CADES SCHUTTE
A Limited Liability Law Partnership

C. MICHAEL HEIHRE 1307
MICHI MOMOSE 9777
Cades Schutte Building
1000 Bishop Street, Suite 1200
Honolulu, HI 96813-4212
Telephone: (808) 521-9200
Fax: (808) 521-9210
Email: mheihre@cades.com
mmomose@cades.com

K&L GATES LLP

JOHN M. SYLVESTER (*Pro Hac Vice*)
HUDSON M. STONER (*Pro Hac Vice*)
210 Sixth Avenue
Pittsburgh, PA 15205
Telephone: (808) 412-355-6500
Email: john.sylvester@klgates.com
hudson.stoner@klgates.com

Attorneys for Plaintiff
ALOHA PETROLEUM, LTD.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

ALOHA PETROLEUM, LTD., Plaintiff, v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, and AMERICAN HOME ASSURANCE COMPANY	CIVIL NO. 1:22-cv-00372-JAO-WRP (Contract) **ALOHA PETROLEUM, LTD.'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT FILED JUNE 2,**

Defendants.	**2023 [Dkt. 56]; CERTIFICATE OF COMPLIANCE WITH WORD LIMIT; CERTIFICATE OF SERVICE** Hearing Date: August 24, 2023 Time: 9:00 a.m. Judge: The Honorable Jill A. Otake

ALOHA PETROLEUM, LTD.'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT FILED JUNE 2, 2023 [Dkt. 56]

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I. INTRODUCTION

AIG[1] fails to meet its burden of establishing that it is *impossible* for the Climate Plaintiffs in the underlying Climate Lawsuits to prevail on a covered claim against Aloha. Indeed, there are multiple claims alleged by the Climate Plaintiffs that, if successful against Aloha, would be covered under the AIG Policies. Hence, AIG has an affirmative duty to defend Aloha with respect to the Climate Lawsuits, and AIG's Motion for Partial Summary Judgment on the duty to defend ("AIG's Motion") should be denied.

AIG's principal argument in support of its Motion is that the Climate Lawsuits' complaints do not allege an "occurrence" (as that term is used in the AIG Policies). To the contrary, AIG's argument ignores the multitude of claims asserted against Aloha that fit within the definition of "occurrence" under the AIG Policies, any one of which would support a defense duty.

AIG also mischaracterizes Hawai'i law regarding the requisites for an "occurrence," and tries to apply an "intentionality" coverage defense that has been applied in much different factual contexts involving a policyholder's physical assault or breach-of-contract. Here, the Climate Lawsuits include quintessential "products

[1] This Memorandum uses terms, including "AIG," the "Climate Lawsuits," "Climate Plaintiffs" and "AIG Policies," as defined and used in Aloha's Memorandum in Support of its Motion for Partial Summary Judgment on the Duty to Defend, Dkt No. 54-1, filed on June 2, 2023 ("Aloha Br."), which is hereby incorporated into this Memorandum.

liability" claims against Aloha that do not require a finding of intentionality for liability to attach. Given that the AIG Policies expressly provide coverage for products liabilities, AIG's refusal to defend Aloha is particularly untenable.[2]

Similarly, regarding AIG's "no property damage during the policy period" argument for denying a defense, AIG simply ignores a host of allegations in the Climate Lawsuits regarding damage alleged to have occurred during an unspecified span of years (including the periods of the AIG Policies). These allegations certainly allow for the possibility that some of the property damage alleged by the Climate Plaintiffs happened between 1984 and 2010, when the AIG Policies were in place.

Moreover, AIG's argument that it has no defense duty because the Climate Plaintiffs have not alleged liability for "damages because of property damage" does not pass the straight-face test. Indeed, the Climate Plaintiffs expressly seek from Aloha and the other defendants "compensatory damages" for the property damage that they allegedly have already suffered.

[2] In addition, the allegations in the Climate Lawsuits that AIG highlights as inconsistent with an "occurrence" plainly do not apply to Aloha. AIG points to allegations that defendants engaged in a "half-century effort" to conceal the consequences of fossil fuels, by working to influence federal legislation and discredit scientific evidence. But AIG knows – or would have learned upon investigation – that Aloha has not even existed for 50 years and has operated as a local seller of gasoline and other petroleum products in Hawai‘i, and was not a participant in industry-wide lobbying and/or public relations campaigns.

Finally, AIG's argument that the pollution exclusion in certain of the AIG Policies negates their defense duty cannot rescue the AIG Motion from defeat. First, AIG acknowledges that at least two of the AIG Policies do not contain a pollution exclusion that could preclude coverage for the Climate Lawsuits. Regarding the other ten AIG Policies at issue, Hawaii's "legal uncertainty" rule prevents the pollution exclusion from serving as the basis for denying a defense, because there is an unanswered question under Hawai'i law as to whether that exclusion would apply to cases, such as the Climate Lawsuits, which do not seek cleanup of environmental contamination.

