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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ALOHA PETROLEUM, LTD., Plaintiff, vs. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., and AMERICAN HOME ASSURANCE COMPANY, Defendants.	CIVIL NO: 1:22-cv-00372-JAO-WRP (Contract) DEFENDANTS NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. AND AMERICAN HOME ASSURANCE COMPANY'S **MEMORANDUM IN OPPOSITION TO PLAINTIFF ALOHA PETROLEUM, LTD.'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE DUTY TO DEFEND** [ECF. 54]; DECLARATION OF KARI K. NOBORIKAWA; EXHIBIT "A"; CERTIFICATE OF COMPLIANCE WITH WORD COUNT; CERTIFICATE OF SERVICE

DEFENDANTS NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. AND AMERICAN HOME ASSURANCE COMPANY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF ALOHA PETROLEUM, LTD.'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE DUTY TO DEFEND

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I. INTRODUCTION

In their Memorandum of Law in Support of Defendants' Motion for Partial Summary Judgment ("AIG Motion" or "AIG Mot."), the AIG Insurers[1] establish they are entitled to summary judgment on the duty to defend the Underlying Lawsuits under the clear terms of the AIG Policies and settled Hawaii law. In its Memorandum in Support of Motion ("Aloha Motion" or "Aloha Mot."), Aloha makes several arguments in an effort to establish the opposite. None has merit.

First, Aloha asserts that, under Hawaii law, the duty to defend standard on summary judgment is essentially insurmountable for any insurer. But Aloha ignores that while the "possibility" of coverage is central to the determination of a duty to defend, courts applying Hawaii law in numerous cases—including cases Aloha cites—have found no duty to defend at the summary judgment stage.

Second, Aloha fails to meet its burden to establish it is owed a defense for the Underlying Lawsuits under the insuring agreements in the AIG Policies. Aloha admits it is not covered for the reasonably foreseeable consequences of its intentional conduct, yet relies on a series of allegations that actually *establish* its conduct does not constitute an accident. And, while Aloha admits coverage is triggered only if the Underlying Lawsuits potentially seek "damages because of" property damage

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[1] Unless otherwise noted, capitalized terms shall have the meaning set forth in the AIG Motion.

during the policy periods of the AIG Policies, Aloha fails to cite specific allegations in the Underlying Lawsuits to make those showings. Notably, if the Court agrees with the AIG Insurers on any one of their three insuring agreement defenses, then there is no coverage for Aloha.

Third, Aloha claims the AIG Insurers acknowledged uncertainty about whether foundational elements of the insuring agreements could be met and therefore conceded a duty to defend. To the contrary, the AIG Insurers have always maintained their position that there is no coverage for the Underlying Lawsuits throughout their correspondence and communications with Aloha.

Fourth, Aloha resorts to the "legal uncertainty rule" in an attempt to avoid application of the pollution exclusions in the AIG Policies. There is, however, no uncertainty about any issue that would affect the outcome of this case—under any interpretation, the pollution exclusions bar coverage for the Underlying Lawsuits.

II. ARGUMENT AND AUTHORITIES

A. Aloha Incorrectly Suggests the Duty to Defend Is Absolute Under Hawaii Law.

Aloha agrees that, under Hawaii law, "'[w]here pleadings fail to allege any basis for recovery within the coverage clause, the insurer has no obligation to defend.'" (Aloha Mot. at 5.) Yet Aloha suggests, citing *Dairy Road Partners v. Island Insurance Co.*, 992 P.2d 93 (Haw. 2000), that because the duty to defend is triggered when there is a "possibility" of coverage, and insurers must prove it is

"impossible" for an insured to be held liable for a covered claim, the duty to defend standard is easily satisfied by insureds and essentially insurmountable for insurers. (*See* Aloha Mot. at 3.) Both case law and common sense establish Aloha is wrong.

In *Dairy Road Partners*, despite noting the "possibility" standard, the Hawaii Supreme Court affirmed the grant of summary judgment to the insurer on the duty to defend because the allegations of the complaint—like the allegations in the Underlying Lawsuits—"dispelled the possibility of coverage." *Dairy Rd. Partners*, 992 P.2d at 122. Numerous courts in Hawaii, including this District, have reached the same conclusion when considering similar allegations. *See, e.g., Keown v. Tudor Ins. Co.*, 293 P.3d 137, 140 (Haw. App. 2012) (finding no duty to defend despite "possibility" standard); *St. Paul Fire & Marine Ins. Co. v. Bodell Constr. Co.*, 601 F. Supp. 3d 858, 868 (D. Haw. 2022) (same); *Nautilus Ins. Co. v. RMB Enters., Inc.*, 497 F. Supp. 3d 936, 953 (D. Haw. 2020) (same); *State Farm Fire & Cas. Co. v. Chung*, 882 F. Supp. 2d 1180, 1188 (D. Haw. 2012) (same). Thus, the duty to defend standard is far from insurmountable.

