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Attorneys for Plaintiff
COUNTY OF MAUI

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

COUNTY OF MAUI,

Plaintiff,

vs.

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

Defendants.

Civil No.: 2CCV-20-0000283
(Other Non-Vehicle Tort)

PLAINTIFF COUNTY OF MAUI'S OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS; DECLARATION OF VICTOR M. SHER IN SUPPORT OF OPPOSITION; EXHIBITS "A" – "M"; CERTIFICATE OF SERVICE

Hearing on Motion:
Date: August 18, 2022
Time: 8:30 a.m.
Judge: Honorable Jeffrey P. Crabtree

Trial Date: None.

(Caption continued on next page)

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PLAINTIFF COUNTY OF MAUI'S OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS

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I. INTRODUCTION

Every aspect of this climate-deception lawsuit rests firmly on longstanding, well-settled principles of Hawai'i law. Invoking its broad authority under HRS § 46-1.5, the County of Maui ("the County") seeks to hold some of the world's largest fossil-fuel companies ("Defendants") liable for injuries caused by their failure to warn about the climate-change impacts of their products and their decades-long campaign to conceal and misrepresent the existence, causes, and effects of global warming. Like *Honolulu*, this action asserts "well recognized" claims for nuisance, trespass, and failure to warn that are "tethered to existing well-known elements." No. 1CCV-20-0000380, Dkt. 618 ("*Honolulu* Order"), at 4. It requests traditional tort remedies for injuries to public rights, infrastructure, and land. And it steers clear of any climate policymaking by cabining Defendants' liability to "the effects of climate change allegedly *caused* by [their] breach of Hawai'i law regarding failures to disclose, failures to warn, and deceptive promotion." *Id.* As a result, the County's "causes of action may seem new … due to the unprecedented allegations involving causes and effects of fossil fuels and climate change." *Id.* at 11. But in reality, they "are common." *Id.*

As in *Honolulu*, Defendants move to dismiss the Complaint (Dkt. 1) ("Compl.") by reimagining the County's claims, asserting that time-honored legal principles cannot apply to climate-related injuries, and inviting this Court to improperly resolve factual disputes under Hawaii's notice-pleading standard. Those premature, misplaced, and unfounded attacks must fail, just as they did in *Honolulu*.

Contrary to Defendants' insistence, the County's claims for nuisance, failure to warn, and trespass are rooted in precedent and consistent with the history, principles, and purpose of Hawai'i common law. In this state and elsewhere, courts recognize that tortious speech and the wrongful promotion, marketing, and sale of dangerous goods can create actionable nuisances. And far from adopting Defendants' proposed "control" element, the Hawai'i Supreme Court has repeatedly defined the relationship between a nuisance and a defendant as a matter of ordinary legal causation. Defendants plainly had a duty to warn of their products' climate-related dangers—dangers that Defendants made sure were hidden from ordinary consumers through their pervasive and ongoing disinformation campaigns. Just as plainly, injured bystanders like the County can sue Defendants for breaching their duty to warn. As for trespass, the Complaint easily satisfies the elements of this ancient tort by alleging that Defendants' failure to warn and deceptive promotion caused "floodwaters, extreme precipitation, saltwater, and other materials" to enter the County's property without its consent. Compl. at ¶¶ 249–50. In short, the County's claims do not "disfigur[e]" Hawai'i tort law. *See* Joint Motion to Dismiss (Dkt. 397) ("Mot.") at 1. Instead, they fit comfortably within the "orderly

growth" of the common-law system. *Fergerstrom v. Haw. Ocean View Estates*, 50 Haw. 374, 376 (1968) (quotations omitted).

Under HRS § 46-1.5, the County clearly has the power to prosecute common-law claims, just as Hawai'i counties have done in various other cases. And under Hawaii's liberal notice-pleading standard, this lawsuit easily meets the requirements of the State's generous standing doctrine. The County has already suffered climate-related injuries directly traceable to Defendants' past failure to warn and deceptive promotion, which inflated fossil-fuel consumption, accelerated global warming, and exacerbated sea-level rise, storm surges, and other climate-related hazards in the County. It is a scientific certainty, moreover, that Defendants' past misconduct will continue to harm the County in the coming decades because greenhouse gas emissions can remain in the atmosphere for "thousands of years." Compl. ¶ 137. Damages, equitable abatement, and other tried-and-true tort remedies are well-equipped to redress these local harms and abate the ongoing hazards to public infrastructure, property, and natural resources in the County.

The passage of time cannot save Defendants from liability for at least five reasons. First, this lawsuit is timely under Hawaii's discovery rule because the County only recently learned that Defendants were behind the widespread climate-disinformation campaigns that are causing the County's injuries. Second, *nullum tempus* applies to the County's claims, all of which seek to protect important public rights. Third, the County is entitled to toll any statute of limitations based on the continuing tort and continuing injury doctrines. Fourth, the County can—at a bare minimum—pursue equitable remedies because no one may gain a prescriptive right to maintain a public nuisance or a trespass on public property. Finally, Defendants' laches defense fails because any delay in this lawsuit was due to Defendants' concerted efforts to conceal their roles in the deception campaigns.

Finally, the County's claims do not raise any nonjusticiable political questions for the same reason they are not preempted by federal law: this lawsuit focuses on past tortious behavior, and "does not prevent Defendants from producing and selling as much fossil fuels as they are able, as long as Defendants make the disclosures allegedly required, and do not engage in misinformation." *Honolulu* Order at 8. This lawsuit does not (and cannot) "usurp the powers of the political branches to set state and national energy and climate policy." Mot. 12. It will not require a factfinder to evaluate the "reasonableness" of fossil-fuel consumption. *Id.* at 14. And it will not decide "who should bear the cost of global warming." *Id.* at 13 (emphasis omitted). The only question that this lawsuit will answer is whether Defendants' failure to warn and deceptive promotion were substantial factors in bringing about the County's injuries—and those are questions for the jury, not politicians.

II. BACKGROUND

Defendants have known for more than half a century that their fossil-fuel products create greenhouse gas pollution that alters the climate. Compl. ¶¶ 1, 7, 56–95. Rather than warning consumers and others about their products' dangers, Defendants embarked on a decades-long campaign of denial and disinformation about the science and consequences of global warming that continues today. *See id.* ¶¶ 96–130, 149–59. Defendants' tortious conduct—their deception and failure to warn—inflated and sustained the market for their fossil-fuel products, causing greenhouse gas pollution to skyrocket, global warming to accelerate, and climate impacts to worsen in the County. *Id.* ¶¶ 52–53, 101–03, 160–62. While Defendants have profited immensely from their decades of deceit, the County has spent and will spend vast sums to protect its residents and public property from harms caused by Defendants' unlawful conduct. *E.g.*, *id.* ¶¶ 2, 191–202. The County sued Defendants to vindicate these local injuries, pleading state-law claims for nuisance, failure to warn, and trespass. *Id.* ¶¶ 204–55. The County principally seeks (1) damages for injuries already sustained because of Defendants' deception campaigns, (2) abatement of future harms that will inevitably accrue because of their past conduct, and (3) future damages to the degree recoverable under the law. The County does not ask this Court to limit, cap, or enjoin fossil-fuel production or emissions of any kind.

III. LEGAL STANDARDS

Rule 12(b)(6) motions are "rarely granted in Hawai'i," *Honolulu* Order at 2, because courts apply a "liberal notice pleading standard." *Bank of Am., N.A. v. Reyes-Toledo*, 143 Haw. 249, 262 (2018). The purpose of pleading is merely to provide "fair notice of what the plaintiff's claim is and [its] grounds." *In re Genesys Data Techs., Inc.*, 95 Haw. 33, 41 (2001). On a motion to dismiss, a court must accept the allegations as true and view them "in a light most favorable to" the plaintiff. *Bank of Am., N.A.*, 143 Haw. at 257 (cleaned up). Dismissal is inappropriate "unless it appears beyond doubt that the plaintiff can prove no set of facts … that would entitle [it] to relief." *Id.* (cleaned up).

IV. ARGUMENT

A. The County Pleads Cognizable Claims Under Hawai'i Law.

Defendants accuse the County of "seek[ing] an unprecedented expansion of state tort law." Mot. 1. That accusation rests on a flawed reading of Hawai'i case law and a fundamental misunderstanding of the common-law system. This lawsuit asserts "well recognized" "tort causes of action" that "are tethered to existing well-known elements." *Honolulu* Order at 4. The County's claims only "seem new due to the unprecedented allegations involving causes and effects of fossil fuels and climate change." *Id.* The "[c]ommon law historically tries to adapt to such new circumstances." *Id.*

Indeed, "[t]he genius of the common law … is its capacity for orderly growth." *Fergerstrom*, 50 Haw. at 376 (quotations omitted). As the Supreme Court has underscored time and again, "[t]he common law does not consist of absolute, fixed, and inflexible rules, but rather of broad and comprehensive principles based on justice, reason, and common sense." *Welsh v. Campbell*, 41 Haw. 106, 120 (1955) (quotations omitted). Contrary to Defendants' insistence, then, "[t]he absence of a precedent d[oes] not prevent the common law from recognizing [a] tort," *Fergerstrom*, 50 Haw. at 376 n.4. If that were true, "[t]he common law system would have withered centuries ago." *Id.* at 376 Instead, Hawai'i courts must "expand and adapt [the common law] to the social, economic, and political changes inherent in a vibrant human society." *Id.* So, a judge who is "confronted with a novel question" of common law "must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop." *Lum v. Fullaway*, 42 Haw. 500, 502–04 (1958) (quotations omitted). Here, the County simply applies time-honored principles of nuisance, failure to warn, and trespass to a new set of facts.

1. The County states claims for public and private nuisance.

Defendants attack the County's nuisance claims by misconstruing the Complaint and misrepresenting the case law. They insist that their deceptive promotion can violate only "the *individual* right to not be defrauded," Mot. 26, even though the County clearly alleges violations to well-established public rights concerning health, safety, and common resources. Defendants then declare that Hawai'i nuisance law applies only if (1) the nuisance arose from a "defendant's *use of land*," and (2) the defendant exercised "control over the instrumentality alleged to constitute the nuisance at the time that the damage occurred." *Id.* at 23, 26 (cleaned up). Since time immemorial, however, Hawai'i courts and others have applied nuisance liability to precisely the sort of misconduct at issue here: tortious speech and the deceptive promotion of dangerous consumer goods. Far from requiring a "control" element, moreover, Hawai'i case law confirms that liability attaches when the defendants' conduct was a legal cause of the nuisance. This Court should decline Defendants' invitation to invent new requirements that conflict with the history, principles, and purpose of Hawai'i nuisance law.

a. The Complaint pleads the elements of nuisance, including interference with a public right.

In Hawai'i, the test for nuisance liability is simple: a plaintiff must show that a defendant "created or maintained a nuisance." *Haynes v. Haas*, 146 Haw. 452, 461 (2020). Nuisances—which are broadly defined to include "anything that works hurt, inconvenience, or damage"—come in two forms. *Id.* at 458–59 (quotations omitted). A private nuisance is anything that interferes with a

plaintiff's use and enjoyment of its land. *Territory v. Fujiwara*, 33 Haw. 428, 430 (1935); *see Restatement (Second) of Torts* § 821D (Am. L. Inst. 1979) (hereinafter "*Restatement*"). A public nuisance is anything that interferes with public rights "to which every citizen is entitled." *Fujiwara*, 33 Haw. at 430. To determine whether a defendant created or maintained a public or private nuisance, Hawai'i courts apply the standard rules of "proximate caus[ation]." *Littleton v. State*, 66 Haw. 55, 67 (1982). A plaintiff must therefore demonstrate that a defendant's conduct was a "substantial factor in bringing about the harm." *Est. of Frey v. Mastroianni*, 146 Haw. 540, 550 (2020); *see People v. ConAgra Grocery Prods. Co.*, 17 Cal.App.5th 51, 101 (2017) ("[T]he causation element of a public nuisance cause of action is satisfied if the conduct of a defendant is a substantial factor in bringing about the result."). Because proximate causation and the existence of a nuisance are both "question[s] of fact," nuisance claims are usually best left "for the jury and not for summary adjudication." *Littleton*, 66 Haw. at 67–68.

The County's 134-page Complaint amply pleads the elements of public and private nuisance. Defendants have worked for decades to conceal and misrepresent the climate impacts of fossil fuels. Compl. ¶¶ 97–130, 149–59. That tortious conduct hyperinflated fossil-fuel consumption, increased greenhouse gas emissions, accelerated global warming, and created hazardous conditions in the County like sea-level rise, storm surges, rain bombs, heatwaves, and wildfires. *Id.* ¶¶ 52–53, 101–03, 160–203. These hazards impair longstanding public rights, including "the public's right of beach access," *Akau v. Olohana Corp.*, 65 Haw. 383, 386 (1982); "indivisible resource[s] shared by the public at large, like air, water, [and] public rights-of-way," *Rhode Island v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 448 (R.I. 2008) (quotations omitted); and "the public health, the public safety, the public peace, the public comfort[, and] the public convenience," *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1104 (1997) (quotations omitted). They also damage critical infrastructure, buildings, roads, and land owned and used by the County. Compl. ¶¶ 191–201. Contrary to Defendants' distortions, then, the Complaint does not seek to vindicate "the *individual* right to not be defrauded." Mot. 26. Instead, the County seeks to protect public rights, infrastructure, and land from being impaired as a proximate result of Defendants' tortious conduct. Accepting the truth of the County's causation allegations, as this Court must on a Rule 12(b)(6) motion, the Complaint easily states claims for public and private nuisance.

Indeed, courts around the country have overwhelmingly approved of analogous nuisance claims brought against manufacturers for injuries caused by the deceptive promotion of asbestos, cigarettes, chemicals, gasoline additives, guns, lead, opioids, and other harmful products.[1] There, as

[1] *Northridge Co. v. W.R. Grace & Co.*, 205 Wis. 2d 267, 282 (App. 1996) (asbestos); *Johnson v. 3M*, 563 F.Supp.3d 1253, 1343 (N.D. Ga. 2021) (chemicals); *Mayor & City Council of Balt. v. Monsanto Co.*, No.

here, the plaintiffs alleged that manufacturers created a nuisance by affirmatively promoting dangerous products for mass consumption, while knowingly concealing and misrepresenting the products' hazards. And there, as here, the defendants argued that nuisance law could not reach injuries involving the sale of lawful products. The courts in those lawsuits rightly rejected that argument as inconsistent with the history, principles, and purpose of nuisance law. This Court should do the same here.

b. Nuisance law reaches the deceptive promotion of dangerous products.