II. ARGUMENT

An insurer seeking to disclaim its duty to defend has a heavy burden. *Nautilus Ins. Co. v. Lexington Ins. Co.*, 321 P.3d 634, 644 (Haw. 2014). The Hawai'i Supreme Court has further described that burden as follows:

> The obligation to defend is broader than the duty to pay claims and arises wherever there is the mere *potential* for coverage. In other words, the duty to defend rests primarily on the *possibility* that coverage exists. This possibility may be remote but if it exists, the insurer owes the insured a defense. All doubts as to whether a duty to defend exists are resolved against the insurer and in favor of the insured.
>
> Accordingly, in connection with the issue of its duty to defend, the insurer bears the burden of proving that there is no genuine issue of material fact with respect to whether a *possibility* exists that the insured would incur liability for a claim covered by the policy. In other words, the insurer is required to prove that it would be *impossible* for the claimant to prevail against the insured in the underlying lawsuit on a claim covered by the policies. Conversely, the insured's burden with

> respect to its motion for summary judgment is comparatively light, because it has merely to prove that a *possibility* of coverage exists.

Tri-S Corp. v. W. World Ins. Co., 135 P.3d 82, 97 (Haw. 2006) (quoting *Dairy Rd. Partners v. Island Ins. Co.*, 992 P.2d 93, 107-08 (Haw. 2000)).

AIG argues that there is no potential for coverage under the terms of the AIG Policies' insuring agreements, and further that the AIG Policies' pollution exclusions bar coverage for the Climate Lawsuits. Yet AIG does not – and cannot – establish that it is *impossible* for coverage to exist.

A. AIG Has Not Met its Burden to Establish That It is Impossible for the Climate Plaintiffs to Prevail on Claims that Would be Covered Under the Insuring Agreements of the AIG Policies

AIG argues that Aloha does not have coverage under the terms of the AIG Policies' insuring agreements because (i) the Climate Lawsuits do not allege property damage caused by an "occurrence," (ii) they do not allege property damage taking place during the policy periods, and (iii) they do not seek "damages because of" property damage. *See* AIG's Memorandum in Support of Motion, Dkt No. 56-1 ("AIG Br.") at 7. AIG is wrong on all counts.

1. The Climate Lawsuits raise the possibility of a covered "occurrence" under the AIG Policies

As AIG notes, "occurrence" is defined by the AIG Policies, in relevant part, as an "accident." *See* AIG Br. at 8. Relying on *Hawaiian Holiday Macadamia Nut Co., Inc. v. Industrial Indemnity Co.*, 872 P.2d 230, 234 (Haw. 1994), AIG argues

that, in the case of the Climate Lawsuits, the relevant injury is the "expected or reasonably foreseeable result of [Aloha's] intentional acts or omissions," thereby precluding the possibility of coverage under the AIG Policies. AIG misapplies Hawai'i law.

a. The underlying complaints allege non-intentional conduct and corresponding causes of action

AIG's assertion that there is "no doubt" that Aloha's liability stems from intentional conduct is squarely at odds with the explicit allegations of non-intentional conduct pled in the Climate Lawsuits. *See* Aloha Br. at 9 (quoting allegations of reckless and negligent conduct). Likewise, AIG's contention that Aloha is "bootstrapping" insurance coverage by virtue of a pleading containing a non-intentional cause of action without corresponding factual allegations of non-intentional conduct, *see* AIG Br. at 12, is meritless.

The relevant allegations in the Climate Lawsuits are not simply unmoored, talismanic recitations of the words "negligence" and "recklessness."[3] AIG unwittingly concedes as much when it references Aloha's alleged "actual malice" as an example of intentional conduct, *see* AIG Br. at 12-13, because the definition of "malice" includes "[r]eckless disregard of the law or of a person's legal rights."

[3] S*ee e.g., State Farm Fire & Cas. Co. v. Souza*, No. CV 14-00504 ACK-BMK, 2015 WL 3562576, at *4 (D. Haw. June 4, 2015) (negligence claim was "thinly disguised intentional act claim").

Malice, Black's Law Dictionary (11th ed. 2019);[4] *see also Awakuni v. Awana*, 165 P.3d 1027, 1042 (Haw. 2007) (adopting Black's definition of "malice").

Indeed, the complaints in the Climate Lawsuits contain other *factual allegations* of non-intentional conduct. For example, in addition to the many negligence allegations, *see* Aloha Br. at 9-10, the complaints also allege recklessness by the defendants. "Recklessness" is defined as "the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk." *Mullaney v. Hilton Hotels Corp.*, 634 F. Supp. 2d 1130, 1154 (D. Haw. 2009). In *Tri-S,* the Hawai'i Supreme Court held that recklessness "does not involve intent or expectation of injury" and is "a covered occurrence" under a policy defining "occurrence" as an "accident." 135 P.3d at 90, 103. This conclusion was bolstered by the Court's explanation that the underlying complaint contained allegations that the injury was "'highly probable,' rather than 'practically certain,'" and hence was not "expected or intended." *Id.* at 103 n.8. The Court held that "negligent and reckless conduct 'is not enough to meet the

[4] Black's defines "actual malice" by reference to "malice," defined as either an "intent, without justification or excuse, to commit a wrongful act" *or* "Reckless disregard of the law or of a person's legal rights[.]" Black's Law Dictionary (11th ed. 2019). The "actual malice" allegations in the Climate Lawsuits describe reckless conduct (acting with conscious disregard for substantial and unjustifiable risk of harm). *See* Aloha Br. at 9, n.3.