For the reasons set forth below and in the AIG Motion, Aloha cannot establish the possibility of coverage for the liability it faces based on the allegations in the Underlying Lawsuits, and, therefore, the AIG Motion should be granted, and the Aloha Motion should be denied.

B. Aloha Cannot Establish the Possibility of Coverage Under the Insuring Agreements of the AIG Policies.

1. Aloha Cannot Establish any Alleged Property Damage in the Underlying Lawsuits Was Caused by a Fortuitous Event.

Aloha acknowledges that each of the AIG Policies incorporates the fundamental insurance principle of "fortuity" by covering Aloha only for damages caused by an "occurrence"—defined, in relevant part, as an "accident." (*See* AIG Mot. at 8–9; Aloha Mot. at 7.) Aloha also agrees that, "[f]or an event to be an 'accident,' 'the injury cannot be the expected or reasonably foreseeable result of the insured's own intentional acts or omissions.'" (Aloha Mot. at 8.) The parties therefore agree there is no possibility of coverage for the reasonably foreseeable consequences of Aloha's intentional conduct.

Nevertheless, citing to paragraph 30 of its Concise Statement of Material Facts ("Aloha SMF"), Aloha asserts that the "underlying complaints allege not only intentional actions by Aloha . . . but also negligent and reckless conduct."[2] (Aloha Mot. at 8; *see also id.* at 9–10.) But the paragraphs of the Underlying Lawsuits Aloha cites in support of Aloha SMF 30 establish the opposite. For example, eight

[2] Although Aloha suggests "reckless" conduct might still be fortuitous conduct, it concedes being "reckless" means to "consciously disregard[] a substantial and unjustifiable risk that conduct will cause such a result" (Aloha Mot. at 9 n.3)—precisely the type of injury that is "the expected or reasonably foreseeable result of the insured's own intentional acts or omissions" and which is not an accident under Hawaii law. *See Hawaiian Holiday Macadamia Nut Co. v. Indus. Indem. Co.*, 872 P.2d 230, 234 (Haw. 1994).

of the paragraphs, which contain identical language, assert Aloha's "wrongful conduct . . . was committed with actual malice." (*See* Ex. 15, ¶¶ 163, 172, 185, 197 and Ex. 16, ¶¶ 212, 233, 245, 254.)[3] Under Hawaii law, "actual malice" means "the intent, without justification or excuse, to commit a wrongful act"; "reckless disregard of the law or of a person's legal right"; and "ill will; wickedness of heart." *See Morgan v. Cnty. of Hawaii*, Civil No. 14-00551 SOM-BMK, 2016 WL 1254222, at *21 (D. Haw. Mar. 29, 2016). Those same paragraphs allege the defendants, including Aloha, "*had actual knowledge that their products were defective and dangerous* . . . and *acted with conscious disregard for the probable dangerous consequences*" of their conduct, and "request an award of punitive damages . . . to punish [Aloha] for the good of society[.]" (Ex. 15, ¶¶ 163, 172, 185, 197 and Ex. 16, ¶¶ 212, 233, 245, 254 (emphasis added).)

The remaining three paragraphs Aloha cites in support of Aloha SMF 30 also allege Aloha committed intentional acts—"distributing, analyzing, recommending, merchandising, advertising, promoting, marketing, and/or selling fossil fuel products"—that led to expected or reasonably foreseeable results—"*knowing* those products in their normal or foreseeable operation and use would cause global and local sea levels to rise and more frequent and extreme precipitation events to

[3] Unless otherwise indicated, references to "Ex. _" are to the Exhibits attached to the Declaration of Kari K. Noborikawa, ECF 57-1. References to "Aloha Ex. _" are to the Exhibits attached to the Declaration of John M. Sylvester, ECF 55-1.

occur[.]" (Ex. 15, ¶¶ 201, 206 and Ex. 16, ¶ 249 (emphasis added).) In sum, the allegations Aloha cites in support of Aloha SMF 30 unmistakably describe the expected or reasonably foreseeable consequences of intentional conduct by Aloha and the other Defendants—which Aloha concedes is not an accident under Hawaii law. (*See* Aloha Mot. at 8.)