Defendants urge dismissal because, in their view, "Hawai'i courts have never recognized a nuisance claim based on the production, promotion, sale, and use of a lawful consumer product." Mot. 23. But "the absence of precedent is a feeble argument" because "accept[ing] it … would be no less than an absolute annihilation of the common law system." *Fergerstrom*, 50 Haw. at 376. In any event, Defendants are simply wrong in their assessment of Hawai'i law, which has consistently applied nuisance liability to conduct other than the use of land. And Defendants cannot overcome this precedent through policy arguments, all of which have been rejected by numerous different courts.

(1) The County's nuisance claims are grounded in precedent.

When Hawai'i became a U.S. territory, it was well-settled that nuisance liability could arise out of the sale of dangerous consumer goods and the dissemination of misleading information. By that time, American and English courts had held that a defendant could create an actionable nuisance by selling "meat, food, or drink" that was "injurious to health"; by selling "obscene pictures, prints, books[,] or devices"; by selling "horse[s] affected with glanders"; by publishing "false reports" that

CV 19-0483, 2020 WL 1529014, at *1 (D. Md. 2020) (same); *Port of Portland v. Monsanto Co.*, No. 3:17-CV-00015, 2017 WL 4236561, at *8 (D. Or. 2017) (same); *Evans v. Lorillard Tobacco Co.*, No. CIV. A. 04-2840A, 2007 WL 796175, at *19 (Mass. Super. 2007) (cigarettes); *In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig.*, 497 F.Supp.3d 552, 648–49 (N.D. Cal. 2020) (e-cigarettes); *In re MTBE Prods. Liab. Litig.*, 725 F.3d 65, 79 (2d Cir. 2013) (gasoline additives); *State v. Exxon Mobil Corp.*, 406 F.Supp.3d 420, 467–69 (D. Md. 2019) (same); *Rhode Island v. Atl. Richfield Co.*, 357 F.Supp.3d 129, 143 (D.R.I. 2018) (same); *City of Bos. v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at *14 (Mass. Super. 2000) (guns); *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416, 420 (same); *Ileto v. Glock Inc.*, 349 F.3d 1191, 1212 (9th Cir. 2003) (same); *ConAgra* 17 Cal.App.5th 51 (lead paint); *State v. Purdue Pharma L.P.*, No. 3AN-17-09966CI, 2018 WL 4468439, at *4 (Alaska Super. 2018) (opioids); *State v. Purdue Pharma L.P.*, No. CV2018002018, 2019 WL 1590064, at *4 (Ark. Cir. 2019) (same); *Commonwealth v. Endo Health Sols. Inc.*, No. 17-CI-1147, 2018 WL 3635765, at *6 (Ky. Cir. 2018) (same); *Commonwealth v. Purdue Pharma, L.P.*, No. 1884CV01808BLS2, 2019 WL 5495866, at *4 (Mass. Super. 2019) (same); *State v. Purdue Pharma Inc.*, No. 217-2017-CV-00402, 2018 WL 4566129, at *13 (N.H. Super. 2018) (same); *In re Opioid Litig.*, No. 400000/2017, 2018 WL 3115102, at *21 (N.Y. Sup. Ct. 2018) (same); *State v. Purdue Pharma L.P.*, No. PC-2018-4555, 2019 WL 3991963, at *11 (R.I. Super. 2019) (same); *State v. Purdue Pharma L.P.*, No. 1-173-18, 2019 WL 2331282, at *6 (Tenn. Cir. 2019) (same); *State v. Fermenta ASC Corp.*, 160 Misc. 2d 187, 196 (N.Y. Sup. Ct. 1994) (pesticides).

"create false terror or anxiety"; and by "posting placards in the vicinity of [a] plaintiff's business" that were "calculated to bring the plaintiff into contempt and to prevent people from trading with him." Wood, *The Law of Nuisances*, at 72–73, 75, 143, 147 (1875) (collecting cases) (Sher Decl. Ex. A).[2] Indeed, the prevailing wisdom of that era was that "*any* act not warranted by law, or omission to discharge a legal duty," could form the basis of nuisance liability, so long as it sufficiently interfered with public rights or private property interests. *Restatement* § 821B cmt. a (cleaned up) (emphasis added).

Hawai'i law incorporated that wisdom. *See* HRS § 1-1. More than a century ago, the Supreme Court recognized that a defendant could be "liable in common nuisance" for selling harmful consumer goods like "a book containing obscene language." *The King v. Grieve*, 6 Haw. 740, 744–45 (1883). And in a series of early cases, the Court affirmed that nuisance liability extended beyond a defendant's use of real property to include the use of chattel, *Territory v. Henriques*, 21 Haw. 50, 52 (1912) (cattle); the use of "obscene and foul language," *The King v. Nawahine*, 3 Haw. 371, 371–72 (1872); and the use of a defendant's own body, *State v. Miller*, 54 Haw. 1, 2 (1972) (public nudity). Indeed, the Legislature at that time enacted numerous "nuisance" statutes targeting activities unrelated to land use, such as "selling … sneezing powder," "causing [a contagious person] to pass through a frequented street," and improperly "marketing … food products." *Marsland v. Pang*, 5 Haw. App. 463, 478–89 & nn. 15–16 (1985) (collecting statutes).[3] From the very beginning, then, Hawai'i nuisance law has reached not only the sale of dangerous goods, but also unprotected speech that interferes with public rights.

That understanding has carried into the modern era. The Supreme Court has noted that nuisance liability may stem from a defendant's "act *or* use of property." *Littleton*, 66 Haw. at 67 (quotations omitted) (emphasis added). And it recently defined nuisance-causing conduct as "*anything* that works hurt, inconvenience, or damage, *anything* which annoys or disturbs one in the free use, possession, or enjoyment of his or her property or which renders its ordinary use or physical

[2] Hawai'i courts from that era regularly turned to Wood's treatise for guidance on nuisance law. *See, e.g.*, *Cluney v. Lee Wai*, 10 Haw. 319, 322 (1896) (calling Wood a "learned author"); *Fernandez v. People's Ice & Refrigerating Co.*, 5 Haw. 532, 533 (1886).

[3] Although many of these early cases and laws concerned the criminal offense of nuisance (which has since been repealed), they still offer important guideposts for determining the scope of nuisance liability at common law. *See Restatement* § 821B cmt. b ("Many states no longer recognize common law crimes, treating the criminal law as entirely statutory. But the common law tort of public nuisance still exists, and the traditional basis for determining what is a public nuisance may still be applicable."). After all, "the essential elements of public nuisance as a theory of tort recovery find their genesis in this historical basis in crime and criminal prosecution." *In re Lead Paint Litig.*, 191 N.J. 405, 422–23 (2007). Defendants appear to recognize as much, for they also cite Hawai'i cases involving the criminal offense of nuisance. *See* Mot. 23 (citing *Miller*, 54 Haw. 1); *id.* at 26 (citing *Henriques*, 21 Haw. 50).

occupation uncomfortable, and *anything* wrongfully done or permitted which injures or annoys another in the enjoyment of his or her legal rights." *Haynes*, 146 Haw. at 458 (cleaned up) (emphasis added).

This broad definition accords with the *Restatement (Second) of Torts*, which Hawai'i courts regularly consult. Far from restricting nuisance-causing conduct to land use, the *Restatement* defines that conduct to include "*all* acts that are a cause of the harm." *Restatement* § 834 & cmt. b (emphasis added). Indeed, a defendant may be held liable for merely "participat[ing]" in "an activity" that causes "a nuisance." *Id.*; *see id.* § 822 cmt. a ("These interests may be invaded by any one of the types of conduct that serve in general as bases for all tort liability."). Notably, Professor Prosser endorsed a similarly broad view of nuisance-causing conduct in his seminal treatise, explaining that "nuisance law is a field of tort liability rather than a type of tortious conduct." Prosser, *Handbook of Law of Torts*, at 573 (4th ed. 1971) (Sher Decl. Ex. B). As a result, the scope of nuisance liability is defined by "reference to the interests invaded" (*i.e.,* public rights or private property interests), "not to any particular kind of act." *Id.*[4] Based on this sound reasoning, courts from numerous states have held that the deceptive promotion of dangerous consumer products can—just like any other activity—create nuisance liability when it impermissibly interferes with public rights or private property use. *See supra* n.1.

In short, the County's deceptive-promotion claims are rooted in Hawai'i precedent, supported by the leading authorities on tort law, and recognized by numerous courts across the United States. The Court should follow this well-reasoned and well-settled authority, and conclude that the County has stated viable nuisance claims under Hawai'i law.

(2) Defendants' arguments are unavailing.

Ignoring this contrary authority, Defendants offer misplaced policy arguments and a few outlier cases in support of immunizing manufacturers from nuisance liability. First, they suggest that Hawaii's products-liability law somehow precludes nuisance claims for deceptively promoting dangerous consumer goods. But the Supreme Court has never said products liability provides the only common-law remedy for product-related injuries. In fact, the Supreme Court created products-liability claims to provide people with "more protection from dangerous products," not less. *State by Bronster v. U.S. Steel Corp.*, 82 Haw. 32, 43 (1996) (quotations omitted); *see Stewart v. Budget Rent-A-Car Corp.*, 52 Haw. 71, 74–75 (1970) (similar). And it is well-established that the same tortious conduct can support multiple common-law causes of action. *E.g.*, *Spittler v. Charbonneau*, 145 Haw. 204 (App. 2019)

[4] *Accord, e.g.*, *Branch v. W. Petroleum, Inc.*, 657 P.2d 267, 273–74 (Utah 1982); *Foss v. Me. Tpk. Auth.*, 309 A.2d 339, 342 (Me. 1973); *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 277 Wis. 2d 635, 657 (2005); *City of Lincoln Ctr. v. Farmway Co-Op, Inc.*, 298 Kan. 540, 551 (2013).

(nuisance and trespass); *Kona's Best Nat. Coffee LLC v. Mountain Thunder Coffee Plantation Int'l, Inc.*, 140 Haw. 250, 2017 WL 3310451 (App. 2017) (unpublished) (tortious business interference, negligent misrepresentation, fraud). Absent an express Supreme Court decision, this Court should not presume that products liability eliminated longstanding nuisance-law remedies. *See Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 451–52 (2017) ("Our courts have repeatedly recognized the importance of the common law and have demonstrated an unwillingness to impliedly reject its principles.").

In any event, a nuisance claim for deceptive promotion is "not a disguised products liability action." *ConAgra*, 17 Cal.App.5th at 164. Instead, the two causes of action target different conduct, protect different rights, and provide different remedies. Where, as here, a defendant uses deception to affirmatively promote a product for a use that the defendant knew to be hazardous, the defendant's conduct is "distinct from and far more egregious than simply producing a defective product or failing to warn of a defective product." *Cty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal.App.4th 292, 309 (2006). And whereas nuisance law "is aimed at the protection and redress of *community* interests" and the "vindicat[ion] [of] individual ownership interests in land," *Gallo*, 14 Cal. 4th at 1103, products-liability law is narrowly focused on protecting "the public interest" in having "products [that] are suitable and safe for use," *Stewart*, 52 Haw. at 74–75. Reflecting this difference, nuisance law provides the remedy of equitable abatement, which seeks to eliminate the ongoing hazard created by a defendant's past tortious conduct. *ConAgra*, 17 Cal.App.5th at 164. By contrast, a products-liability action provides only compensatory damages. *Santa Clara*, 137 Cal.App.4th at 310. As pleaded and argued, then, the County's claims do not impermissibly blur the boundaries between products liability and nuisance.

Nor do the County's claims threaten to "turn[] nuisance law into a monster that would devour in one gulp the entire law of tort." Mot. 24 (quotations omitted). As the Supreme Court has explained, "the argument that recognizing [a] tort will result in a vast amount of litigation" is "unpersuasive" because that argument "has accompanied virtually every innovation in the law." *Fergerstrom*, 50 Haw. at 377. In any event, Defendants' speculation is baseless. Nuisance has not devoured all of tort law in the many jurisdictions that recognize nuisance claims for deceptively promoting dangerous products. Even a cursory review of the case law in those jurisdictions confirms that nuisance cases represent a tiny share of lawsuits involving product-related injuries. This is unsurprising. Most product-related harms involve bodily injuries, not the sort of land-based injuries that can support private nuisance.[5]

[5] *See, e.g.*, *Acoba v. Gen. Tire, Inc.*, 92 Haw. 1, 5 (1999) (death); *Udac v. Takata Corp.*, 121 Haw. 143, 147 (App. 2009) (spinal cord injury); *Ontai v. Straub Clinic & Hosp. Inc.*, 66 Haw. 237, 240 (1983) (bodily injuries); *Josue v. Isuzu Motors Am., Inc.*, 87 Haw. 413, 414 (1998) (paralysis).

And as Defendants' citations explain, "the manufacture and distribution of products rarely cause a violation of a public right" because widespread individual consumer injuries rarely rise to the level of a communal or public injury. *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 721 (Okla. 2021).

To be sure, a few courts have limited nuisance liability to the misuse of land. But they represent the minority, not the "clear national trend." *Compare* Mot. 23–25, *with supra* n.1. In narrowing nuisance liability, moreover, these outlier courts relied on state-specific considerations not applicable here. Some of them, for example, restricted nuisance liability based on state-specific statutes that have no analogues in Hawai'i. *E.g.*, *Lead Paint Litig.*, 191 N.J. at 429–39 (Lead Paint Act and Product Liability Act); *Lead Indus. Ass'n*, 951 A.2d at 457–58 (the LPPA and the LHMA). Others did the same because of "the lack of case law" in their respective states applying "nuisance doctrine to cases involving the sale of goods." *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993).[6] In Hawai'i, by contrast, there *is* precedent for applying nuisance liability to the sale of dangerous goods, *see supra* Section IV.A.1.b.1, and in any event, the lack of precedent is no bar to recognizing a right under Hawai'i common law*, see Fergerstrom*, 50 Haw. at 376.

In short, neither Defendants' policy arguments nor their cited cases provide this Court with a basis for restricting nuisance-causing conduct to the misuse of land. The Court should therefore hold that nuisance liability may arise from the deceptive promotion of dangerous products, consistent with the historical development of nuisance law in this State and elsewhere.

c. The Complaint satisfies Defendants' non-existent control requirement.

The Court should also reject Defendants' attempts to dismiss the nuisance claims based on an imaginary "control" element. Hawai'i nuisance law does not require proof of "control over the instrumentality alleged to constitute the nuisance at the time that the damage occurred." Mot. 27 (cleaned up). And even if it did, the Complaint would easily satisfy that requirement.