'practically certain' standard required for an insurance policy to exclude expected injuries." *Id.*[5]

Similarly here, the Climate Lawsuits allege that the defendants acted with conscious disregard of probable risk of harm:

> Defendants had actual knowledge that their products were defective and dangerous and that they had not provided reasonable and adequate warnings against those known dangers, and acted with conscious disregard for the probable dangerous consequences of their conduct's and products' foreseeable impact upon the rights of others.

See, e.g., Ex.15 at ¶¶163, 172, 185, 197, 206; Ex.16 at ¶¶212, 233, 245, 254.

The Climate Lawsuits contain a number of other allegations that the damage at issue was at most "highly probable" (or otherwise below the "practically certain" standard for expected or intended injury). For example:

- [Defendants] have known for decades that those impacts ***could*** *be* catastrophic and that only a narrow window existed to take action before the consequences would be irreversible. Ex. 15 ¶1; Ex. 16 ¶1.

- The fossil fuel industry has known about the ***potential*** warming effects of greenhouse gas emissions since as early as the 1950s. Ex. 15 ¶49; Ex. 16 ¶56.

- In contrast to their public-facing efforts challenging the validity of the scientific consensus about anthropogenic climate change, Defendants' acts

[5] In footnote 8, the Court discussed the application of an "expected or intended" injury exclusion. The footnote follows the sentence that "recklessness . . . is thus a covered occurrence," and is in a section of the Court's opinion combining the "occurrence" and exclusion discussion. *Id.* at 103. Hence, it is equally relevant to interpreting the meaning of "occurrence."

and omissions evidence their internal acknowledgement of the reality of climate change and its ***likely*** consequences. Ex. 15 ¶118; Ex. 16 ¶131.

The presence of other statements in the complaints suggesting certainty of result from defendants' actions, such as that "Defendants have known for more than 50 years that greenhouse gas pollution from their fossil fuel products would have a significant adverse impact on the Earth's climate and sea level" do not alter this conclusion. *See* AIG Br. at 13. The allegations to which the Climate Plaintiffs attribute Aloha's knowledge are frequently couched in terms of *possibility*.[6] As alleged in the section of the complaints titled "Defendants Went to Great Lengths to Understand, and Either Knew or Should Have Known About, the Dangers Associated with Their Fossil Fuel Products":

- In 1959, the American Petroleum Institute organized a centennial celebration of the American oil industry at Columbia University. . . . Following his speech, [a keynote speaker] was asked to "summarize briefly the danger from increased carbon dioxide content in the atmosphere in this century." He responded that "there is a ***possibility*** the icecaps will start melting and the level of the oceans will begin to rise." Ex. 15 at ¶¶51-52; Ex. 16 at ¶¶58-59.

- By 1965, concern over the ***potential*** for fossil fuel products to cause disastrous global warming reached the highest levels of the United States' scientific community. In that year, President Lyndon B. Johnson's Science Advisory Committee's Environmental Pollution Panel reported that a 25% increase in carbon dioxide concentrations ***could*** occur by the year 2000, that such an increase ***could*** cause significant global warming, that melting of the Antarctic

[6] Aloha disputes having this alleged knowledge, and information demonstrating that Aloha did not have such knowledge was readily ascertainable by AIG at the time it denied coverage. *See infra*, § II.A.1.b; *see also* Aloha Br. at 13 n.6.

ice cap and rapid sea level rise ***could*** result, and that fossil fuels were the clearest source of the pollution. Ex. 15 at ¶53; Ex. 16 at ¶60.

- Thus, by 1965, Defendants and their predecessors-in-interest were aware that the scientific community had found that fossil fuel products, ***if used profligately***, would cause global warming by the end of the century, and that such global warming would have wide-ranging and costly consequences. Ex. 15 at ¶55; Ex. 16 at ¶62.

- "[T]he president of the American Petroleum Institute, Frank Ikard, addressed leaders of the petroleum industry in Chicago at the trade association's annual meeting. . . . Ikard also relayed that 'by the year 2000 the heat balance will be so modified as ***possibly*** to cause marked changes in climate beyond local or even national efforts[.]'" Ex. 15 at ¶54; Ex. 16 at ¶61.