Next, citing Aloha SMF 31, Aloha asserts that "the underlying complaints are replete with allegations of conduct, without any corresponding allegations of intent." (Aloha Mot. at 9.) But the paragraphs of the Underlying Lawsuits Aloha cites in support, which contain identical language, establish the opposite when read in the context in which they appear in the complaints—a requirement of Hawaii law. *See, e.g.*, *State Farm Fire & Cas. Co. v. Vogelgesang*, 834 F. Supp. 2d 1026, 1036 (D. Haw. 2011).

For example, Paragraphs 139 of the Honolulu Action and 151 of the Maui Action both appear under a heading which states: "*Defendants Continue to Mislead About the Impact of Their Fossil Fuel Products on Climate Change Through Greenwashing Campaigns and Other Misleading Advertisements*." (Ex. 15, § G and Ex. 16, § G (emphasis added).) In the first paragraph of these sections, Honolulu and Maui allege "Defendants' *coordinated campaign of disinformation and deception* continues today[.]" (Ex. 15, ¶ 137 and Ex. 16, ¶ 149 (emphasis added).) In the next paragraph, they allege that, "[i]nstead of widely disseminating this

information, . . . Defendants placed profits over people." (Ex. 15, ¶ 138 and Ex. 16, ¶ 150.)

Then, paragraphs 139 of the Honolulu Action and 151 of the Maui Action further describe the "coordinated campaign of disinformation and deception" by alleging that Aloha's "advertising and promotional materials fail to disclose the extreme safety risk associated with the use of Defendants' dangerous fossil fuel products, which are causing 'catastrophic' climate change . . . . [and] [t]hey continue to omit that important information to this day." (Ex. 15, ¶ 139 and Ex. 16, ¶ 151.) Finally, in the next paragraphs, Honolulu and Maui allege that, "[a]fter having engaged in a long campaign to deceive the public about the science behind climate change, Defendants are now engaging in 'greenwashing' by employing false and misleading advertising campaigns[.]" (Ex. 15, ¶ 140 and Ex. 16, ¶ 152.)

Similarly, Paragraphs 159 of the Honolulu Action and 208 of the Maui Action are contained in Count I of the complaints, which assert a claim for Public Nuisance. The first paragraph of Count I incorporates all prior allegations of the complaints (*see* Ex. 15, ¶ 155 and Ex. 16, ¶ 204), which, as described above and in the AIG Motion, allege the reasonably foreseeable consequences of Aloha's intentional conduct. (*See* AIG Mot. at 5-15.) In the next paragraph, underlying plaintiffs assert that Aloha and the other defendants "were a substantial contributing factor in the creation of the public nuisance by, *inter alia*: . . . *Affirmatively and knowingly*

concealing the hazards that Defendants knew would result from the normal use of their fossil fuel products . . . Disseminating and funding the dissemination of information *intended to mislead* customers, consumers, and regulators *regarding the known and foreseeable risk of climate change* . . . , [and] *Affirmatively and knowingly* campaigning against the regulation of their fossil fuel products, *despite knowing the hazards associated with the normal use of those products* . . . ." (Ex. 15, ¶ 158 and Ex. 16, ¶ 207 (emphasis added).)

Finally, in Paragraphs 159 of the Honolulu Action and 208 of the Maui Action—the specific paragraphs Aloha cites in support of Aloha SMF 31—Honolulu and Maui allege Aloha was aware of the expected or reasonably foreseeable results of the alleged intentional acts or omissions described in the paragraphs discussed above: "*Because of their superior knowledge of fossil fuel products*, Defendants were in the best position to prevent the nuisance, but failed to do so, . . . and [they] *fail[ed] to take any other precautionary measures to prevent or mitigate those known harms*." (Ex. 15, ¶ 159 and Ex. 16, ¶ 208 (emphasis added).) These are hardly allegations that, read in context, establish conduct without intent.

Simply put, even the cherry-picked paragraphs Aloha cites in support of its assertions of non-accidental conduct allege that Aloha intentionally sold and promoted the ever-increasing use of its products knowing that climate change was

the reasonably foreseeable result of its intentional conduct.[4] Under Hawaii law, that is not an "occurrence."