(1) Control is not an element of Hawai'i nuisance.

Hawai'i courts have never held that a defendant must control the instrumentality of the nuisance when the damage occurs. Instead, they have described the requisite relationship between the

[6] *See also Camden Cty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 541 (3d Cir. 2001) (absence of "New Jersey precedents"); *City of Phila. v. Beretta U.S.A., Corp.*, 126 F.Supp.2d 882, 908 (E.D. Pa. 2000) (absence of Pennsylvania cases "allow[ing] recovery on a public nuisance basis for the distribution of a legal product"); *Hunter*, 499 P.3d at 725 (absence of Oklahoma case law "appl[ying] public nuisance law to the manufacturing, marketing, and selling of lawful products"); *State ex rel. Jennings v. Purdue Pharma L.P.*, No. CVN18C01223, 2019 WL 446382, at *11 (Del. Super. Ct. 2019) (absence of Delaware precedent "recogniz[ing] a cause of action" for products-based public nuisance).

defendant and the nuisance as a matter of ordinary legal causation—*i.e.*, a question of "proximate caus[ation]." *Littleton*, 66 Haw. at 67; *see Lee Ching v. Loo Dung*, 145 Haw. 99, 115 (App. 2019) (a defendant's conduct must be "a legal cause" of the nuisance), *rev'd on other grounds*, 148 Haw. 416 (2020).

This coheres with the *Restatement (Second) of Torts*, which explains that a defendant "is subject to liability for a nuisance *caused* by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on." *Restatement* § 834 (emphasis added). Where (as here) a defendant participates in creating a harmful physical condition (*e.g.*, sea-level rise) that interferes with public rights or private property interests, the defendant will remain liable for the ongoing nuisance—even after the defendant "ceases" its tortious "activity" and even if the defendant "is no longer in a position to abate the condition and to stop the harm." *Id.* cmt. e. Or as one venerable treatise put it more than a century ago: a defendant need not "commit the particular act that creates the nuisance; it is enough if he contributes thereto either by his act or neglect, directly or remotely." Wood, *Law of Nuisance*, at 39; *see also Restatement* § 824 cmt. b (a defendant's acts or omissions merely need to "set in motion a force or chain of events resulting in the invasion").

Numerous courts agree.[7] Like the Hawai'i Supreme Court, these courts rightly recognize that "the critical question is whether the defendant *created or assisted in the creation of the nuisance*." *Santa Clara*, 137 Cal.App.4th at 306 (quotations omitted); *see also Haynes*, 146 Haw. at 461 ("Under Hawai'i law, whether the act or thing alleged to *create* a nuisance is really so hurtful or prejudicial to others as to render it a common nuisance, is a question of fact…." (cleaned up) (emphasis added)). And from that basic and ancient principle of law, they have correctly concluded that a manufacturer can be liable for nuisances created by their deceptive promotion of a dangerous product, even if the alleged injuries occurred *after* the harmful product left the manufacturer's hands. *See supra* nn.1, 7.

Overlooking this authority, Defendants suggest the element of control is lurking in *Henriques*, 21 Haw. at 50–52, a 1912 criminal-nuisance case involving the obstruction of a public highway by "certain dairy cattle." It isn't. When the Hawai'i Supreme Court stated that the defendant's "[o]wnership or control of the cattle was an essential ingredient of the offense charged," *id.*, it was referring to the rule that "[n]o one is liable in damages for injuries by an animal which he does not own, harbor, or control," 2 Cyc. 378 (Sher Decl. Ex. C). Indeed, the opinion's own citations confirm as much. *See Henriques*, 21 Haw. at 52 (citing 2 Cyc. 378). *Henriques* did not purport to invent a generally

[7] *See, e.g.*, *City of Modesto Redevelopment Agency v. Superior Ct.*, 119 Cal.App.4th 28, 38 (2004); *In re MTBE Prod. Liab. Litig.*, 175 F.Supp.2d 593, 628 (S.D.N.Y. 2001); *Exxon Mobil Corp.*, 406 F.Supp.3d at 467–68; *Cincinnati*, 95 Ohio St. 3d at 420; *Northridge*, 205 Wis. 2d at 282; *Page Cty. Appliance Ctr., Inc. v. Honeywell, Inc.*, 347 N.W.2d 171, 176–77 (Iowa 1984); *Smith & Wesson*, 2000 WL 1473568, at *14.

applicable control element for nuisance liability, and it should not be read as doing so *sub silentio*.

Defendants' remaining arguments are equally unpersuasive. In their view, "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.'" Mot. 26 (quoting *City of Phila.*, 126 F.Supp.2d at 911). But notions of fair play do not help Defendants here because, as alleged in the Complaint, they knew exactly how consumers would *use* their fossil fuels—*i.e.*, for combustion—and the dire climate-related consequences that would ensue. *Cf. City of Phila.*, 126 F.Supp.2d at 901 ("[T]he knowledge of potential *misuse* cannot be implicated to the gun manufacturers as a matter of law." (emphasis added)). Nor does the availability of a nuisance abatement remedy justify Defendants' proposed control element. In this case, an abatement order would simply require Defendants to reduce the local environmental hazards in the County that were created by their tortious conduct, such as by fortifying public infrastructure against sea-level rise and increased flooding. It would not require Defendants to exercise any control over fossil-fuel users. Nor would it require Defendants to enter land that it had no legal right to enter. Indeed, courts have identified a myriad of ways for manufacturers to abate nuisances created by their products. *See, e.g.*, *ConAgra*, 17 Cal.App.5th at 115, 131–34 (abatement fund for lead paint nuisance); *Purdue Pharma*, 2018 WL 4566129, at *14 (state properly alleged opioids nuisance could be abated through "consumer education," "honest marketing," "addiction treatment," "disposal of unused opioids"). This Court has similar options here.

(2) The Complaint pleads control.

Even if this Court were to add a new control element to Hawai'i nuisance claims, the County would clear that hurdle for at least two reasons. *First*, Defendants' control argument "rests upon a false premise that the instrumentality of the nuisance is the [fossil-fuel] product itself." *See JUUL Labs*, 497 F.Supp.3d at 649 (cleaned up). Here, as in other nuisance claims for the deceptive promotion of a dangerous product, the nuisance-causing instrumentality is "Defendants' conduct in carrying out their business activities," *see In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2019 WL 3737023, at *10 (N.D. Ohio 2019)—*i.e.*, "their ongoing conduct of marketing, distributing, and selling [fossil fuels]," *Cincinnati*, 95 Ohio St. 3d at 420. The element of control does not require Defendants to be "the final link in the causal chain." *Johnson*, 563 F.Supp.3d at 1338. Nor does it demand that they control "the actual use" of their fossil-fuel products. *Cincinnati*, 95 Ohio St. 3d at 420. Instead, it merely requires Defendants to have dangerously inflated the market for fossil fuels—a requirement that the Complaint clearly satisfies. *Compare* Compl. ¶ 52 (Defendants "unduly inflated the market for fossil fuel products"), *with Smith & Wesson*, 2000 WL 1473568, at *14 (control element met where

"Defendants created and supplied an illegal, secondary market in firearms.").

Second, it would not matter whether this Court accepts Defendants' definition of the instrumentality because the County has also adequately pleaded that Defendants exercised control over fossil-fuel use and greenhouse gas emissions. As alleged in the Complaint, Defendants exerted control over every step of the fossil-fuel supply chain—from "extract[ion]," to "product[ion]," to "distribut[ion]," to "s[ale]." Compl. ¶ 4. And they "inflated" global fossil-fuel consumption through their failure to warn and deceptive promotion. *Id.* ¶¶ 1–12. To this day, moreover, Defendants continue to shape demand for fossil fuels through their "greenwashing campaigns." *Id.* ¶¶ 149–59. As a result, "Defendants are directly responsible for the substantial increase in all CO_2 emissions between 1965 and the present." *Id.* ¶ 9. Taken as true, these allegations demonstrate that Defendants controlled (*i.e.*, inflated) worldwide fossil-fuel consumption and greenhouse gas emissions. At a minimum, they raise thorny questions of fact about Defendants' "level of control" that are "inappropriate for resolution on a motion to dismiss." *JUUL Labs*, 497 F.Supp.3d at 649 (cleaned up); *see also, e.g.*, *State v. Tippetts-Abbett-McCarthy-Stratton*, 204 Conn. 177, 185 (1987) ("[T]he question of whether a defendant maintains control over property sufficient [for] nuisance liability normally is a jury question.").

Defendants rely heavily on the Rhode Island Supreme Court's decision in *Lead Industries*. As multiple courts have rightly concluded, however, that decision does not foreclose nuisance liability where, as here, a defendant manufacturer inflated the market for a dangerous product by "misrepresent[ing]" the product's risks, supplying "excessive amounts" of the product, and "falsely promot[ing] and distribut[ing] [the product] generally." *Purdue Pharma*, 2019 WL 3991963, at *10 (nuisance claim against opioid manufacturers was cognizable under Rhode Island law); *see Rhode Island v. Atl. Richfield Co.*, 357 F.Supp.3d 129, 142–43 (D.R.I. 2018) (nuisance claim against MTBE manufacturers was viable under Rhode Island law). The County therefore prevails even if this Court were to apply Defendants' preferred case and their preferred test.

2. Defendants breached their duties to warn.

In a similar vein, Defendants try to dismiss the County's failure-to-warn claims by inventing new legal requirements and raising disputed issues of fact. They insist that the County cannot assert these claims because it was not injured by its own use of Defendants' products, and they invite this Court to hold—as a matter of law—that the climate impacts of their fossil fuels were open and obvious to ordinary consumers. In Hawai'i, however, injured bystanders and non-consumers can pursue products-liability remedies when they are harmed by the foreseeable use of a dangerous product. *See Brown v. Clark Equip. Co.*, 62 Haw. 530, 538, 541–43 (1980) (products-liability suit brought

by survivors of injured bystander). And as alleged in the Complaint, Defendants made sure that the dangers of their products were neither open nor obvious through their pervasive climate-disinformation campaigns. To hold otherwise would intrude on the jury's province to determine the existence and adequacy of Defendants' warnings.

a. Defendants had a duty to provide appropriate warnings to protect bystanders like the County.

Defendants ignore the last sixty years of tort law when they contend that the County cannot assert failure-to-warn claims because "it was [not] injured from *its own use* of [Defendants'] product[s]." Mot. 29. Although products-liability law "was at first limited to 'users' or 'consumers'" because it was "grounded on a theory of warranty," courts quickly shelved this warranty theory starting in the 1960s and expanded products liability to protect bystanders injured by products consumed or used by others. *Prosser & Keeton on Torts* § 100, pp. 703–04 (5th ed. 1984) (Sher Decl. Ex. D).

The rationale for this expansion is aptly summarized in *Elmore v. American Motors Corp.*, 70 Cal. 2d 578 (1969), the first case to have a "real discussion" of bystander liability. *Prosser & Keeton on Torts* § 100, p. 704. There, the California Supreme Court reasoned that "the costs of injuries … [should be] borne by the manufacturers that put [] products on the market rather than by the injured persons who are powerless to protect themselves." 70 Cal. 2d at 585 (cleaned up). "If anything," the court continued, "bystanders should be entitled to greater protection than the consumer or user where injury to bystanders … is reasonably foreseeable." *Id.* at 586. That is because "the bystander ordinarily has no … opportunity" to avoid dangerous products. *Id.*

Since *Elmore*, courts have "almost unanimously" allowed foreseeably injured bystanders to sue in products liability. 1 *Owen & Davis on Products Liability* § 5:5 (4th ed., May 2022 update); *accord* 6 *American Law of Torts* § 18:137 (Mar. 2022 update) (this is the "[m]odern prevailing view"). Hawai'i is no exception. In *Brown*, the Supreme Court affirmed a jury verdict in a products-liability suit brought by survivors of an injured bystander. 62 Haw. at 538, 541–43. And the Supreme Court has consistently described a manufacturer's duty to warn in broad terms, instructing that "a manufacturer must give appropriate warnings of any known dangers which the user of its product would not ordinarily discover," and that a manufacturer must "protect against [the] foreseeable dangers" of its products, *Ontai*, 66 Haw. at 247, 248; *see also Wagatsuma v. Patch*, 10 Haw. App. 547, 569 (1994) ("a manufacturer's duty of care" extends to "those who are foreseeably endangered" (cleaned up)). Indeed, to reject bystander liability would contravene the core goals of Hawai'i products liability: affording "the maximum possible protection that the law can muster against dangerous defects in products," and

placing "the burden of accidental injuries caused by defective chattels … upon those in the chain of distribution." *Stewart*, 52 Haw. at 74–75.

Unable to find a products-liability case that supports their position, Defendants turn to non-products-liability decisions that have held that a person generally has no duty to prevent a third party from injuring another absent a "special relationship." *See* Mot. 29–30 (citing *Winfrey v. GGP Ala Moana LLC*, 130 Haw. 262 (2013); *Cuba v. Fernandez*, 71 Haw. 627 (1990); *Schwenke v. Outrigger Hotels Haw., LLP*, 122 Haw. 389 (App. 2010)). This general rule is "beside the point" for products-liability claims because "when a manufacturer's product is dangerous in and of itself," products-liability law separately imposes a duty to warn. *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986, 994, 995 (2019); *see Smith v. Bryco Arms*, 131 N.M. 87, 95 ¶¶ 25–26 (N.M. App. 2001) (similar). Special relationship or not, manufacturers must bear "the burden of accidental injuries" from their dangerous products. *Stewart*, 52 Haw. at 75. In fact, even if a *negligent* third party is part of the causal chain between the manufacturer and the injured person, that "negligence is not a defense unless such negligence is the sole proximate cause of the plaintiff's injuries." *Ontai*, 66 Haw. at 249 (citing *Brown*, 62 Haw. at 538). Here, Defendants have not come close to showing third-party negligence, much less that their customers were the sole proximate cause of the County's injuries.

Finally, Defendants wrongly insist that the County "seeks to impose … a duty to warn the world." *See* Mot. at 29. Consistent with Hawai'i law, the County merely alleges that Defendants had a duty to "issue adequate warnings" about product dangers. *See* Compl. ¶¶ 223, 236. Ultimately, the jury will decide the factual question of what would have constituted an adequate warning under the circumstances. *Est. of Klink ex rel. Klink*, 113 Haw. 332, 360 (2007) ("The adequacy of a warning is generally a question for the trier of fact …."); 10A Federal Practice and Procedure § 2729.1 (courts are "relunctan[t]" to resolve factual issues, including "whether defendant … delivered an adequate warning"); *see In re MTBE Prods. Liab. Litig.*, 725 F.3d at 123 & n.44 (affirming jury verdict where plaintiff argued the defendant manufacturer had a duty to warn the public, not just users and consumers, and the court gave a general instruction about the defendants' duty to warn). This Court should not do so on a motion to dismiss.

b. The dangers of Defendants' products were not open and obvious.