- In 1982, another report prepared for API . . . warn[ed] that "[s]uch a warming ***can have*** serious consequences for man's comfort and survival since patterns of aridity and rainfall ***can*** change, [and] the height of the sea level ***can*** increase considerably[.] Ex. 15 at ¶73; Ex. 16 at ¶80.

None of the above-quoted allegations in the complaints (or other similar ones) regarding the *possibility* that defendants' sale of fossil fuel products could cause damage lead to the conclusion that the risk of injury Aloha allegedly consciously disregarded was "practically certain" to occur. Indeed, there is an alleged multi-step chain of causation between Aloha selling its fossil fuel products and the alleged property damage in the counties of Maui and Honolulu. Uncertainty in Aloha's purported knowledge of any of the intervening links in the chain of causation – including that: (i) fossil fuels release greenhouse gases; (ii) fossil fuels would be consumed to the degree necessary to create a greenhouse effect causing climate

change; (iii) climate change would cause rising sea levels and extreme weather incidents; and (iv) those incidents would cause property damage allegedly suffered by the counties of Maui and Honolulu – is something less than the intent to cause injury that would preclude the finding of an "occurrence."

AIG cites to several Hawai'i court decisions for the proposition that the Climate Lawsuits did not allege an "accident," *see* AIG Br. at 9-10, but they are factually inapposite. In those cases, there is a direct, immediate and obvious harm resulting from the policyholder's alleged activity.[7] Other cases cited by AIG concern liabilities arising out of contractual relationships,[8] which are categorically not "occurrences" under Hawai'i law and not relevant here, given the absence of a breach-of-contract claim. *See Dongbu Ins. Co., Ltd. v. Watson*, No. 15-00214 DKW-

[7] Many involve sexual assault or physical violence. *See State Farm Fire & Cas. Co. v. Alualu*, No. 16-00039 LEK-KJM, 2016 WL 7743036, at *3 (D. Haw. Nov. 22, 2016) (violently shoving a minor); *Hawaiian Ins. & Guar. Co. v. Blanco*, 804 P.2d 876, 880-81 (Haw. 1990) (firing a rifle at a neighbor); *Hawaiian Ins. & Guar. Co. v. Brooks*, 686 P.2d 23, 27-28 (Haw. 1984) (driving while passenger raped victim). Another is so obvious as to be a tautology. *See State Farm v. Certified Mgmt.,* No. CV 17-00056 KJM, 2018 WL 1997533, at *8 (D. Haw. Apr. 27, 2018) (charging fee means incurring fee). *Cf. Weight v. USAA Cas. Ins. Co.*, 782 F. Supp. 2d 1114, 1129 (D. Haw. 2011) (insurer's "attempt to equate the maintenance of a decades-old stream diversion [alleged to be improperly maintained by insured] with gunshots, assault and battery, sexual assault, and fraud is unpersuasive" because the "latter types of conduct are intentional, as *Tri-S Corp.* describes those concepts, and the resulting damages expected").

[8] *See State Farm Fire & Cas. Co. v. GP W., Inc.*, 190 F. Supp. 3d 1003, 1008 (D. Haw. 2016) (HVAC installation contract); *Hawaiian Holiday*, 872 P.2d at 232 (farming contract).

BMK, 2016 WL 4033096, at *3 (D. Haw. July 27, 2016) (claims arising solely because of alleged breach of contractual duties do not arise from occurrence or accident); *see also Weight*, 782 F. Supp. 2d at 1129 (noting, "in the absence of a contract," cases "involving contract breaches are not germane") (examining expected or intended exclusion).[9]

AIG also cites to the Supreme Court of Virginia case *AES Corp. v. Steadfast Insurance Co.*, 725 S.E.2d 532 (Va. 2012). That case concerned an energy company directly emitting greenhouse gases, not a distributor or seller of a product that, when used in the ordinary course, generated carbon dioxide. *Id.* at 534. Moreover, the court examined Virginia law which provides that an event is not an accident if the effect it creates is the "natural or probable consequence." *Id.* at 536. That does not acknowledge the distinction the Hawai'i Supreme Court has drawn between "highly probable" expectation of injury, which is insufficient to show the injury was expected or intended, and "practically certain" injury.

In sum, the allegations in the Climate Lawsuits of negligent or reckless conduct means that, viewed in the light most favorable for coverage, it is possible that Aloha's conduct could be found to be non-intentional. *See Tri-S Corp.*, 135 P.3d

[9] AIG also cites *AIU Ins. Co. v. McKesson Corp.*, 598 F. Supp. 3d 774 (N.D. Cal. 2022). *See* AIG Br. at 15, n.4. The *McKesson* district court decision, which is currently on appeal before the Ninth Circuit, is inapposite, given that California law, as the district court applied it, required only an intentional, deliberate act that produced the injuries. *See id.* at 794-95. Foreseeability of the injury was not at issue.

at 97 ("All doubts as to whether a duty to defend exists are resolved against the insurer and in favor of the insured."); *see also id.* at 103 ("[The insurer] cannot prove that it would be impossible for the [underlying plaintiff] to prevail against [the policyholder] on a 'wilful and wanton' misconduct claim based upon evidence only of non-intentional misconduct because the possibility exists that [the policyholder] could be found liable for recklessness, which does not involve intent or expectation of injury and is thus a covered occurrence under the policy."); *Island Ins. Co. v. Arakaki*, No. 29116., 2010 WL 2414924, at *5 (Haw. Ct. App. June 16, 2010) (rejecting argument that underlying complaint alleged no "occurrence" because misappropriation of partnership assets was intentional or willful, stating: "Because [the policyholder's] conduct was alleged to be negligent, it gives rise to an occurrence or accident within the meaning of [the] Policy").