Nor does it matter that, as Aloha argues (whether accurate or not), "[t]he complaints in the Climate Lawsuits allege public and private nuisance (Counts I & II), strict liability failure to warn (Count III), negligent failure to warn (Count IV), and trespass (Count V), which do not necessarily require proof of intentional conduct on the part of Aloha." (Aloha Mot. at 10–11 (citation omitted).) As the Hawaii Supreme Court has cautioned, an insured cannot be permitted to "bootstrap the availability of insurance coverage" by claiming the underlying lawsuit purports to "state a claim for negligence based on facts that, in reality, reflected manifestly intentional, rather than negligent, conduct." *Dairy Rd. Partners*, 992 P.2d at 112. As a result, "Hawaii courts focus solely on the factual allegations in the underlying complaint, and not on the legal theories pled by plaintiff." *State Farm Fire & Cas. Co. v. Alualu*, Civil No. 16-00039, LEK-KJM, 2016 WL 7743036, at *3 (D. Haw. Nov. 22, 2016) (finding no "occurrence" alleged even though claims "sound in

[4] The case Aloha cites (Aloha Mot. at 8), *Clarendon National Insurance Co. v. Smead*, No. CIV. 06-00434SOM/BMK, 2007 WL 1670112 (D. Haw. June 7, 2007), does not change this conclusion. There, the court concluded the specific facts of that case—relating to the insured's efforts to remove water from their land that resulted in flooding on adjacent land—clearly alleged a negligent act. *Id.* at *8. But that is a far cry from what is alleged here—a "coordinated, multi-front effort [by Aloha] to conceal and deny their own knowledge . . . about the reality and consequences of their fossil fuel pollution." (*See, e.g.*, Ex. 15, ¶ 1.)

negligence," because claims were based on "intentional conduct"). Regardless of how the counts in the Underlying Lawsuits are styled, the factual allegations on which those counts are based undeniably relate to the reasonably foreseeable consequences of Aloha's intentional conduct.[5]

Next, Aloha asserts that "[t]he underlying complaints make no specific allegations about Aloha in particular (as opposed to all defendants collectively) having had knowledge of any dangers arising from the sale and use of fossil fuels." (Aloha Mot. at 13.) Aloha is incorrect. The Underlying Lawsuits specifically allege that "*each defendant* had actual knowledge that its fossil fuel products were hazardous." (*See, e.g.*, Ex. 15, ¶ 28 and Ex. 16, ¶ 2 (emphasis added).) Moreover, the Underlying Lawsuits clearly assert that references to "Defendants" *include* Aloha (*see, e.g.*, Ex. 15, ¶ 10) and, under settled Hawaii law, the complaints' allegations control. *See Hawaiian Holiday*, 872 P.2d at 234–35. As discussed above and in the AIG Motion, those allegations—whether singling out Aloha or discussing all defendants, including Aloha—establish Aloha's liability does not arise from accidental conduct.

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[5] *Tri-S Corp. v. Western World Insurance Co.*, 135 P.3d 82 (Haw. 2006), is not, as Aloha contends, based on "similar circumstances." (*See* Aloha Mot. at 11.) There, the court relied on undisputed statements in the insured's affidavit that the event was an accident to conclude there was a possibility of coverage.

It also does not matter that, as Aloha contends, a "reasonable investigation" would have established Aloha was not acquired by Sunoco until 2014, and "it is certainly possible" that, as a result, Aloha "would be found not to have had knowledge of the industry information that is alleged by the Climate Plaintiffs as the basis for 'foreseeability' of harm from selling fossil fuels." (*See* Aloha Mot. at 13.)[6] The possibility that the allegations of the Underlying Lawsuits are ultimately disproven is not relevant to the determination of whether there is a duty to defend. As the Hawaii Supreme Court has explained, "[l]iability of the insured to the plaintiff is not the criterion; it is the allegation in the complaint of a cause of action which, *if sustained*, will impose liability covered by the policy." *Allstate Ins. Co. v. Pruett*, 186 P.3d 609, 623 (Haw. 2008) (emphasis added); *see also Com. & Indus. Ins. Co. v. Bank of Hawaii*, 832 P.2d 733, 736 (Haw. 1992) ("The duty to defend is not

