

global emissions, including countless out-of-state sources, and thus its claims, even if properly pled as state-law torts, are preempted by the Clean Air Act under *Ouellette* and its progeny.

* * *

This motion focuses on whether Plaintiff has stated a claim under Hawai‘i law. It has not. In fact, Plaintiff has failed at every turn. The claims are untimely, as the Complaint fails to identify a single alleged misrepresentation within the two-year limitations period. Plaintiff, as a Hawai‘i *County*, also lacks the power to assert common-law tort claims like those pleaded here. Plaintiff's claims also ask the Court to make policy determinations reserved for the legislative and executive branches, in violation of Hawai‘i's political question doctrine. And Plaintiff lacks standing because it fails to allege an actual, cognizable injury, that can fairly be traceable to Defendants' alleged misstatements. Finally, even if Plaintiff could surmount these obstacles, the Complaint fails to allege the necessary elements of any state-law claim. In short, Plaintiff's claims represent a radical departure from well-established principles of tort law and should be dismissed with prejudice.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss Plaintiff's Complaint in its entirety with prejudice.

DATED: Honolulu, Hawaii, May 25, 2022.

RESPECTFULLY SUBMITTED,

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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI`I

COUNTY OF MAUI, Plaintiff, 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. 2CCV-20-0000283 (Other Non-Vehicle Tort) **NOTICE OF HEARING MOTION AND CERTIFICATE OF SERVICE**

NOTICE OF HEARING MOTION

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NOTICE IS HEREBY GIVEN that DEFENDANTS' JOINT MOTION TO DISMISS filed herein on May 25, 2022, shall come on for hearing before the Honorable, Judge Jeffrey P. Crabtree, Judge of the above-entitled Court on August 18, 2022 at 8:30 a.m.

DATED: Honolulu, Hawaii, May 25, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was duly served on the above-referenced parties through their respective attorneys at their last known address by electronic service via JEFS on the date below.

DATED: Honolulu, Hawaii, May 25, 2022.

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