In sum, the allegations of negligence and/or recklessness are all that is necessary to allow for the possibility of an "occurrence" under the AIG Policies, thereby defeating AIG's "no occurrence" argument.

b. It is possible that Aloha did not foresee the alleged property damage at issue

Even if this Court were to find that the complaints in the Climate Lawsuits allege that Aloha acted intentionally, it is nonetheless *possible* that Aloha did not foresee the property damage alleged therein.

AIG's foreseeability discussion ignores the requirement under Hawai'i law that AIG must conduct a reasonable investigation before denying a duty to defend, if the underlying complaints do not "clearly and unambiguously assert a covered claim." *See Dairy Rd. Partners*, 992 P.2d at 109-10; *see also Bayudan v. Tradewind Ins. Co.*, 957 P.2d 1061, 1070-71 (Haw. Ct. App. 1998) (finding duty to investigate where allegations in complaint differ from "known to or readily ascertainable" facts, or are "ambiguous or inadequate").

The complaints unambiguously *provide* for coverage, given that they present the *possibility* of a covered claim. In the alternative, the Climate Lawsuit complaints are in conflict with facts "known to or readily ascertainable" by AIG, or are at least ambiguous as to whether they assert covered claims. As noted, the complaints allege reckless conduct. Moreover, unlike other defendants, the complaints never mention Aloha by name as having knowledge of the alleged dangers arising from the sale and use of fossil fuels. Instead, as AIG observes, Aloha is lumped together with "Defendants" generally, its knowledge inferred from "reports and updates . . . from industry trade associations . . . , U.S. Government Advisory Committees, and the in-house research divisions of other industry participants." *See* AIG Br. at 13. But many of the reports that AIG relies upon for Aloha's alleged knowledge were issued in the 1960's and early 1970's – before Aloha even came into existence in 1977. *See* Aloha

Br. at 13 n.6. AIG's duty to investigate under Hawai'i law was therefore triggered. *See Bayudan*, 957 P.2d at 1070-71.

AIG does not contend it conducted a reasonable investigation. Thus, AIG did not satisfy even the minimal requirement for denying Aloha a defense. As Aloha explained in its moving brief, a reasonable investigation would have shown that Aloha was not a "major corporate member of the fossil fuel industry," but a local seller of gasoline and other petroleum products, with no demonstrated relationship to any of the other oil industry defendants in the Climate Lawsuits, until its 2014 acquisition by Sunoco. *See* Ex. 15 at ¶1; Ex. 16 at ¶1; Aloha Br. at 12-13. Accordingly, it is possible that Aloha would not have the requisite knowledge of resulting injury.

c. AIG's interpretation of the AIG Policies violates Aloha's reasonable expectations of coverage

AIG suggests that Aloha's potential liability in the Climate Lawsuits is tied to the deliberate act of "*intentionally* plac[ing] its fossil fuel products into the stream of commerce." AIG Br. at 10. In other words, AIG contends that Aloha has no coverage for the allegedly harmful results of the sale and use of its gasoline products – products that were critical for the functioning of society – because: (1) Aloha intentionally sold its products into the stream of commerce; and (2) the Climate

Plaintiffs allege that their injuries were foreseeable from the use of those products, based on an "objective" standard. That cannot be.

A fundamental precept of Hawai'i law is that the "objectively reasonable expectations of policyholders . . . regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *Del Monte Fresh Produce (Hawaii), Inc. v. Fireman's Fund Ins. Co.*, 183 P.3d 734 (Haw. 2007); *see also Tri-S Corp.*, 135 P.3d at 92.

The terms of the AIG Policies expressly provide "products liability" or "products hazard" coverage. *See* Aloha SMF ¶14.[10] The purpose of that coverage is "to protect against loss for injury to the person or property of others caused by use of the insured's products." *See* 9A Couch on Ins. 3d § 130:1 (2023); *see also* 3 Appleman, *Law of Liability Insurance* § 16.01 (2023) (policies "cover liability arising out of [the policyholder's] work or product").