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[6] Aloha also cannot create coverage by making statements that contradict the allegations in the Underlying Lawsuits. (*See, e.g.*, Ex. 15, at ¶ 20 (alleging that Aloha was formerly known as Associated Oil, which, at times relevant to this litigation, was a subsidiary of Phillips 66).) For example, Aloha claims it did not purchase the assets of Phillips 66 in Hawaii until *after* 1977. (Aloha SMF ¶¶ 32, 33.) But the "History" document Aloha attaches to its SMF states that in "1977 Aloha Petroleum, Ltd. was established by purchasing some of the Hawaii assets from Phillips 66." (Aloha Ex. 20.) And, in its Motion, Aloha asserts it "was first incorporated as a Hawai'i corporation by independent incorporators in 1977 . . . ." (Aloha Mot. at 13, n.6.) But the Aloha Petroleum website on which the Aloha "History" document is found proudly proclaims Aloha's "100 Years in Hawaii." *See* www.alohagas.com.

outcome-determined . . . [it] 'is determined at the time suit is brought and not at the conclusion of litigation.'")

Aloha has failed to meet its burden to establish that the liability it faces in the Underlying Lawsuits arises from an "occurrence."

2. Aloha Cannot Establish the Alleged Property Damage Occurred During the Policy Periods of the AIG Policies.

The Insuring Agreements provide, in relevant part, that the AIG Insurers will pay those sums Aloha becomes legally obligated to pay as damages because of property damage that *takes place during the policy period* and is caused by an "occurrence." (*See* SOF ¶¶ 15–18, 21; Noborikawa Decl. ¶¶ 39–41, 44.) Aloha concedes there are no specific allegations in the Underlying Lawsuits of property damage that occurred during the policy periods of the AIG Policies—February 1, 1984 to April 1, 2010. (Aloha Mot. at 14–15.)

Instead, Aloha relies on undated, generalized allegations of purported property damage to argue it is "*possible* that the alleged property damage occurred during the relevant policy periods" (*id.*), and cites to one case, *Group Builders, Inc. v. Admiral Insurance Co.*, Case No. 29729, 2013 WL 1579600 (Haw. App. Apr. 15, 2013), to support its position. *Group Builders*, however, is not so broad. There, a contractor sought coverage from its insurer for a lawsuit claiming that design and construction defects led to a mold infestation. *Grp. Builders*, 2013 WL 1579600, at *1. The complaint in the underlying lawsuit alleged the mold growth was discovered

after the relevant policy period but did "not specify when the mold growth began, when any property damage occurred, or what caused the mold to grow." *Id.* at *8. At the time the insurer declined a defense, "the source of the mold had not been alleged . . . [or] determined . . . ." *Id.*

That is not the case here. The Underlying Lawsuits allege the source of the property damage to be climate disruption caused by human-driven emissions of greenhouse gases primarily from consumption of Aloha's fossil fuel products. (*See* Ex. 15, ¶ 36.) That climate disruption, according to the Underlying Lawsuits, would not arise until 2000 at the earliest. Indeed, the Underlying Lawsuits allege Aloha was aware that scientists *uniformly predicted* that "climate-related effects" from CO_2 emissions (preceding the alleged property damage) would not arise until "the end of the century [*i.e.*, 2000]." *Id.* at ¶¶ 55–56; *see also* ¶ 65 (discussing a 1979 report predicting it would not be until 2000 that the first "clear effects of global warming might be detected").

The Underlying Lawsuits further allege that researchers predicted "[n]oticeable temperature changes would occur *around 2010* as the [carbon dioxide] concentration reaches 400 ppm" and in fact "surpassed 400 parts per million *in 2015* for the first time in millions of years." (*Id.* at ¶ 62 (emphasis added).) As Aloha concedes, these "climate-related effects" are a necessary *precursor* to any potentially covered property damage. (*See, e.g.*, Aloha Mot. at 1.) Indeed, Aloha concedes that

the Underlying Lawsuits allege Aloha's products "caused an extended chain reaction of events over a period of eight decades," which ultimately caused property damage. (Aloha Mot. at 1.) Thus, unlike *Group Builders*, the Underlying Lawsuits include allegations that provide crucial context and place the timing of any alleged property damage *after* the policy periods of the AIG Policies.