Defendants ask this Court to decide they had no duty to warn because the dangers of their products were open and obvious. Mot. 30–32. But the open-and-obvious-danger doctrine is interpreted narrowly to avoid intruding on the jury's province. Here, Defendants affirmatively hid and

misrepresented the dangers of their products, which will support a jury finding that those dangers were not open and obvious precisely because of Defendants' own conduct. At a minimum, reasonable minds could differ about openness and obviousness, and this Court should not intercede.

In *Tabieros v. Clark Equip. Co.,* the Hawai'i Supreme Court held that "[w]hether a product presents an open and obvious danger barring recovery is, in the first instance, a question of law for the court." 85 Haw. 336 (1997) at 364 (quotations omitted). But it cautioned "there is no bright line rule" distinguishing openly and obviously dangerous products from those that are "unreasonably dangerous." *Id.* (quotations omitted). The Supreme Court therefore set a high bar for holding that a danger is open and obvious, instructing that the risk posed by a product must be "patent" and that the question "should be decided by the trier of fact *when reasonable minds may differ*." *Id.* (quotations omitted) (emphasis in original).

This reticence to wrest failure-to-warn claims from juries is consistent with other courts' decisions. *Laaperi v. Sears, Roebuck & Co., Ind.*, 787 F.2d 726, 731 (1st Cir. 1985) (observing a trend in "the current state of the tort law in Massachusetts and most other jurisdictions" away from courts' finding openness and obviousness as a matter of law); 2 *Owen & Davis on Prod. Liab.* § 10:6 & n.11 (collecting decisions). As the Second Circuit has aptly explained, "judges should be very wary of taking the issue of liability away from juries, even … where the relevant dangers might seem obvious." *Liriano v. Hobart Corp.*, 170 F.3d 264, 268 (2d Cir. 1999) (Calabresi, J.). That is because juries are better-positioned than judges to weigh obviousness under "particularized facts" and "circumstances that render[] the issue less clear than it would be when posed in the abstract." *Id.*

Here, the climate impacts of Defendants' products were not open and obvious dangers that a consumer or user would "ordinarily discover." *Ontai*, 66 Haw. at 248. Typically, dangers are obvious because they are "discernible by casual inspection" of the product and pose "a plain and palpable danger." *Josue*, 87 Haw. at 417 (cleaned up); *see Prosser & Keeton on Torts* § 96, pp. 686–87 ("obvious danger" "usually mean[s] … a condition that would ordinarily be *seen* and the danger of which would ordinarily be appreciated" (emphasis added)). Examples include "the danger that a knife can cut, or a stove burn." *Tabieros*, 85 Haw. at 364 (quotations omitted). But a person cannot discern the climate-related dangers of liquid and gaseous fossil fuels by casually inspecting them. Other dangers are obvious because they are within common experience—for example, the danger of children drowning in pools, *Wagatsuma*, 10 Haw. App. at 570. But the greenhouse effect caused by fossil fuels is imperceptible and falls outside the common experience of ordinary people. Finally, warnings are unnecessary for certain professionals with specialized knowledge. *Tabieros*, 85 Haw. at 366 (dock

workers and "trained … operators" should know that straddle carriers (heavy vehicles) have blind spots). But Defendants failed to warn ordinary persons, not just climate scientists, and they affirmatively advertised their products to the public as *safe*.

Defendants simplistically argue that because many of the world's scientific bodies and governments recognized and publicly discussed the dangers of Defendants' products, the dangers were open and obvious to *consumers*. *See* Mot. 31–32. But this question is not "resolvable as [a] matter[] of law when viewed in the fullness of circumstances that render[s] the issue less clear than it would be when posed in the abstract." *Liriano*, 170 F.3d at 268. Here, Defendants engaged in a successful, far-reaching disinformation campaign to obscure the existence, causes, and effects of climate change. *E.g.*, Compl. ¶¶ 97–130. Under these facts, reasonable minds can differ about obviousness, and this Court should defer to the jury—just as courts have done in cases against tobacco manufacturers for their deceptive promotion of cigarettes. *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 441–42 (2013) (obviousness was a jury question because "cigarette manufacturers[] engaged in a calculated effort through advertising and public statements to raise doubts [about] the causative link between cigarettes and cancer"); *see Burton v. R.J. Reynolds Tobacco Co.*, 884 F.Supp. 1515, 1526 (D. Kan. 1995) (similar).

Finally, even if this Court were to find that the dangers of Defendants' products were open and obvious at all relevant times, Defendants' argument would not warrant dismissal of the County's negligent products-liability claim. "[E]ven [if] the danger is obvious," "the creation of any unreasonable danger is enough to establish negligence." *Tabieros*, 85 Haw. at 366 (quotations omitted). The County will prove that Defendants' products were so dangerous that even if their climate risks were obvious, Defendants—in exercising ordinary care—should nevertheless have warned.

3. The County states a trespass claim.

The County's trespass claim treads well-settled precedent in seeking to hold Defendants liable for causing water and other harmful materials to enter County-owned land. In arguing otherwise, Defendants misconstrue the Complaint and the scienter requirement of trespass liability.

Following the *Restatement (Second) of Torts*, Hawai'i law recognizes at least two forms of trespass that are relevant here. *Spittler*, 145 Haw. at 210–11 (adopting Sections 6, 158, 161, and 166). *First*, a defendant commits trespass when it "*intentionally*" "cause[s] a thing" to "enter" a plaintiff's "land." *Id.* (quoting *Restatement* § 158) (emphasis added). *Second*, "[a] trespass may be committed by the continued presence on [the plaintiff's] land" of a "thing which the [defendant] has *tortiously* placed there, whether or not the [defendant] has the ability to remove it." *See id.* (quoting *Restatement* § 161) (emphasis added). In this context, a defendant's conduct is intentional when the defendant knows "to a substantial

certainty" that the conduct will "result in the entry of the foreign matter." *Restatement* § 158 cmt. i. And a defendant's conduct is "tortious" when it is intentional, reckless, or negligent. *Restatement* § 6 cmt. a (defining "tortious" conduct); *accord id.* § 165 (extending liability to reckless and negligent activity that causes a thing to harm a plaintiff's land).

The Complaint handily meets these elements under Hawaii's notice-pleading standard. By concealing and misrepresenting the climate impacts of their products, Defendants hyperinflated demand for fossil fuels and thereby significantly increased greenhouse gas emissions. *E.g.*, Compl. ¶¶ 2, 9, 52–55, 137–48, 160–162. Those increased emissions, in turn, brought about sea-level rise, erosion, flooding, rain bombs, storm surges, and other hazards that caused freshwater, saltwater, and other physical things to enter and damage County-owned land, property, and infrastructure. *E.g.*, *id.* ¶¶ 52–55, 165–72, 185–86, 194–203. At all relevant times, Defendants engaged in this tortious conduct knowing that doing so would flood, submerge, and destroy real property in the County. *Id.* ¶¶ 49–87. They are therefore liable for trespass because they intentionally, recklessly, and negligently caused water and other foreign materials to enter, remain on, and injure the County's land without the County's consent.

Defendants resist this conclusion by trying to recast the trespass as the entry of "weather events" onto County property. Mot. 32. But the Complaint defines the trespass as the entry of floodwater, rainwater, seawater, and other tangible materials. Compl. ¶¶ 249–51. Weather is simply part of the causal chain connecting Defendants' tortious conduct to the trespassory invasion. It is not the "thing" that is trespassing on and damaging the County's land, property, and infrastructure.

Nor is there anything "audacious" about holding Defendants liable for weather-related trespasses. Mot. 32. In this state and elsewhere, courts have long recognized that a defendant can trespass by causing water to enter a plaintiff's land. *Anderson v. State*, 88 Haw. 241, 250 (App. 1998) (flooding another property is a continuous trespass). And in many of those cases, the trespass would not have occurred absent weather events like rainfall, storms, or snowfall. *See, e.g.*, *Mapco Express v. Faulk*, 24 P.3d 531, 538, 540, 547 (Alaska 2001) (snowfall); *Shaheen v. G & G Corp.*, 230 Ga. 646, 648 (1973) (rainfall); *Kurpiel v. Hicks*, 284 Va. 347, 350 (2012) (significant storms). Indeed, the *Restatement (Second) of Torts* identifies as a prototypical example of trespass the case where a defendant "builds an embankment that *during ordinary rainfalls*" causes dirt to be "washed upon" the plaintiff's land. *Id.* § 158 cmt. i (emphasis added). The Complaint here simply applies that basic fact pattern to a more complex chain of causation.

Defendants mistakenly argue that they could not have "*intentionally* caused" the alleged

trespasses because the "instrumentality" of those invasions "lies far beyond [their] direct control." Mot. 33. To demonstrate that a trespass is intentional, a plaintiff merely needs to show that the defendant engaged in conduct knowing to "a substantial certainty" that the conduct would "result in the entry of the foreign matter." *Restatement* § 158 cmt. i. The County pleads that element in spades, showing that Defendants knew their tortious conduct would cause climate impacts. Compl. ¶¶ 49–96, 249. As with nuisance, moreover, control of the instrumentality is not a requirement of trespass under Hawai'i law. Instead, Hawai'i courts adhere to the *Restatement (Second) of Torts*, holding that a defendant may be liable for trespass even after it "become[s] impossible or impracticable for [it] to terminate the intrusion on the [plaintiff's] land." *Anderson*, 88 Haw. at 242 (quoting *Restatement* § 161 cmt. c).

None of Defendants' citations call for a contrary conclusion. In fact, *Spittler* confirms that trespass liability does not require control of the instrumentality. 145 Haw. at 210 ("[A] trespass may be committed by the continued presence … of a … thing which the [defendant] has tortiously placed there, *whether or not the actor has the ability to remove it*." (quoting *Restatement* § 161) (emphasis added)). And in any event, that case was dismissed because the complaint failed to allege "physical harm" to the plaintiff's person or property, *id.* at 211 & n.18, in sharp contrast to the County's many allegations of physical damage in this lawsuit, *see* Compl. ¶¶ 165–72, 185–86, 194–203. *Helix Land Co. v. City of San Diego* is even further afield: it addressed claims for nuisance, not trespass, and it dismissed those claims because the plaintiff's alleged injuries were "not present, real or ascertainable." 82 Cal.App.3d 932, 950 (1978). Here, the County asserts numerous property-based injuries that have already occurred. Compl. ¶¶ 194–203. Finally, *In re Paulsboro Derailment Cases* simply held that the airborne migration of gas particles did not qualify as a trespass under New Jersey law. 2013 WL 5530046, at *7–8 (D.N.J. 2013). That decision did not call into question the longstanding rule in New Jersey that "the flooding of [a] plaintiff's land" is an actionable trespass. *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 144 N.J. 84, 99 (1996) (quoting *Restatement* § 821D cmt. e). It therefore cannot cast doubt on the County's trespass claims for the flooding, submersion, and destruction of its land by sea-level rise, storm surges, rain bombs, and other climate impacts.[8]

4. The County has suffered cognizable damages.

Contrary to Defendants' assertions, Mot. 33–34, the County's damages are neither speculative nor conjectural, and Hawai'i law permits the County to seek future damages.

[8] Moreover, *Paulsboro* cannot be squared with the voluminous body of case law approving of trespass claims arising out of environmental contamination. *See Restatement* § 159, case citations (collecting trespass claims for subsurface "contamination"); 61C *Am. Jur. 2d Pollution Control* § 1886 (2d ed., May 2022 update) (collecting cases for "[t]respass … for injuries resulting from pollution").

As detailed in the Complaint, Defendants' tortious conduct has already caused the County to suffer actual losses and damages "that are real and substantial as opposed to speculative." *McLellan v. Atchison Ins. Agency, Inc.*, 81 Haw. 62, 66 (1996). The County is already warming, its sea levels are already rising, and its wildfires are already intensifying. Compl. ¶¶ 163–90. It has already experienced "injury or destruction of County-owned or -operated facilities," as well as "decreased tax revenue due to impacts on the County's tourism- and ocean-based economy and property tax base." *Id.* ¶ 11. Its roads, utility connections, and parks have already been damaged by rising seas and storms. *Id.* ¶¶ 197–201. It has already incurred costs to fight climate-related wildfires and shelter evacuees. *Id.* ¶ 196. These allegations of harm far exceed the "general factual allegations of injury resulting from the defendant's conduct" that are "sufficient" at the pleading stage. *Kaleikini v. Yoshioka*, 128 Haw. 53, 69 (2012).

Without citation, Defendants assert that Hawai'i law bars the recovery of future damages. *See* Mot. 33–34. Not so. Hawai'i courts routinely permit the recovery of "reasonably probable" future pain and suffering, future medical expenses, and future loss of income. *Kato v. Funari*, 118 Haw. 375, 381–83 (2008); *Bachran v. Morishige*, 52 Haw. 61, 68 (1970); *see* Hawai'i Civil Jury Instructions Nos. 8.3, 8.9(3)–(5). Indeed, there is "nothing unusual" about an award of "past, present, and future damages flowing from" past tortious conduct, so long these damages are supported by "competent evidence." *In re MTBE Prods. Liab. Litig.*, 725 F.3d at 111.[9]

B. State Law Authorizes the County to Bring These Claims.

The plain text of HRS § 46-1.5(3) disposes of Defendants' unprecedented attempt to categorically exclude Hawaiian counties from common-law remedies. That statute grants each county "the power to enforce *all* claims on behalf of the county." HRS § 46-1.5(3) (emphasis added). By using the word "all," the Legislature unambiguously authorized Hawaiian counties to file common-law claims. "The word 'all' usually does not admit of an exception, addition, or exclusion." *Spirent Holding Corp. v. State, Dep't of Tax'n*, 121 Haw. 220, 227 (App. 2009) (quotations omitted). So, when a statute uses the phrase "all claims," courts should not read the statute to mean anything less. *See id.* (reversing for failure to give "all claims" its "plain and unambiguous" meaning).[10] Instead, they must "give effect

[9] Defendants' citations to *Haynes*, 146 Haw. at 461, and *Helix*, 82 Cal.App.3d at 950–51, change nothing. These cases stand merely for the proposition that future harms for an abatable nuisance may be addressed with equitable relief. Defendants are also wrong that "[a]ctual damages are an essential element of each of Plaintiff's claims." Mot. 33. Claim in point: the County is not required to show actual damages for its trespass claim. *Spittler,* 145 Haw. at 210 (citing *Restatement* § 158).