Accordingly, the AIG Policies expressly provide coverage for liabilities relating to Aloha's intentional sale of its products. Based on that express language, Aloha reasonably expected that it was purchasing insurance with products liability

[10] For example, the 1985 National Union Policy provides coverage for "all property damage included within the products hazard." Ex. 2 at EZSERVE000003. "Products hazard" is defined, in relevant part, as "property damage arising out of the named insured's products" that occurs away from the policyholder's premises and the products are possessed by others. *Id.* at EZSERVE000004.

coverage for negligence and recklessness in connection with the intentional sale and use of its products in the ordinary course.

AIG's position denying Aloha a defense of the Climate Lawsuits, if adopted by the Court, would negate that express coverage. If a local seller acts intentionally for purposes of the "occurrence" definition simply by selling its products, the second prong of the "occurrence" definition – the foreseeability element, which AIG contends is objective – would always be considered.[11] Yet foreseeability is a necessary element to pleading a products liability negligence claim. *See Mullaney*, 634 F. Supp. 2d at 1142; *Pulawa v. GTE Hawaiian Tel*, 143 P.3d 1205, 1218 (Haw. 2006). As discussed above, foreseeability is also an integral part of recklessness. *See supra* § II.A.1.a.

Practically, the result of AIG's position is that "products hazard" coverage expressed in the AIG Policies could never be accessed – a result contrary to the rule that insurance contracts cannot be construed to render coverage illusory. *See Budget Rent-A-Car Sys., Inc. v. Ricardo*, 942 P.2d 507, 513 (Haw. 1997). Accordingly, the standard for expectation under the "occurrence" definition is a *subjective* one (*i.e.*, policyholder actually knew), and not an objective one (*i.e.*, policyholder should have

[11] AIG relies on *Hawaiian Holiday*, 872 P.2d at 234 ("[T]he injury cannot be the expected or reasonably foreseeable result of the insured's own intentional acts or omissions"), but that decision has been supplanted by more recent Hawai'i Supreme Court precedent.

known) – and thus allegations that Aloha merely "should have known" injuries would result from the sale of its gasoline products presents the possibility of an "occurrence."

In *Hawaiian Holiday Macadamia Nut Co.*, the Hawai'i Supreme Court implied that whether an "occurrence" exists is to be determined objectively. *See* 872 P.2d at 234 ("The teaching of *Blanco* and *Brooks* . . . is that the injury cannot be the expected or *reasonably foreseeable result* of the insured's own intentional acts or omissions") (quoting *Haw. Ins. Co. v. Caraang*, 851 P.2d 321, 329 (Haw. 1993)).[12] AIG proposes this interpretation here, *see* AIG Br. at 9, but it is not the current state of Hawai'i law.

Twelve years after *Hawaiian Holiday*, in examining the related "expected or intended injury" exclusion, the Hawai'i Supreme Court explained "*the definition of 'expected' does not exclude harm that the insured 'should have anticipated[.]'* [Rather,] [c]onsciousness of the likelihood of certain results occurring is determined by examination of the *subjective* mental state of the insured." *Tri-S Corp.*, 135 P.3d at 103 n.8 (citation omitted).

[12] As noted, *Blanco* and *Brooks* are factually inapposite, as they concern situations in which there was a direct, immediate and obvious harm resulting from the insured's alleged activity. *Blanco*, 804 P.2d 876 (firing rifle); *Brooks*, 686 P.2d 23 (driving while passenger raped victim).

Tri-S did not mention *Hawaiian Holiday,* but its holding necessarily supplants *Hawaiian Holiday* on this point. Otherwise, they are irreconcilable: under *Tri-S*, a policyholder defeats the "expected or intended" exclusion if it merely "should have known" the dangers, yet under *Hawaiian Holiday,* coverage would be denied on the basis that there is no "occurrence" because the harm was objectively foreseeable (*i.e.*, the policyholder "should have known"). This Court has followed the holding of *Tri-S* on this issue. *See Weight*, 782 F. Supp. 2d at 1128–29 ("In light of *Tri–S Corp.*, . . . [w]hether [the policyholder] intended to cause injury is not only relevant but also determinative.").

This Court should therefore hold that the "occurrence" analysis is subjective, and that mere foreseeability of harm does not preclude the possibility of coverage. Under that subjective analysis, because the Climate Lawsuits allege that Aloha alternatively "knew or *should have known*" that the alleged injuries would result, the "should have known" allegation allows for the possibility of an "occurrence." *See* Ex. 15 at § V.C., ¶¶162, 177-78, 189-90; Ex. 16 at § V.C., ¶¶37, 211, 225-26, 237-38. Hence, the "no occurrence" argument in AIG's Motion fails.

2. It is possible for Aloha to be held liable for property damage during the policy periods

As AIG concedes, the Climate Lawsuits allege undated property damage. *See* AIG Br. at 17. Given the well-established rule that pleadings are interpreted in the policyholder's favor, those allegations are sufficient to create a *possibility* of

coverage. *See Grp. Builders, Inc. v. Admiral Ins. Co.*, No. 29729, 2013 WL 1579600, at *8 (Haw. Ct. App. Apr. 15, 2013) (finding possibility of coverage where "complaint [did] not specify when the mold growth began, when any property damage occurred, or what caused the mold to grow").