Nor is it enough, as Aloha contends, that the Underlying Lawsuits allege "ongoing emissions since at least the 1950s, and that no particular CO2 molecule can be traced to any particular source" to establish the possibility of property damage during the policy periods. (Aloha Mot. at 15–16.) "Under an occurrence policy," like the AIG Policies, "the event that triggers potential coverage is the sustaining of actual damage by the complaining party and not the date of the act or omission that caused the damage." *Sentinel Ins. Co. v. First Ins. Co. of Haw. Ltd.*, 875 P.2d 894, 905 (Haw. 1994). "Simply stated, the relevant focus under an occurrence policy is on the *effect*, not the *cause*." *Id.* The Underlying Complaints' allegations of "ongoing emissions since at least the 1950s" relate to the *cause*, not the *effect*, and do not demonstrate "actual damage" in the policy periods sufficient to trigger coverage.

The allegations of the Underlying Lawsuits, read as a whole, are fundamentally about abating *future* damages and are replete with allegations of anticipated future harms, potential "effects" of which indisputably did not occur

during the policy periods of the AIG Policies. (*See, e.g.*, Ex. 15, ¶ 152(e) ("Plaintiffs have planned and are planning, at significant expense, adaptation and mitigation strategies to address climate change related impacts in order to preemptively mitigate and/or prevent injuries to Plaintiffs and County residents."); Ex. 16, ¶ 199 (same); *see also* AIG's Mot. at 15–18.) Indeed, Honolulu and Maui state they brought the Underlying Lawsuits as an exercise of police power *to prevent* injuries to and pollution of the City's property and waters, and *to prevent* and abate hazards to the environment. (*See* Ex. 15, ¶ 16; Ex. 16, ¶ 16.)

Here, the Underlying Complaints contain specific, concrete, dated allegations of property damage *after* the relevant policy periods and, further, are replete with allegations of potential *future* damage. Neither Aloha's cherry-picked references to generalized, undated allegations of purported property damage nor *Group Builders* establish property damage during the relevant policy periods. *See Sentinel*, 875 P.2d at 909 n.13 (insured's burden to prove loss is covered).

3. Aloha Cannot Establish It Faces Liability for "Damages Because of" Property Damage.

The AIG Policies only cover sums the insured shall become legally obligated to pay as "damages *because of*" property damage. (*See* SOF 15–18; Noborikawa Decl. ¶¶ 38–41.) Aloha contends the Underlying Lawsuits seek damages *because of* property damage based on the request for relief for "unspecified 'compensatory damages'" in the Underlying Lawsuits and its assertion that "it is certainly *possible*

that those compensatory damages are for 'property damage' caused by an occurrence during the policy periods." (Aloha Mot. at 17.) Aloha's boundless speculation, divorced from the voluminous and detailed allegations that preceded the standard request for relief, does not prove the "possibility" of coverage.

Even if the Court finds that the Underlying Lawsuits allege some property damage during the policy periods (it should not), the liability Aloha faces is not for *damages because of* any such property damage. The parties agree that, under Hawaii law, "because of" has the same meaning as the synonymous term "arising out of." *Cf.* Aloha Mot. at 16 *with* AIG Mot. at 18 (citing *Ass'n of Apt. Owners of the Moorings, Inc. v. Dongbu Ins. Co.*, No. 15-00497 BMK, 2016 WL 4424952, at * 4 (D. Haw. Aug. 18, 2016) (quoting *C. Brewer & Co. v. Marine Indem. Ins. Co. of Am.*, 347 P.3d 163, 166 (Haw. 2015)), *aff'd*, 731 F. App'x 713 (9th Cir. 2018)). In the insurance context, the phrase "arising out of" "is often interpreted to require a causal connection between the injuries alleged and the objects made subject to the phrase." *C. Brewer*, 347 P.3d at 166 (quotation omitted). For example, in analyzing an exclusion containing the phrase "arising out of," the Hawaii Supreme Court explained the "causal requirement" that an injury arise out of a particular incident "has been held *to be more than 'but-for' causation*[.]" *See Oahu Transit Servs., Inc. v. Northfield Ins. Co.*, 112 P.3d 717, 723 n.11 (Haw. 2005) (citation omitted) (emphasis added).