[10] *See also In re Peers' Est.*, 234 Iowa 403, 411, (1944) ("[W]e cannot by judicial interpretation nullify the definite pronouncements of the legislature … that the statute in question applies to 'all claims.'"); *Jackson v. Hall*, 460 So.2d 1290, 1292 (Ala. 1984) ("'All claims' means just that.").

to [the statute's] plain and obvious meaning." *Citizens Against Reckless Dev. v. Zoning Bd. of Appeals*, 114 Haw. 184, 193 (2009) (quotations omitted). Because common-law claims are undoubtedly "a subset of 'all claims,'" HRS § 46-1.5(3) "clearly and unambiguously" authorizes the County to bring this lawsuit, "notwithstanding the legislature's failure to specifically provide that the term 'all claims'" includes common-law claims. *Spirent*, 121 Haw. at 1251 (holding that the statutory phrase "all claims" included "amended claims").

If the Court harbors any doubts, HRS § 46-1.5(22) should dispel them. That provision authorizes each county "to sue and be sued in its corporate name," without limitation or qualification. As courts in Hawai'i and elsewhere have long recognized, the phrase "sue and be sued" is a phrase of art that means an entity can sue and be sued as if it were a natural person. *Oahu Plumbing & Sheet Metal, Ltd. v. Kona Constr., Inc.*, 60 Haw. 372, 379–80 (1979); *Haw. Mill Co. v. Andrade*, 14 Haw. 500, 501 (1902); *Reconstruction Fin. Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 85–86 (1941) ("[T]he unqualified authority to sue and be sued placed petitioner upon an equal footing with private parties."). Because the Legislature presumably knew this when it enacted HRS § 46-1.5(22), the County's power to "sue and be sued" includes asserting common-law claims, just as natural persons routinely do. *See People v. Borynack*, 238 Cal.App.4th 958, 965 (2015) (the legislature is "presumed to be aware of its established meaning" when it "uses a term of art"); *State v. Reis*, 115 Haw. 79, 97 (2007) ("[W]e must presume that the legislature knows the law when enacting statutes.").

Reinforcing this conclusion is the longstanding rule that "sue-and-be-sued clauses … should be liberally construed," *Thacker v. TVA*, 139 S. Ct. 1435, 1441 (2019), both where the entity is suing and where it is being sued, *FDIC v. Sumner Fin. Corp.*, 451 F.2d 898, 904 (5th Cir. 1971) ("We have found no authority which indicates that the 'sue and be sued' clause should be read more narrowly when the corporation is suing instead of being sued."). Indeed, courts are extremely reluctant to impose any "implied restriction[s]" on a governmental entity's power to sue and be sued. *FHA, Region No. 4 v. Burr*, 309 U.S. 242, 245 (1940). They will do so only when it is "necessary" to avoid "grave interference" the performance of a governmental function, or an inconsistency with the constitution or a statute. *Id.*

Here, Defendants cannot identify any inconsistency or risk of "grave interference" that warrants imposing an implied restriction on the County's power to sue. Nor can they point to any case law limiting the County's authority to bring common-law claims. To the contrary, Hawai'i counties have routinely prosecuted tort actions over the years.[11] As a result, Defendants cannot overcome the

[11] *See* Sher Decl. Exs. E to M (materials from tort litigation brought by the County and other Hawai'i

"presum[ption]" in Hawai'i that "a county's exercise of police power is within its delegated authority so long as the legislature did not clearly intend to preempt." *Syngenta Seeds, Inc. v. Cty. of Kauai*, 842 F.3d 669, 675 (9th Cir. 2016). This Court should affirm the County's power to sue in tort—the only conclusion that is consistent with the text of HRS § 46-1.5, the case law, and settled historical practice.

C. The County Has Standing.

The County easily satisfies the elements of injury in fact, causation, and redressability under Hawaii's relaxed test for standing. The County has been and imminently will be injured by climate-change impacts. These non-self-inflicted injuries are traceable to Defendants' misconduct through a commonsense causal chain supported by robust allegations. And this Court can redress the County's injuries through compensatory damages and other equitable and legal remedies. All of Defendants' counterarguments fail because they misread the County's allegations, urge a cramped view of standing that is inconsistent with the law of this state, and seek premature merits adjudication.

1. Standing must be construed liberally.

Defendants try to avoid Hawaii's liberal standing doctrine by emphasizing inapposite federal decisions. In federal courts, standing is "an issue of subject matter jurisdiction." *Tax Found. Of Haw. v. State*, 144 Haw. 175, 190 (2019). By contrast, Hawaii's standing doctrine "aris[es] out of prudential concerns," and "the touchstone of … standing is the needs of justice." *Id.* at 190–91 (cleaned up). Courts err toward leniency because "standing requirements should not be barriers to justice." *Life of the Land v. Land Use Comm'n*, 63 Haw. 166, 174 (1981). And those requirements are even "less rigorous … in environmental cases" because of "public interest concerns" rooted in the Hawai'i Constitution. *Sierra Club v. Dep't of Transp.*, 115 Haw. 299, 320 (2007) (cleaned up). "[T]he lowering of standing barriers" is plainly warranted in this case, where the County seeks to protect its residents, infrastructure, and land from environmental hazards created by Defendants' deceptive conduct. *Id.* And the Complaint easily clears that low hurdle, especially because—at this early pleading stage—the Court should "look solely to whether [the County] is the proper plaintiff in this case, without regard to the merits of the allegations." *See Haw. Thousand Friends v. Anderson*, 70 Haw. 276, 281 (1989).

2. The County has suffered injuries in fact.

Defendants misread the Complaint to argue that the County alleges only "*future* injuries" and "costs to mitigate the *future* effects of climate change." Mot. 18 (emphasis added). Instead, the County has *already* suffered cognizable injuries to its infrastructure, property, and other interests because of

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counties); *see also City & Cty. of Honolulu v. Cavness*, 45 Haw. 232, 235–36 (1961) (in county's suit, holding a building was a public nuisance "at common law" and under the building code).

rising sea levels, flooding, wildfires, and other harms. *See supra* Section IV.A.4 (collecting allegations). As explained in the Complaint, moreover, the climate impacts from Defendants' *past* conduct will continue to grow in the future, even if all emissions ceased today. *See* Compl. ¶ 137. So, the County far exceeds the "general factual allegations of injury resulting from the defendant's conduct" that "suffi[ce]" at the pleading stage. *Kaleikini*, 128 Haw. at 69. In fact, the County's injuries would satisfy even the stricter federal standards for standing. *E.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 522–23 (2007) (property loss because of sea-level rise); *NRDC v. Wheeler*, 955 F.3d 68, 77 (D.C. Cir. 2020) (similar); *Connecticut v. AEP*, 582 F.3d 309, 341–42 (2d Cir. 2009) ("*AEP I*") (climate-related flooding, declining water supplies, coastal erosion), *aff'd in relevant part*, 564 U.S. 410, 420 (2011) ("*AEP II*") ("affirm[ing] … the Second Circuit's exercise of jurisdiction"); *Comer v. Murphy Oil USA*, 585 F.3d 855, 863 (5th Cir. 2009) ("*Comer II*") (climate-related property damage).[12]

Relying on *Clapper v. Amnesty International USA, Inc.*, 568 U.S. 398 (2013), Defendants argue that the County's past climate injuries are self-inflicted and thus do not confer standing. Mot. 18. Even if this Court is the first in Hawai'i to adopt *Clapper*, *Clapper* would change nothing because the County has not "manufacture[d] standing merely by inflicting harm on [itself] based on [its] fears of hypothetical future harm." *See Clapper*, 568 U.S. at 416. The plaintiffs in *Clapper* incurred costs to secure their communications because of a "subjective" fear of government surveillance, despite not knowing whether they had ever been surveilled. *Id.* at 411, 416–18. By contrast, the County has already suffered tangible climate-related harm traceable to Defendants' tortious and deceptive conduct. *See* Compl. ¶¶ 160–203. There is nothing hypothetical, for example, about the County's roads washing into the ocean. *Id.* at 116 fig. 12.[13] To the extent the County has spent money—for example, to shelter wildfire

[12] *Comer v. Murphy Oil USA, Inc.* had a tortured procedural history. 839 F.Supp.2d 849, 852–54 (S.D. Miss. 2012) ("*Comer III*"). The district court initially dismissed the plaintiffs' claims on political-question and other grounds. No. 1:05-CV436, 2007 WL 6942285, at *1 (S.D. Miss. 2007) ("*Comer I*"). A Fifth Circuit panel reversed in *Comer II*, 585 F.3d 855. The Fifth Circuit then granted rehearing *en banc*, automatically vacating *Comer II*. 607 F.3d 1049, 1053 (5th Cir. 2010). But one of the appellate judges was disqualified and recused, depriving the *en banc* court of its quorum. *Id.* at 1053–54. The *en banc* panel therefore dismissed the appeal without addressing the substance of the *Comer II* opinion. *Id.* at 1055. The plaintiffs then refiled their lawsuit, and the district court in *Comer III* dismissed the case on *res judicata* and other grounds. 839 F.Supp.2d at 857. Finally, the Fifth Circuit in *Comer IV* affirmed *Comer III* "on the basis of res judicata" only. 718 F.3d 460, 464 (5th Cir. 2013) ("*Comer IV*").

[13] *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1049 (9th Cir. 1979), and *Chamber of Commerce v. Seattle*, No. C16-0322, 2016 WL 4595981, at *4 (W.D. Wash. 2016), are nothing like this case. In *Rohnert Park*, a city plaintiff altogether failed to explain how it would be injured by a planned shopping center in another city. 601 F.2d at 1044–45. In *Chamber of Commerce*, a challenge to a municipal ordinance addressing collective bargaining was premature, because the possibility of collective bargaining was still hypothetical. 2016 WL 4595981, at *2. The County has tangible, present injuries.

evacuees or protect critical infrastructure from rising seas, *id.* ¶¶ 192–96—the County did not "inflict[] harm on [itself]" based on some "subjective" fear, *cf. Clapper*, 568 U.S. at 416. And the County knows based on the overwhelming scientific consensus that Defendants' past conduct will continue harming the County for years to come. *See* Compl. ¶¶ 137, 160–203. The County has robustly alleged injuries.

3. The County's injuries are traceable to Defendants' conduct.

The County's injuries are traceable to Defendants' tortious conduct through a common sense causal chain supported by robustly pleaded links. Hawai'i courts take a relaxed view of traceability. *Akau v. Olohana Corp.*, 65 Haw. 383, 389–90 (1982) (the connection between a plaintiff's injury and a defendant's conduct may be "very slight or attenuated"). But the County's injuries are traceable to Defendants' conduct even under the more demanding federal test for traceability, which requires "a 'line of causation' between defendants' action and their alleged harm that is more than 'attenuated.'" *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (quotations omitted). This traceability inquiry is less rigorous than "proximate causation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014). "A causation chain" may have "several links, provided those links are not hypothetical or tenuous …." *Maya*, 658 F.3d at 1070 (quotations omitted). Put another way, the "length" of the chain does not "matter[]," provided each link is sufficient. *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) (quotations omitted). Traceability is not met "if the injury complained of is the result of the *independent* action of some third party not before the court." *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (cleaned up). "Independent" means the third party's actions must break the chain, so the traceability requirement "does not exclude injury produced by determinative or coercive effect [by a defendant] upon … someone else." *Id.*

Each link of the County's causal chain is supported by ample allegations. *First*, Defendants—major producers and sellers of fossil fuels—have mounted a multi-decade climate deception campaign to conceal the dangers of their products.[14] *Second*, this campaign greatly increased demand for and sales of Defendants' products, increasing greenhouse gas pollution. *Third*, this pollution has injured, and

[14] Defendants wrongly suggest that the County's injuries must be attributable to emissions caused by misrepresentations Defendants made in Hawai'i. *See* Mot. 19. It is black-letter law that Defendants may be held liable under Hawai'i law for out-of-state conduct causing in-state injuries. *E.g.*, *Young v. Masci*, 289 U.S. 253, 258–59 (1933) ("The cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it."); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) ("[I]t is beyond dispute that [a state] has a significant interest in redressing injuries that actually occur within the [s]tate."); *cf. Carolina Trucks & Equip., Inc. v. Volvo Truck of N. Am., Inc.*, 492 F.3d 484, 489 (4th Cir. 2007) (addressing state statutes and regulations that regulated out-of-state conduct, not tort claims arising out of in-state injuries caused by out-of-state conduct).

will continue to injure, the County. This causal chain is supported by detailed allegations about the history of Defendants' conduct and the science of climate change that allows the County to attribute their injuries to the additional greenhouse gas emissions caused by Defendants' tortious conduct. *E.g.*, Compl. ¶¶ 1–12, 27–35, 41–139, 149–202. Importantly, the third-party consumers influenced by Defendants' conduct are not "independent." That is because the County relies on the "predictable effect of [Defendants'] action on the decisions of [these] third parties." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019); *see Maya*, 658 F.3d at 1070 (traceability satisfied by allegations that defendants had marketed homes to unqualified buyers in plaintiffs' neighborhoods, artificially inflating home prices and thus injuring plaintiffs); *My Pillow, Inc. v. LMP Worldwide, Inc.*, No. 18-CV-0196, 2019 WL 6727298, at *5 (D. Minn. 2019) (traceability satisfied with allegations that "false and misleading advertising" would divert third-party consumers from a business).

The County's causal chain resembles those in other cases where courts readily found plaintiffs' climate-related injuries traceable to defendants that increased greenhouse gas pollution. *E.g.*, *Massachusetts*, 549 U.S. at 523–25 (state's sea-level-rise injuries were traceable to agency's decision not to regulate greenhouse gas emissions from new motor vehicles, where U.S. motor vehicles accounted for about 6% of global emissions); *AEP I,* 582 F.3d at 345 ("Plaintiffs have sufficiently alleged that their injuries are 'fairly traceable' to the actions of [power company] Defendants."); *Wheeler*, 955 F. 3d at 77 (traceability met where agency action "will lead to an increase in [greenhouse gas] emissions, which will in turn lead to an increase in climate change, which will threaten petitioners' coastal property"); *Comer II*, 585 F.3d at 865–67 (finding traceability satisfied even when "defendants' actions [we]re only one of many contributions to greenhouse gas emissions").