To evade this straightforward conclusion, AIG proposes a new requirement under Hawai'i law, under which Aloha must make some greater showing than the possibility of property damage taking place during the relevant policy periods. *See* AIG Br. at 17. Neither of the two authorities cited by AIG on this point support the creation of such a requirement.

First, the Hawai'i Supreme Court's holding in *Sentinel Insurance Co., Ltd. v. First Insurance Co. of Hawai'i, Ltd.*, 875 P.2d 894 (Haw. 1994), that the insured has the burden to prove a loss, does not speak to whether undated allegations of property damage may satisfy that burden.

Second, AIG cites to an unpublished Ninth Circuit case predicting Alaska law would permit insurers to rely on extrinsic evidence "to prove that coverage is unavailable when the complaint is *silent* as to the existence of those facts and when the facts will not be determined in the underlying action." *Delta Airlines v. State Farm Fire*, No. 95–35706, 95–35759, 1996 WL 511575, at *1 (9th Cir. 1996). Here, unlike in *Delta Airlines*, AIG is not introducing extrinsic evidence conclusively showing the absence of property damage during the AIG Policies' periods.

Regardless, AIG would need to show "that *none* of the facts upon which it relies might be resolved differently in the underlying lawsuit." *Dairy Rd. Partners*, 992 P.2d at 117.

AIG's remaining arguments are simply irrelevant. Aloha is not contending that allegations of anticipated future harms or allegations of property damage occurring outside of the policy periods satisfy the AIG Policies' insuring agreements. Rather, because the Climate Lawsuits also allege undated property damage that may have happened during the AIG Policy periods, and because the complaints are read in the light most favorable to coverage, AIG cannot disclaim its defense duty on this basis.

3. It is possible for Aloha to be held liable for "damages because of" property damage

AIG argues that the damages sought by the Climate Plaintiffs are not "because of property damage" that has already occurred, but rather are sought only to prevent future damage. AIG is wrong factually because the Climate Lawsuits do possibly seek compensatory damages, in part, for past property damage. AIG is also wrong as a matter of law. AIG recognizes that in defining "because of," this Court has looked to the Hawai'i Supreme Court's expansive definition of the synonymous term "arising out of" as "'originating from,' 'having its origin in,' 'growing out of,' or 'flowing from.'" *See* AIG Br. at 18-19 (quoting *Ass'n of Apartment Owners of the Moorings, Inc. v. Dongbu Ins. Co.*, No. 15-00497 BMK, 2016 WL 4424952, at *4

(D. Haw. Aug. 18, 2016), *aff'd sub nom. Ass'n of Apartment Owners of Moorings, Inc. v. Dongbu Ins. Co.*, 731 F. App'x. 713 (9th Cir. 2018) ("*Moorings*")).

Despite acknowledging *Moorings* – which quotes from a 2015 Hawai'i Supreme Court case examining the phrase in the CGL context – AIG declines to analyze it further, choosing instead to highlight out-of-circuit case law and a footnote in a decade-older Hawai'i Supreme Court case stating "arising out of" means more than "but-for causation." *See* AIG Br. at 18-21.[13] That is a mistake, as *Moorings* resolves this question with little difficulty.

In *Moorings*, this Court held that an award of attorneys' fees was covered because it "flowed from" the property damage at issue and, but for the property damage, the litigation would not have ensued. *Moorings*, 2016 WL 4424952, at *4. The Ninth Circuit affirmed, noting that "because of" "connotes a non-exacting causation requirement whereby any award of damages that flows from covered property damage is covered, unless otherwise excluded." *See Moorings*, 731 F. App'x at 714. AIG's proposed requirement to tie specific monetary damages with specific property damage occurring during the policy period is plainly incompatible with opinions of this Court and the Ninth Circuit.

[13] That 2015 case, *C. Brewer & Co. v. Marine Indem. Ins. Co.*, 347 P.3d 163 (Haw. 2015), does not cite to the 2005 case relied upon by AIG, *Oahu Transit Servs. v. Northfield Ins. Co.*, 112 P.3d 717, 724 (Haw. 2005).

As explained in Aloha's moving brief, the Climate Lawsuit complaints demand "compensatory damages." *See* Aloha Br. at 17. Given that the complaints also allege the possibility of covered "property damage" during the policy periods, it is likewise *possible* that those compensatory damages are for "property damage" during the policy periods caused by an occurrence – *i.e.*, they "flow" from covered "property damage." That is enough to trigger the duty to defend, and this Court therefore need not look to other jurisdictions to resolve this question.