Hawaii case law on this key issue is consistent with the growing trend of coverage decisions around the country in nuisance cases brought by government entities that have held "because of" requires more than a tenuous "but for" connection.[7] In a series of decisions discussed more fully in AIG's Motion, state and federal appellate courts have held that various government entities seeking to hold opioid dispensers responsible for the future costs of abating a public nuisance created by the opioid crisis were not seeking "damages because of" bodily injury, *even though* their economic injury may not have occurred *but for* the bodily injury. (*See* AIG Mot. at 19–21.) According to those courts, the allegations involving injuries sustained by citizens merely provided context for their claims to abate the alleged nuisance and prevent future damages. (*Id.*)

The same is true here. Honolulu and Maui seek funds for their "increased economic costs" in responding to the global warming crisis, not for the specific costs of repairing any specifically identified past property damage. For example, Honolulu alleges that more than $19 billion in assets and 38 miles of roads are *at risk of damage or destruction* due to sea level rise estimated to occur by the year 2100. (Ex. 15, ¶ 150(b).) And Maui alleges that more than $3.2 billion in assets and

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[7] *See Ass'n of Apartment Owners of the Moorings*, 2016 WL 4424952, at *3 (noting a court may "look[] to well-reasoned decisions from other jurisdictions" in the absence of controlling Hawaii case law).

11.2 miles of major roads are *at risk of* inundation and destruction due to sea level rise estimated to occur by the year 2100. (Ex. 16, ¶¶ 170–171.) Not one of the allegations of property damage, however, includes an articulated or requested dollar amount incurred to remediate or repair past alleged property damage. Simply put, Aloha cannot establish the liability it faces is for "damages because of" actual property damage, as opposed to a concern about, and a desire to abate, the impacts of climate change and to prevent potential future property damage.

4. AIG Did Not Concede the Possibility of Coverage.

Contrary to Aloha's assertion, AIG neither "flip-flopped in its position" that the Underlying Lawsuits were not covered, nor "implicitly conceded" there were no provisions other than the pollution exclusion "serving as a basis to deny a defense." (Aloha Mot. at 2; *see also id.* at 6 (same).) As Aloha notes, in the "April 19, 2021 coverage position letter, National Union asserted that it was denying coverage under the 1985 National Union Policy (then, the only AIG policy located) based solely on its application of the pollution exclusion." (Aloha Mot. at 17; *see also* Ex 13.) National Union's letter satisfied its obligation under Hawaii law to "provide a reasonable explanation of the basis . . . for denial of a claim." *See* Haw. Rev. Stat. § 431:13-103(11)(p).

In that same letter, however, National Union also took "th[e] opportunity to advise Aloha that additional provisions of the policy may serve to limit or preclude

coverage," including the "occurrence," property damage during the policy period, and "damages because of" property damage requirements of the insuring agreement, and expressly "*reserve[d] its rights to assert these provisions at a later time.*" (Aloha Ex. 13, at 3 (emphasis added).) This is a right National Union has exercised numerous times.

For example, in September 2022, National Union filed its Answer and Affirmative Defenses. (*See* ECF No. 17.) In addition to citing the pollution exclusion, National Union stated no coverage was due because the Underlying Lawsuits do not allege an "occurrence" and do not allege property damage that occurred during the policy periods, and the relief sought is not for "damages because of" property damage. (*See id.*) National Union reiterated those grounds orally and in writing several times, including in its responses to Aloha's First Set of Interrogatories, a subsequent letter denying coverage under all twelve AIG Policies, and its Answer and Affirmative Defenses to Aloha's First Amended Complaint. (*See* Ex. A,[8] at 4; Aloha Ex. 13; ECF No. 53.) In sum, the AIG Insurers have maintained all their defenses to coverage throughout their correspondence and communications with Aloha.

[8] Ex. A refers to Exhibit A, attached to the Second Declaration of Kari K. Noborikawa, filed herewith.

Nor does National Union's use of the word "may" in its initial coverage letter when discussing certain coverage defenses—a letter in which National Union explicitly denied coverage—amount to a concession that coverage for the Underlying Lawsuits was nevertheless "possible." (*See* Aloha Mot. at 18 (citing cases).) The Pennsylvania and Illinois cases cited by Aloha do not establish otherwise; in those cases, unlike here, the insurers, uncertain about coverage, *did not deny coverage at all* and instead provided a defense. *See Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods Co.*, 828 N.E.2d 1092, 1104 (Ill. 2005); *Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 948 A.2d 834, 852 (Pa. Super. Ct. 2008), *aff'd*, 2 A.3d 526 (Pa. 2010).