Defendants argue that the County's causal chain is too attenuated. *See* Mot. 19. But "this argument, which essentially calls upon [the Court] to evaluate the merits of [the County's] causes of action, is misplaced at this threshold standing stage of the litigation." *Comer II*, 585 F.3d at 864; *see AEP I*, 582 F.3d at 347 (leaving factual disputes about causation "to the rigors of evidentiary proof at a future stage of the proceedings"); *Webb ex rel. K.S. v. Smith*, 936 F.3d 808, 814 (8th Cir. 2019) (warning against "collaps[ing]" the "fairly-traceable inquiry" and "merits-based, tort-causation inquiry").

Nor do Defendants' citations to *Kivalina I*, 663 F.Supp.2d 863 (N.D. Cal. 2009), *Kivalina II*, 696 F.3d 849 (9th Cir. 2012), and *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013), help them.[15] In *Kivalina I*, the plaintiffs "concede[d] they [were] unable to trace their alleged

[15] Defendants also imply that the advertising and marketing described in *Hawai'i Tourism Authority* resembles their deception campaign. *See* Mot. at 21. Not so. *See Sierra Club v. Haw. Tourism Auth. ex rel.*

injuries to any particular Defendant," and for that reason, the district court found that the plaintiffs lacked standing. 663 F.Supp.2d at 878–81. The County makes no such concession here. *See* Compl. ¶ 53. On appeal from *Kivalina I*, moreover, the Ninth Circuit chose to affirm based on the merits, not on standing, holding the plaintiffs lacked a cause of action. *Kivalina II*, 696 F.3d at 855–58. The Ninth Circuit necessarily rejected the district court's standing analysis because the court had to ensure the plaintiffs had Article III standing before the court decided whether "a cause of action" "existed." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–102 (1998). Only the concurring judge in *Kivalina II* found the plaintiffs lacked standing. 696 F.3d at 858 (Pro, D.J., concurring). *Kivalina I* and *Kivalina II* do not have the persuasive force Defendants ascribe to them.

Bellon is even less persuasive. As the Ninth Circuit recently explained in *Juliana v. United States*, "*Bellon* held that the causal chain between local agencies' failure to regulate five oil refineries and the plaintiffs' climate-change related injuries was 'too tenuous to support standing' because the refineries had a 'scientifically indiscernible' impact on climate change." 947 F.3d 1159, 1169 (9th Cir. 2020). By contrast, the plaintiffs in *Juliana* satisfied the traceability requirement because their injuries did not stem from "a few isolated agency decisions," but instead were caused by "a host of federal policies … spanning over 50 years" *Id.* (quotations omitted). Similarly, here, the County alleges that its injuries are traceable to a multi-decade, large-scale deception campaign that substantially and measurably drove the "Great Acceleration"—the dramatic increase in greenhouse gas concentrations since the mid-20th century—and thus caused the County's climate-related harm. *E.g.*, Compl. ¶¶ 1–12, 27–35, 41–139, 149–202. Defendants' factual disputes about causation should be left "to the rigors of evidentiary proof at a future stage of the proceedings." *AEP I*, 582 F.3d at 347.

4. This Court is empowered to redress the County's injuries.

Defendants' redressability arguments fare no better. The County "must show that it is likely, as opposed to merely speculative, that its injury will be redressed by a favorable decision. It is not necessary to show a guarantee" of redressability. *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 968 F.3d 738, 749 (9th Cir. 2020) (cleaned up). Even "minimal" redressability confers standing. *Id.*; *see Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) (redressability satisfied if the court can "effectuate a partial remedy"); *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (similar). Here, this Court can award compensatory damages to the County to redress its past injuries. That suffices.

Bd. of Dirs, 100 Haw. 242, 251–54 (2002) (plaintiffs were not injured by a government agency's tourism marketing campaign that tried to increase per-visitor *spending*, because plaintiffs' injury theory assumed an increase in *total* visitors).

This Court therefore need not address Defendants' redressability arguments, which wrongly assume that the County seeks only damages for "speculative" future harm. Mot. 21. In any case, these arguments are unsound. Contrary to Defendants' arguments, *id.* 21–22, the County has shown non-speculative future harm caused by Defendants' past conduct (because already-emitted greenhouse gases will remain in the air), *supra* Section IV.C.2, and Hawai'i law gives the County a right to damages for that harm to the extent the County can competently prove them, *supra* Section IV.A.4.

Moreover, Defendants do not meaningfully contest that this Court is empowered to grant the County's request for "[e]quitable relief, including abatement of the nuisances," Compl. 134, to remedy Defendants' continuing private nuisance, public nuisance, and trespass, *see* Mot. 21–22. Defendants instead argue that *if* the County seeks equitable relief in the form of an abatement fund, such a remedy would be improper. *Id.* That argument is premature because it is too early for this Court to decide what forms of equitable relief would be proper. It is also beside the point because even if an abatement fund is improper, other forms of equitable relief may be warranted.

In any event, an abatement fund would be a proper form of relief. *First*, the County's request for abatement is nothing like the request for equitable relief in *Juliana*. Mot. 22. The *Juliana* plaintiffs claimed a constitutional right to a "climate system capable of sustaining human life" and sought an "injunction requiring the government … to prepare a plan subject to judicial approval to draw down harmful emissions." 947 F.3d at 1169–70. In this lawsuit, the County merely seeks abatement of local harms caused by Defendants' past conduct. *Second*, Defendants are wrong that an abatement fund would duplicate a future damages award. An abatement fund provides "no compensation" because its "sole purpose is to eliminate the hazard" created by a defendant's past tortious conduct. *See Conagra*, 17 Cal.App.5th at 132–33.[16] *Third*, Defendants' contention that abatement must "'eliminate' … [the] accumulated greenhouse gases in the global atmosphere" misses the mark. *See* Mot. 21. Here, the nuisance and trespass—local climate change impacts, Compl. ¶¶ 210, 218, 249—can be mitigated through local adaptation measures like seawalls, other erosion controls, and measures to move or elevate roads and infrastructure. Importantly, courts do not require abatement to be perfect: "To assume that a nuisance is abatable only if it can be completely terminated or removed does violence to the law of nuisance." *Beatty v. Wash. Metro. Transit Auth.*, 860 F.2d 1117, 1124 (D.C. Cir. 1988).[17]

[16] An abatement fund does not become a damages award just because the defendant must pay money. "That equitable remedies are always orders to act or not to act, rather than to pay, is a myth; equity often orders payment." *United States v. Apex Oil Co.*, 579 F.3d 734, 736 (7th Cir. 2009).

[17] *Accord Mangini v. Aerojet-Gen. Corp.*, 12 Cal.4th 1087, 1098 (1996) ("We accept the general proposition that something less than total decontamination may suffice to show abatability."); *Burley v. Burlington*

Finally, Defendants underestimate this Court's power to establish an abatement fund. *See* Mot. 22. Hawai'i courts have "extraordinary broad remedial powers … to fashion [equitable] relief." *Haw. Ventures, Inc. v. Otaka, Inc.*, 114 Haw. 438, 456 (2007). And they have experience with receiverships, an equitable remedy resembling an abatement fund. *Id.* This Court could oversee an abatement fund by appointing an administrator, just as other courts have done. *See Conagra*, 17 Cal.App.5th at 157–58. Indeed, an abatement fund would be simpler than other equitable remedies Hawai'i courts have administered in the past. *E.g.*, *Ching v. Case*, 145 Haw. 148, 182–85 (2019) (mostly affirming a complicated injunction requiring state agencies to fulfill public trust duties). In sum, the County's injuries are well within this Court's power to redress.

D. The County's Claims Are Timely.

Defendants fail to show the County's claims are untimely because the elements of its statute-of-limitations and laches defenses are not "apparent from the pleadings," *Yokochi v. Yoshimoto*, 44 Haw. 297, 302 (1960), and for a multitude of other reasons.

1. No statute of limitations bars this lawsuit.

The County's claims are timely under the discovery rule because it only recently learned about Defendants' large-scale deception campaign. Also, the County's claims are timely for three alternative reasons. *First*, the County is exempt from statutes of limitations under the common-law *nullum tempus* doctrine because this case seeks to vindicate public interests. *Second*, the County is entitled to invoke the continuous tort and continuing injury doctrines. *Third*, the limitations provision Defendants rely upon—HRS § 657-7—applies only to the extent the County seeks compensation for property injuries.

a. The County's claims are timely under the discovery rule.

Hawaii's liberal discovery rule applies to HRS § 657-7, the two-year statute of limitations invoked by Defendants. *Hays v. City & Cty. of Honolulu*, 81 Haw. 391, 393 (1996). Under that rule, the limitations clock starts only when a plaintiff "discovers, or through the use of reasonable diligence should have discovered, (1) the damage; (2) the violation of the duty; and (3) the causal connection between the violation of the duty and the damage." *Id.* at 396 (cleaned up). Questions of discovery and reasonable diligence are highly fact-intensive and "should be resolved by the trier of fact." *See Ass'n of Apartment Owners of Newtown Meadows v. Venture 15, Inc.*, 115 Haw. 232, 280 (2007). Indeed, "even when there is no dispute as to the facts, it is usually for the jury to decide whether" a plaintiff's diligence was "reasonable." *Id.* at 277. As a result, courts will dismiss a case under the discovery rule only if a plaintiff "cannot prevail under *any* circumstances." *Jacoby v. Kaiser Found. Hosp.*, 1 Haw. App.

N. & Santa Fe Ry. Co., 364 Mont. 77, 107 (2012) (similar).

519, 527 (1981) (emphasis added).

Faced with this herculean task, Defendants try to shift the burden of proof onto the County, suggesting that the County must "plead facts showing it lacked sufficient knowledge of the basis of its claims before October 2018." Mot. 6. But statute of limitations is an affirmative defense, HRCP 8(c), so the burden falls entirely on Defendants, *Advanced Air Conditioning, Inc. v. Smith*, 134 Haw. 180, 2014 WL 6993919, at *2 (App. 2014) (unpublished); *see U.S. Bank Nat'l Ass'n v. Castro*, 131 Haw. 28, 41 (2013) ("[T]he defendant has the burden of proof on all affirmative defenses." (cleaned up)). The County has no obligation to affirmatively plead its lack of knowledge. *Defendants* must show that the County's allegations—taken as true and viewed in the light most favorable to the County—establish beyond a doubt that the County's claims are untimely.

Defendants do not—and cannot—carry their heavy burden. The Complaint never alleges that, before October 2018, the County had actual knowledge that Defendants were orchestrating widespread climate-disinformation campaigns that were causing local climate impacts in the County. Nor does the Complaint provide any basis for resolving—as a matter of law—the fact-bound question of whether the County could have discovered this causal connection with reasonable diligence. To the contrary, the County alleges that Defendants affirmatively hid their tortious conduct from the public. As detailed in the Complaint, Defendants "deliberately obscured" the existence and operation of their deception campaigns by using think tanks, front groups, dark money foundations, fringe scientists, and trade associations to spread climate disinformation. Compl. ¶¶ 97–130. In this way, Defendants not only concealed their role in directing and controlling this disinformation. They also ensured that outside observers like the County would view the disinformation as coming from a myriad of unconnected sources, rather than from Defendants' coordinated deception campaigns.

At a minimum, then, the Complaint raises factual questions as to when the County should have traced these seemingly disparate threads of climate disinformation back to Defendants. Indeed, courts routinely deny limitations defenses where, as here, the complaint "allege[s] concealment of facts regarding the cause of [a plaintiff's] injuries." *Hays*, 81 Haw. at 398. And for good reason: the discovery rule's purpose is to prevent "[t]he injustice of barring the plaintiff's action before she could reasonably have been aware that she had a claim." *Yoshizaki v. Hilo Hosp.*, 50 Haw. 150, 154 (1967). That purpose would be defeated if a defendant could "hinder the plaintiff's discovery through misrepresentations and then fault plaintiff for failing to investigate," *Weatherly v. Universal Music Publ'g Grp.*, 125 Cal. App.4th 913, 919 (2004).

The scientific complexity of this case also counsels against resolving Defendants' limitations

defense as a matter of law. The Hawai'i Supreme Court has recognized that tolling is especially appropriate where there are "inherent difficulties in the … causal relationship between the negligent act and the injury, such as technological, scientific, or medical limitations." *Hays*, 81 Haw. at 398. Here, the science connecting the County's injuries to Defendants' failure to warn and deceptive conduct is complex, as Defendants themselves often emphasize. This Court should let the factfinder decide when exactly the County should have known that the evolving science of climate-change attribution allowed the County to connect its injuries to Defendants' tortious conduct.

Defendants' four counterarguments are unpersuasive. *First*, they urge dismissal because the Complaint does not "allege an act of deception" within the two-year limitations period. Mot. 6. But the County's claims accrued when it discovered the elements of its claims, not when Defendants committed their last tortious act. In any event, the Complaint alleges that Defendants' deception campaign "continues today," and it details Defendants' ongoing "greenwashing campaigns." Compl. ¶¶ 149–59. Those allegations more than satisfy Hawaii's notice-pleading standard.

Second, Defendants speculate that the County knew of Defendants' tortious conduct because their deception campaigns involved making false and misleading statements to the public. As explained above, however, the Defendants used front organizations to prevent the public from tracing those statements back to Defendants. More importantly, the County's injuries did not arise from any individual public statement made by Defendants. Rather, they are the cumulative effect of Defendants' decades-long deception campaigns. At the pleading stage, this Court cannot assume that the County discovered the tortious source of its injuries (*i.e.*, the campaigns) just because it may have known that a variety of seemingly independent actors were making deceptive statements about climate change.

Third, Defendants argue that the County "had sufficient notice that fossil fuels may contribute to climate change for decades." Mot. 7. That argument misses the target because a claim accrues under the discovery rule only when a plaintiff discovers "the causal connection between the violation of the [defendant's] duty and the [plaintiff's] damage." *Hays*, 81 Haw. at 396. Here, as in *Honolulu*, Defendants did not breach their duties by merely producing fossil fuels. Instead, they did so by concealing and misrepresenting the dangers of their products. Accordingly, the County's historical knowledge of global warming, fossil-fuel use, and climate impacts is not enough to trigger the limitations clock.