Regardless, AIG's citations to out-of-circuit case law on this issue are distinguishable. *See* AIG Br. at 18-21.[14] In *Ace American Insurance Co. v. Rite Aid Corp.*, 270 A.3d 239 (Del. 2022), the underlying plaintiff "disclaimed any recovery for personal injuries stemming from the opioid epidemic." *Id.* at 253. Likewise, the underlying government plaintiffs in *Acuity v. Masters Pharmaceutical, Inc.*, 205 N.E.3d 460 (Ohio 2022) did not "seek damages for bodily injury on behalf of their injured citizens." *Id.* at 473.

And in *Westfield National Ins. Co. v. Quest Pharmaceuticals, Inc.,* 57 F.4th 558 (6th Cir. 2023), the Sixth Circuit partially based its reasoning on the fact that Kentucky law did not include punitive damages as damages "because of bodily

[14] The Seventh Circuit rejected AIG's narrow reading of the phrase "because of." *See Cincinnati Ins. Co. v. H.D. Smith, L.L.C.,* 829 F.3d 771, 775 (7th Cir. 2016) (damages were "because of bodily injury" where state incurred excessive costs related to diagnosis, treatment and cure of addiction).

injury." *Id.* at 562. The Ninth Circuit did not make a similar distinction under Hawai'i law with respect to attorneys' fees. *See Moorings*, 731 F. App'x at 714.

Ultimately, although the Climate Plaintiffs may include requested damages similar to "costs for expanding its parks and recreational activities to address weight gain or increased public hospital expenditures for treating the population,"[15] they also seek compensatory damages for potentially covered property damage. Accordingly, AIG cannot say it is impossible for the Climate Lawsuits to be seeking "damages because of property damage."

B. It is Possible for the Climate Plaintiffs to Prevail on Claims that Are Covered under the AIG Policies Despite the Presence of Pollution Exclusions in Certain Policies

AIG contends that 10 of the 12 AIG Policies contain a form of pollution exclusion that could serve as a basis for denying its duty to defend Aloha. *See* AIG Br. at 22.[16] AIG's admission that at least two of its policies cannot be excused from a duty to defend on the basis of a pollution exclusion renders AIG's argument about this exclusion irrelevant. Indeed, so long as any of the AIG Policies have a duty to

[15] *See* AIG Br. at 20.

[16] In previous correspondence, AIG had acknowledged that, for at least *four* of the AIG Policies, AIG could not rely on a pollution exclusion to justify denying a defense. *See* Aloha Br. at 17-18.

defend, AIG must defend Aloha because each of its Policies has an indivisible duty to defend the entirety of the Climate Lawsuits.[17]

In any event, regarding the 10 policies for which AIG is making this argument, AIG spends over four pages discussing why the pollution exclusion(s) in those AIG Policies preclude coverage. *See* AIG Br. at 22-26. Not once, however, does AIG acknowledge that Hawai‘i courts follow the "legal uncertainty rule." Under the rule, "[t]he mere fact" that Hawai‘i courts have not "conclusively answered" a question interpreting a policy provision proves coverage is a possibility if there is "a notable dispute nationwide" and "significant conflict among jurisdictions" with respect to that provision. *See Sentinel*, 875 P.2d at 907 (finding duty to defend in light of legal uncertainty).

AIG fails to address the legal uncertainty rule despite the fact that the rule is central to the holding of one of the few cases AIG cites for this argument, *Pacific Employers Insurance Co. v. Servco Pacific Inc.*, 273 F. Supp. 2d 1149 (D. Haw. 2003). *See* AIG Br. at 24.[18] In that case, this Court applied the rule to find a duty to defend where the interpretation of the "sudden and accidental" language in the "qualified pollution exclusion" was unresolved under Hawai‘i law. *See Servco Pac.,* 273 F. Supp. 2d at 1157–58.

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[17] *See Sentinel*, 875 P.2d at 904 (duty to defend hinged on possibility of coverage "under any of the policies" issued by insurer).

[18] AIG also cites to *Sentinel* in another section of its brief. *See* AIG Br. at 17.

There remains an open question under Hawai‘i law as to whether any form of the pollution exclusion applies only to "traditional" environmental pollution (as Aloha contends) or, alternatively, to pollution allegedly arising out of the use of a product in the ordinary course (as AIG contends). *See* Aloha Br., at 24-25. The legal uncertainty rule therefore requires a defense, as it has previously. *See Apana v. TIG Ins. Co.*, 504 F. Supp. 2d 998, 1004 (D. Haw. 2007) (denying insurer's motion for summary judgment regarding duty to defend based on legal uncertainty surrounding applicability of total pollution exclusion).

III. CONCLUSION

Accordingly, the Court should deny AIG's motion for partial summary judgment on the duty to defend.

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CADES SCHUTTE
A Limited Liability Law Partnership

/s/ *C. Michael Heihre*
C. MICHAEL HEIHRE
MICHI MOMOSE

JOHN M. SYLVESTER (PRO HAC)
HUDSON STONER (PRO HAC)
K&L GATES LLP

Attorneys for Plaintiff
ALOHA PETROLEUM, LTD.