Finally, Defendants contend that the County should have been aware that a California entity filed a climate-deception lawsuit in 2017. Stepping far outside the Complaint, they boldly assert that this lawsuit was "widely publicized" based on an eleventh-page *New York Times* article that briefly described this case, among other climate-related actions. Mot. 8 n.8. The Court must disregard this

speculative argument because it "is strictly limited to the allegations of the complaint" on a Rule 12(b)(6) motion. *Blair v. Ing*, 95 Haw. 247, 252 (2001). In any case, "[t]he fact that news about some event was *available* at a particular time does not, by itself, resolve whether a reasonable person would have read or heard that news." *Johnson v. Multnomah Cty. Dep't of Cmty. Just.*, 344 Or. 111, 122 (2008); *see Litif v. United States*, 670 F.3d 39, 45 (1st Cir. 2012) (finding "early and relatively sparse newspaper coverage" insufficient and requiring a high degree of "local notoriety" (cleaned up)). The Court should leave these factual disputes for the jury to resolve.

b. The County enjoys *nullum tempus*.

Under the "ancient" doctrine of *nullum tempus*, "statutes of limitations do not as a general rule run against the sovereign or government," unless the legislature enacts "express statutory provisions to the contrary." *Keola v. Parker*, 21 Haw. 597, 598 (1913) (cleaned up). As the Supreme Court explained in *Keola*, counties and other local governments may invoke this doctrine when they sue to enforce "public rights." *Id.* at 599.[18] That view aligns with the purpose of *nullum tempus*, which "is applied for the protection of all rights which are of a public nature and such as pertain purely to governmental affairs." *Id.* at 598; *see Galt v. Waianuhea*, 16 Haw. 652, 658 (1905) (*nullum tempus* serves "the great public policy of preserving the public rights, revenues and property from injury and loss"). It also coheres with the *nullum tempus* principles adopted by numerous states around the country. 54 C.J.S. Limitations of Actions § 45 (May 2022 update) ("[S]tatutes of limitations run against political subdivisions, except with respect to public rights, or the exercise of governmental functions …."); *City of Colo. Springs v. Timberlane Assocs.*, 824 P.2d 776 (Colo. 1992) ("A majority of jurisdictions … provide local governments with limited immunity from statutes of limitations ….").

As apparent from the face of the Complaint, this lawsuit vindicates important and well-recognized public rights. The County seeks to protect public roads, public places, public property, and public trust resources from damage caused by Defendants' deceptive and tortious conduct. *Compare* Compl. ¶¶ 191–201, *with Keola*, 21 Haw. at 599 (the protection of "public streets or places" is a basis for municipal *nullum tempus*); *Galt*, 16 Haw. at 658. The County requests relief that would protect numerous public interests identified in the Hawai'i Constitution. *Compare* Compl. ¶¶ 10, 163–90, *with* Haw. Const. art. I, § 5 (due process, equal protection, anti-discrimination); art IX, § 1 (protection of public health), § 8 (promotion of healthful environment), § 9 (preservation of cultural resources); art.

[18] In *Keola*, the defendant argued that the Territory of Hawai'i could not invoke *nullum tempus* because it was "not a sovereign power." 21 Haw. at 598. The Supreme Court disagreed, explaining that even if the Territory were "view[ed] … as a mere municipality," it enjoyed *nullum tempus* because its lawsuit was "of vital importance to the people of these islands." *Id.* at 600.

XI, § 1 (protection of natural resources); art. XII, § 7 (protection of Native Hawaiian rights).[19] The County is therefore entitled to *nullum tempus* in this case.

c. The County's claims are timely under the "continuing tort" and "continuous injury" doctrines.

Even if the County's claims have already accrued under the discovery rule and *nullum tempus* does not apply, the County would still be entitled to invoke the "continuing tort" and "continuous-injury" doctrines. *Anderson*, 88 Haw. at 249.[20] "[G]enerally, a continuing tort is a tortious act that occurs so repeatedly that it can be termed 'continuous,' such that one may say that the tortious conduct has not yet ceased." *Id.* In such circumstances, a plaintiff may treat "the entire sequence of events" or "the cumulative effect of the conduct" as an actionable wrong, so the statute of limitations is tolled until the tortious conduct has ceased. *Id.* at 248 (cleaned up). The doctrine is especially fitting when "no single incident in a continuous chain of tortious activity can fairly or realistically be identified as the cause of significant harm." *Id.* (cleaned up); *see Aryeh*, 55 Cal. 4th at 1192 (similar).

Here, the County alleges a decades-long course of injury-causing conduct. Compl. ¶¶ 1, 4, 8, 28, 97–130. This tortious conduct has not ceased: Defendants still fail to warn consumers about the dangers of their products and continue to deceive and disinform by engaging in "greenwashing" campaigns. *Id.* ¶¶ 150–53. "[N]o single incident in [this] continuous chain of tortious activity can fairly or realistically be identified as the cause of significant harm." *See Anderson*, 88 Haw. at 248 (quotations omitted). The County's climate-related injuries were not caused by Defendants' failure to warn one consumer or dissemination of one misleading statement. Instead, it is the "cumulative effect" of Defendants' decades-long deception campaigns that inflated fossil-fuel consumption, accelerated global warming, and exacerbated climate-related hazards in the County. *See id.* (quotations omitted).

Separately, Hawai'i recognizes a "continuous-injury" doctrine. *See id.* at 249. This doctrine focuses not on the plaintiff's continuing *tortious conduct*, but rather on the plaintiff's "alleged injury." *Id.* at 249 n.8. In *Wong Nin v. City and County of Honolulu*, for example, Honolulu built a pipeline diverting a stream, depriving a downstream farmer of water. 33 Haw. 379, 380 (1935). The farmer sued eight years later. *Id.* at 379. The claim was timely even though "the injury complained of having had its inception in occurrences transpiring" long ago. *Id.* at 386. Because the pipeline's existence continued

[19] In the analogous private-attorney-general doctrine, courts have found public rights at stake when a Hawai'i plaintiff sues to protect "the environment, public spaces, or historical sites." *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 2018 WL 6705529, *8 (D. Haw. 2018); *Honolulu Constr. & Draying Co. v. State*, 130 Haw. 306, 314 (2013).

[20] The California Supreme Court's decision in *Aryeh v. Canon Bus. Sols., Inc.*, 55 Cal. 4th 1185, 1192 (2013), puts the two doctrines in sharp relief but uses slightly different terminology.

to injure the farmer, the farmer's claims were timely. *Id.* at 386; *see Aryeh*, 55 Cal. 4th at 1192 ("[A] series of … injuries may be viewed as each triggering its own limitations period ….''). Here, Defendants' past tortious conduct continues to injure the County because, *inter alia*, greenhouse gases can remain in the atmosphere for "thousands of years," and past emissions will continue to cause climate-related harm. Compl. ¶¶ 137, 160–203.[21] All of the County's claims are therefore timely.

d. The statute of limitations Defendants invoke applies only to the extent the County seeks damages for property injuries.

Defendants invoke only one statute of limitations: the two-year limitations period in HRS § 657-7 that applies to "[a]ctions for the recovery of compensation for damage or injury to persons or property." *See* Mot. 5–9. In doing so, Defendants have waived any other statutes of limitations. *See Ray v. Kapiolani Med. Specialists*, 125 Haw. 253, 267 (2011) (no new arguments in reply briefs). And Defendants simplistically assume that because the County, among other remedies, seeks property damages, HRS § 657-7 applies to *all* of the County's claims and requests for relief including its requests for other compensatory damages, equitable relief, punitive damages, and disgorgement. Mot. 6.

Defendants cannot be right to the extent the Defendants have maintained a public nuisance and a trespass on public property. A person cannot gain "a prescriptive right or any other right to maintain a public nuisance," *Cabral v. City & Cty. of Honolulu*, 32 Haw. 872, 881 (1933) (cleaned up), and a trespasser cannot gain prescriptive or proprietary rights over public property, *In re Real Prop.*, 49 Haw. 537, 552 (1967). So, the County's claims for equitable abatement relief are necessarily timely.

Moreover, HRS § 657-7 would apply only to the extent Maui seeks to "recover[] … *compensation* for damage or injury to … property." Put another way, HRS § 657-7 has been applied to "claims for *damages* resulting from *physical* injury to persons or *physical* injury to tangible interests in property." *DW Aina Le'a Dev., LLC v. State Land Use Comm'n*, 148 Haw. 396, 405 (2020) (quotations omitted) (emphasis added). The Hawai'i Supreme Court has refused to expand HRS § 657-7. For example, the court has refused to apply the statute when a plaintiff seeks just compensation for a taking, *id.*, or when a plaintiff seeks remedies for a fraudulent misrepresentation that resulted in physical injury, *Au*

[21] This is in keeping with the law of other states, which have recognized that continuing nuisances and trespasses are subject to continuous accrual. *Wong Nin*, 33 Haw. at 386 (citing *Prentiss v. Wood*, 132 Mass. 486, 488–89 (1882) (continuing nuisance); *Bare v. Hoffman*, 79 Pa. 71, 77–78 (1875) (continuing "obstruction," or nuisance)); *see* 14 A.L.R.7th Art. 8 (continuing nuisances and trespasses).

Defendants may argue that the "continuous injury" doctrine from *Wong Nin* is inapplicable to products liability claims, or that the doctrine applies only to abatable nuisances and trespasses. However, Hawai'i courts have imposed no such limitations. Whether the nuisances and trespasses here are abatable is a question properly addressed later in this litigation. *See supra* Section IV.C.4 (citing cases including *Beatty*, 860 F.2d at 1124, showing that the law does not require perfect abatability).

v. Au, 63 Haw. 210, 216–17 (1981). Here, HRS § 657-7 might govern to the extent the County seeks compensation for property injuries. But the County seeks other relief. The County seeks economic damages—for example, the costs of fighting wildfires and providing emergency shelter to evacuees. *See* Compl. ¶ 196. The County also seeks equitable relief including disgorgement. *Id.* at 134. It is immaterial that the County's requests for other relief arise from the same transactions as its request for compensation for property injuries. "[W]here two or more causes of action arise from a single transaction, different statutes of limitations are applicable to the separate claims." *Au*, 63 Haw. at 214. It also is immaterial that Maui's complaint did not plead separate causes of action for different remedies. *E.g.*, Compl. ¶¶ 247–56 (pleading a single trespass cause of action, instead of separate causes of action for damages and equitable relief). "The proper standard to determine the relevant limitations period is the nature of the claim or right, not the form of the pleading." *Au*, 63 Haw. at 214; *see Nawahie v. Goo Wan Hoy*, 26 Haw. 137, 143 (1921) (pleadings often "blend[]" legal and equitable claims). In sum, HRS § 657-7 applies only in part to the County's claims, and the Defendants have waived the application of other statutes of limitations by not invoking any.

2. Laches does not apply.

Defendants' laches defense stumbles right out of the gate. Because *nullum tempus* applies, the County enjoys an "exemption … against the defense of laches." *Keola*, 21 Haw. at 601. Independently, that defense fails because the County can invoke the continuing tort and injury doctrines. *Capruso v. Vill. of Kings Point*, 23 N.Y.3d 631, 642 (2014) ("[T]he doctrine of laches has no application when plaintiffs allege a continuing wrong."). To the extent that the County seeks equitable abatement, laches cannot defeat the County's nuisance and trespass claims because a person cannot gain "a prescriptive right or any other right to maintain a public nuisance," *Cabral*, 32 Haw. at 881 (cleaned up), and a trespasser cannot gain rights over public property, *In re Real Prop.*, 49 Haw. at 552.[22]

Even if the Court were to reach the merits of Defendants' laches arguments, it should reject them out of hand. Defendants cannot establish that "all the elements of laches are apparent from the pleadings and no question of facts remains to determine the existence of the defense." *Yokochi*, 44 Haw. at 302–03. Indeed, they do not even come close to satisfying either of the two prerequisites for

[22] Defendants quote the Hawai'i Supreme Court's statement in *Ass'n of Apartment Owners of Royal Aloha v. Certified Mgmt., Inc.*, 139 Haw. 229, 236 (2016), that "laches is a defense to any civil action." The court made this statement in the context of abrogating Hawaii's longstanding rule that laches is inapplicable to legal claims. *See id.* at 233–36. This statement should not be read as repealing by implication the other limitations to laches that the County describes. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (courts should not consider precedents that have "direct application" to have been overruled by implication).

laches: (1) unreasonable delay that (2) resulted in prejudice to the defendant. *See HawaiiUSA Fed. Credit Union v. Monalim*, 147 Haw. 33, 42 (2020).

No delay is evident on the face of the Complaint. *See supra* Section IV.D.1(a). Even if delay could be discerned, it was attributable to (among other tactics) Defendants' use of front groups to hide their deception campaigns from the public's eye. *See id.* It would be inequitable for Defendants—having concealed and disinformed—to now argue the County should have sued earlier. Indeed, "[t]he doctrine of unclean hands … can bar a defendant from asserting an equitable defense." *Seller Agency Council, Inc. v. Kennedy Ctr. for Real Est. Educ.*, 621 F.3d 981, 986–87 (9th Cir. 2010); *see 7's Enters., Inc. v. Del Rosario*, 111 Haw. 484, 494 (2006) ("[H]e who comes into equity must come with clean hands."). And Defendants show no prejudice. They argue only that they "*may* be prejudiced by … delay." Mot. 10–11 (emphasis added). No Hawai'i court has found such speculation enough to show laches.[23]

Defendants' laches defense does not "require[e] dismissal." Mot. 11. Defendants seek an unjustified equitable escape hatch that would be especially inappropriate at this early stage.

E. The Complaint Does Not Raise a Political Question.

Defendants' political questions are illusory. This lawsuit will not require a factfinder to balance the costs and benefits of fossil-fuel consumption, and it cannot answer the question of who should bear the costs of climate change. At most, the trier of fact will determine who should bear the costs of Defendants' failure to warn and deceptive promotion, using the same time-tested standards that have governed Hawai'i tort law for decades.

Following *Baker v. Carr*, 369 U.S. 186 (1962), Hawai'i courts rely on six factors to determine whether a case presents a nonjusticiable political question, only two of which Defendants raise here.[24] The first factor applies when a claim cannot be resolved according to "judicially discoverable and manageable standards." *Nelson v. Haw. Homes Comm'n*, 127 Haw. 185, 194 (2012) (quotations omitted). The second applies when it is "impossibl[e]" to decide a case "without an initial policy determination

[23] Defendants speculate that, if the County had sued earlier, climate harms would have been less severe. *See* Mot. at 10–11. But Defendants do not show when the County should have sued, identify any plausible mechanism by which any delay by *the County* could have worsened the climate-related harm *Defendants* have caused, show what specific quantity of additional harm was attributable to any delay, demonstrate that earlier litigation could have reduced this harm, or justify why this Court should—sitting in equity—weigh any delay by the County more heavily than Defendants' still-ongoing tortious conduct.

[24] Because Defendants did not even mention the four other *Baker* factors in their Motion, they have waived their right to argue that any of those factors warrant dismissal. *See AEP I*, 582 F.3d at 324 ("We find [defendants' argument that climate change is an issue of "high policy"] insufficiently argued and therefore consider it waived.").

of a kind clearly for nonjudicial discretion." *Id.* (quotations omitted) The political-question doctrine constitutes a "narrow exception" to the general rule that a court "has a responsibility to decide cases properly before it, even those it would gladly avoid." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012) (cleaned up). A case does not present a political question merely because it "raises an issue of great importance to the political branches." *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1992). Instead, dismissal is warranted only if one of the *Baker* factors is "inextricable from the case at bar." *Nelson*, 127 Haw. at 194. For that reason, the Hawai'i Supreme Court has "caution[ed] that a case should not be dismissed on the ground that it involves a political question without 'discriminating inquiry into the precise facts and posture of the particular case.'" *See Trs. of Off. of Haw. Affs. v. Yamasaki*, 69 Haw. 154, 169 (1987) (quoting *Baker*, 369 U.S. at 217). Defendants cannot clear that "high bar" here. *AEP I*, 582 F.3d at 321.

1. The County's claims are governed by clear, well-settled standards.

Courts rarely dismiss tort claims for lack of judicially discoverable and manageable standards. *See Lofgren v. Polaris Indus. Inc.*, 509 F.Supp.3d 1009, 1028 (M.D. Tenn. 2020) (collecting cases). That is because "the common law of tort provides clear and well-settled rules on which [a] court can easily rely." *Klinghoffer v. S.N.C. Achille*, 937 F.2d 44, 49 (2d Cir. 1991); *Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (same). The County's claims are no different: they invoke "well recognized" "tort causes of action" that are "tethered to existing well-known elements including duty, breach of duty, causation, and limits on actual damages caused by the alleged wrongs." *Honolulu* Order at 4.

Contrary to Defendants' assertions, nothing in this litigation requires a factfinder to balance the utility and harms of fossil-fuel consumption or to determine the precise threshold at which greenhouse gas emissions become unreasonable. To prevail on trespass under Hawai'i law, the County simply needs to prove that Defendants intentionally engaged in tortious conduct (their failure to warn and deceptive promotion) that "cause[d] a thing" (seawater, floodwater, *etc.*) to enter the County's land. *Spittler*, 145 Haw. at 210–11; *supra* Section IV.A.3. And to prevail on either strict-liability or negligent failure to warn, the County must establish that (1) Defendants failed to "give appropriate warning of any known dangers which the user of its product would not ordinarily discover," and (2) their inadequate warnings proximately caused the County's injuries. *See Ontai*, 66 Haw. at 248; *supra* Section IV.A.2. Plainly, a jury or judge can evaluate these elements of knowledge, warning, causation, and injury without "balancing [the] benefits and costs of emissions-generating activities." Mot. 2.

The same is true of the County's claims for public and private nuisance. Under the *Restatement*, the reasonableness of a nuisance is determined by balancing the social utility of a defendant's nuisance-

creating conduct against the harms flowing from that conduct. *See Restatement* § 826 & cmt. a (unreasonableness of a nuisance); *id.* § 827 & cmt. a ("gravity of harm"); *id.* § 828 & cmt. a ("utility of conduct"). And here, as in *Honolulu*, the Complaint defines Defendants' nuisance-creating conduct as their concealment and misrepresentation of the climate impacts of fossil fuels. *Compare* Compl. ¶ 207, *with Honolulu* Order at 4 ("[Plaintiffs] seek damages only for the effects of climate change allegedly *caused* by Defendants' breach of Hawai'i law regarding failures to disclose, failures to warn, and deceptive promotion."). To the extent, then, that any balancing is required, a factfinder will weigh the costs and benefits of Defendants' failure to warn and deceptive promotion.[25] It will not need to balance the costs and benefits of Defendants' fossil-fuel products. Indeed, a trier of fact *cannot* engage in that sort of balancing because, under century-old Hawai'i law, the utility of a manufacturer's product is "no defense" to nuisance liability. *See Fernandez*, 5 Haw. at 534; *see also Haynes*, 146 Haw. at 460 (explaining *Fernandez*).

Defendants also assert that there are no judicially discoverable and manageable standards for determining "whether Defendants' alleged misrepresentations (as opposed to several other factors and activities) caused emissions." Mot. 15. They overlook Hawaii's longstanding test for legal causation, however. *See Est. of Frey*, 146 Haw. at 549. This time-honored standard of causation "represents a realistic approach to problems of causation," *McKenna v. Volkswagenwerk Aktiengesellschaft*, 57 Haw. 460, 465 (1977), and provides "the jury" with "sufficiently intelligible" guidelines, *Knodle v. Waikiki Gateway Hotel, Inc.*, 69 Haw. 376, 390 (1987). It therefore easily satisfies the definition of a judicially discoverable and manageable standard. *See Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005) (the standard must allow courts "to reach a ruling that is principled, rational, and based on reasoned distinctions" (quotations omitted)).

Moreover, a complex causal chain does not render Hawaii's legal-cause standard undiscoverable or unmanageable. As a century's worth of toxic tort cases confirms, courts have successfully used analogous standards to resolve thorny issues of causation involving "complex scientific evidence." *AEP I*, 582 F.3d at 327 (collecting cases); *see also Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 93–94 (Iowa 2014). In any event, the political-question doctrine asks whether a legal standard is "rational" and "principled," *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (quotations omitted), not whether a plaintiff can satisfy that standard. "[L]ooming evidentiary and proof obstacles"

[25] Under the *Restatement*'s test for unreasonableness, Defendants' failure to warn and deceptive promotion has zero social utility because it violates "common standards of decency." *Restatement* § 828 cmt. e. The nuisance they created is thus "unreasonable as a matter of law." *Id.*

do not create political questions. *Alperin*, 410 F.3d at 553. Nor do the "logistical" challenges that come with adjudicating cases that are "behemoth" in "magnitude and complexity." *Id.* at 552, 554, 555. Here, the Complaint alleges that the County will satisfy Hawaii's causation test by attributing local climate impacts to Defendants' tortious conduct "on an individual and aggregate basis." Compl. ¶ 53. Whether the County can carry that burden is a question for the jury, not for the political branches.

2. The County's claims do not rest on any initial policy determinations.

For similar reasons, Defendants establish that it is "impossibl[e]" to resolve the County's claims without making "an initial policy determination of a kind clearly for nonjudicial discretion." *Nelson*, 127 Haw. at 194 (quotations omitted). These purported policy determinations stand on a misreading of the Complaint that this Court already rejected in *Honolulu*.

The County's claims will not require a factfinder to determine "*who* should bear the cost of *global warming*," Mot. 13 (second emphasis added), because they do not seek relief for "*all* effects of climate change," *Honolulu* Order at 4. Instead, this lawsuit—like *Honolulu*—seeks remedies "only for the effects of climate change allegedly *caused* by Defendants' breach of Hawai'i law regarding failures to disclose, failures to warn, and deceptive promotion." *Honolulu* Order at 4. At most, then, a factfinder will decide who should bear the cost of Defendants' failure to warn and deceptive promotion.

As with *Honolulu*, moreover, "this case does not prevent Defendants from producing and selling as much fossil fuels as they are able, as long as Defendants make the disclosures allegedly required, and do not engage in misinformation." *Honolulu* Order at 8. Accordingly, this lawsuit cannot "set state and national energy and climate policy," Mot. 12; determine "the appropriate amount of regulation in any particular greenhouse gas-producing sector," *id.* (cleaned up); or prevent the Hawai'i state government from "weigh[ing] the benefits and costs of fossil fuel use" and "promot[ing] … the availability of petroleum products," if it so chooses, *id.* at 15–16. Nor can Defendants manufacture a political question with vague speculations about "far-reaching economic, environmental, foreign policy, and national security policy issues." *Id.* at 14. Political questions cannot rest on "[a]bstraction and generality." *Al-Tamimi v. Adelson*, 916 F.3d 1, 8 (D.C. Cir. 2019). And in any event, none of Defendants' speculative policy issues are "[p]rominent on the surface" of the Complaint, as required for the political-question doctrine to apply. *Nelson*, 127 Haw. at 194 (quotations omitted); *see also In re MTBE Prods. Liab. Litig.*, 438 F.Supp.2d 291, 295 (S.D.N.Y. 2006) (political questions "must be clear from the Complaint"). Instead, the "claims made here focus on failures to disclose, failures to warn, and deceptive marketing." *Honolulu* Order at 8.

Indeed, even if this Court were to adopt Defendants' framing of the Complaint, their political-

question arguments would still fail, as various air-pollution cases confirm.[26] In *AEP I*, for example, the Second Circuit refused to dismiss a nuisance suit on political-question grounds, even though the plaintiffs sought an order requiring the largest U.S. energy companies to reduce their emissions at a pace specified by the court. 582 F.3d at 318.[27] As the court explained, a factfinder would not need to "assess[] and balance[e] the kind of broad interests that a legislature or a President might consider in formulating a national emissions policy." *Id.* at 329. Instead, "[t]he question presented [t]here [was] discrete, focusing on Defendants' alleged public nuisance and Plaintiffs' alleged injuries." *Id.*

Nor can Defendants rehabilitate their political-question defense based on *Kivilana*, *Comer III*, or *General Motors*. Indeed, all of those cases are distinguishable on the same basis: they sought to hold the defendants strictly liable for climate-related injuries caused by the defendants' lawful production, promotion, and sale of fossil fuels or fuel-consuming equipment.[28] In applying the political-question doctrine, these district courts did not mention—much less squarely address—the "failures to disclose, failures to warn, and deceptive marketing" that are the "focus" of the County's claims here. *See Honolulu* Order at 8. For the same reasons, then, that *Honolulu* was "different from" *City of New York*, the County's case is inapposite from *Kivalina*, *Comer III*, or *General Motors*. *See id.* at 3.

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[26] *See, e.g.*, *Comer II*, 585 F.3d at 873–79 (explaining that the U.S. Supreme Court had distinguished transboundary-pollution suits from cases that normally raised political questions, and that Congress had affirmatively preserved state-common-law remedies for cross-border pollution in the Clean Air Act); *Juliana v. United States*, 217 F.Supp.3d 1224, 1241 (D. Or. 2016) (rejecting political-question defense in case alleging that the government violated constitutional rights by not curbing carbon emissions), *rev'd on other grounds*, 947 F.3d at 1174 n.9 ("[W]e do not find this to be a political question, although that doctrine's factors often overlap with redressability concerns."); *Freeman*, 848 N.W.2d at 90, 94 (rejecting argument that tort claims raised political question because they could not be adjudicated "without balancing economic benefits against the harms caused by air pollution"); *Chernaik v. Kitzhaber*, 263 Or. App. 463, 480–81 (2014) (acknowledging that public-trust claims for climate harm "might not unduly burden the other branches of government or result in the judiciary impermissibly performing duties or making policy determinations that are reserved to those other branches").

[27] As noted, the Supreme Court "affirm[ed], by an equally divided Court, the Second Circuit's exercise of jurisdiction." *AEP II*, 564 U.S. at 420.

[28] *See Kivalina I*, 663 F.Supp.2d at 868 (seeking to hold fossil-fuel companies liable for their "contribution to the excessive emission of carbon dioxide and other greenhouse gases which they claim are causing global warming"), *aff'd*, 696 F.3d at 853 ("Kivalina alleges that massive greenhouse gas emissions emitted by the Energy Producers have resulted in global warming, which, in turn, has severely eroded the land where the City of Kivalina sits and threatens it with imminent destruction."); *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871, at *14 (N.D. Cal. 2007) ("seeking to impose damages for the Defendant automakers' lawful worldwide sale of automobiles"); *Comer III*, 839 F.Supp.2d at 852 ("The plaintiffs also contend that the defendants should be held strictly liable for the injuries that result from their emissions.").

In fact, the political-question analyses conducted in those three strict-liability lawsuits cannot be reconciled with this Court's decision in *Honolulu*. In dismissing the plaintiffs' claims as nonjusticiable, the *Kivalina* court reasoned that a factfinder would need to decide "who should bear the costs of global warming," 663 F.Supp.2d at 876–77; the *General Motors* court reasoned that "impos[ing] damages for the [d]efendant automakers' lawful worldwide sale of automobiles" interfered with "interstate commerce and foreign policy," 2007 WL 2726871, at *14; and the *Comer III* court reasoned that a trier of fact would need to "make initial policy determinations that have been entrusted to the EPA by Congress" through the Clean Air Act, 839 F.Supp.2d at 865. In *Honolulu*, by contrast, this Court held that climate-deception claims "do not ask for damages for *all* effects of climate change," *Honolulu* Order 4; do not seek to hold Defendants liable for "lawful conduct in producing and selling fossil fuels," *id.*, and do not conflict with any federal policies, *id.* at 9.[29]

F. Federal Law Does Not Preempt the County's Claims.

Defendants repeat the same federal-preemption arguments that they lost in *Honolulu*, but only "to preserve them for appeal." Mot. 34. This Court need not—and should not—reconsider its earlier preemption analysis. Indeed, three more federal courts of appeals have since concluded that analogous climate-deception cases are not governed by federal common law because (1) these state-law claims do not significantly conflict with any uniquely federal interests, and (2) the Clean Air Act displaced the federal common law of interstate pollution.[30] As these on-point decisions confirm, *Honolulu* was rightly decided, and this Court should reach the same conclusion here.

V. CONCLUSION

The Court should deny Defendants' joint motion to dismiss.

[29] *Kivalina*, *Comer III*, and *General Motors* are also fatally flawed on their own terms, as shown by the Second Circuit's decision in *AEP I* and the Fifth Circuit's decision in *Comer II*.

[30] See *Mayor & City Council of Balt. v. BP P.L.C.*, 31 F.4th 178, 204 (4th Cir. 2022) ("We cannot conclude that any federal common law controls Baltimore's state-law claims because federal common law in this area ceases to exist due to statutory displacement …."); *Rhode Island v. Shell Oil Prod. Co.*, 35 F.4th 44, 55 (1st Cir. 2022) ("[W]e cannot rule that any federal common law controls Rhode Island's claims."); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy U.S.A. Inc.*, 25 F.4th 1238, 1260 (10th Cir. 2022) ("[T]he federal common law of nuisance that formerly governed transboundary pollution suits *no longer exists* due to Congress's displacement of that law through the CAA.").

Respectfully submitted,

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June 24, 2022

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