Indeed, the Hawaii Supreme Court has rejected the very argument proffered by Aloha. In *Enoka v. AIG Hawaii Insurance Co.*, 128 P.3d 850 (Haw. 2006), the appellant, Enoka, argued AIG Hawaii had conceded the applicability of certain coverage defenses because it had not raised those defenses in its initial denial. *See Enoka*, 128 P.3d at 854. The Hawaii Supreme Court disagreed: "While it is true that an insurer's specification of one of several available grounds for disclaimer may be taken by the insured as an indication that the other grounds have been overlooked, as a basic matter of fairness we see no reason why this circumstance should operate to bar the later assertion of the other grounds for disclaimer where the insured cannot claim to have suffered any degree of prejudice." *Id.* at 870.

As the Hawaii Supreme Court explained, "[t]he record . . . demonstrates that AIG maintained its position of no coverage for no-fault benefits to Enoka throughout the course of its correspondence with her. AIG never changed its position regarding coverage and never made any representations to the contrary." *Id.*, 128 P.3d at 871. The Supreme Court thus determined that AIG Hawaii had not conceded the applicability of any coverage defense. Here too, under *Enoka*, Aloha's "concession" argument should be rejected.

C. Coverage for the Underlying Lawsuits Is Also Precluded by the Pollution Exclusions.

Aloha is seeking summary judgment based on two variations of the pollution exclusion in the AIG Policies. (Aloha Mot. at 22–25.) For purposes of the Aloha Motion, the parties agree that the differences between the variations are immaterial. (*See* Aloha Mot. at 23.) Both require the discharge, dispersal, or release of a substance described as a pollutant in essentially the same way. As demonstrated in the AIG Motion, the allegations in the Underlying Lawsuits satisfy those elements.[9] (AIG Mot. at 22–25.)

[9] There is a third variation of pollution exclusion in two National Union Policies with a policy period of February 1, 1988–February 1, 1989 that states: "THERE IS NO COVERAGE FOR NON-SUDDEN OR GRADUAL EMISSIONS OF POLLUTANTS . . . ARISING OUT OF THE PRODUCT/COMPLETED OPERATIONS HAZARD . . . ." (*See* SOF 25; Noborikawa Decl. ¶ 48.) Aloha does not challenge the application of this exclusion in its Motion. For the reasons stated in AIG's Motion, coverage for the Underlying Lawsuits is also barred by

This Court has found the language in the pollution exclusions unambiguous and applied it to bar coverage for pollution in the form of concrete dust and toxic fumes from a drain cleaner. *See Allen v. Scottsdale Ins. Co.*, 307 F. Supp. 2d 1170, 1176–77 (D. Haw. 2004) (Ezra, C.J.) (no duty to defend or indemnify); *Apana v. TIG Ins. Co.*, 504 F. Supp. 2d 998, 1006 (D. Haw. 2007) (Seabright, J.) (no duty to indemnify). Despite the clear and unambiguous language of these exclusions, Aloha contends the AIG Insurers have a duty to defend the Underlying Lawsuits based on the so-called "legal uncertainty rule," because the Hawaii Supreme Court has not addressed whether this language applies only to "traditional" environmental pollution, or more broadly. (Aloha Mot. at 24–25.)

As an initial matter, the Court need not decide whether the pollution exclusions apply because there is no coverage for the Underlying Lawsuits for the reasons discussed above. In any event, it does not matter which test a Hawaii court would apply because the Underlying Lawsuits plainly allege traditional environmental pollution and thereby satisfy even the more restrictive test.

Citing no authority, Aloha contends the Underlying Lawsuits do not allege "traditional" environmental pollution because the liability it faces arises from "claims predicated on the ordinary and intended use of a policyholder's product."

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this exclusion. (AIG Mot. at 25–26.)

Id. at 24–25. This is not the test in Hawaii or elsewhere. As Judge Ezra has explained, the question is whether "a reasonable policy holder would consider the substance at issue to be a pollutant in the specific context of the underlying case." *Nautilus Ins. Co. v. Hawk Transport Servs., LLC*, 792 F. Supp. 2d 1123, 1134 (D. Haw. 2011). Under this test, there is no doubt that the alleged decades-long efforts by Aloha to extract and promote its fossil fuel products knowing that use of such products resulted in hazardous greenhouse gas emissions into the atmosphere would commonly be considered environmental pollution.

Two cases from this District highlight how this standard has been applied. First, in *Apana v. TIG Insurance Co.*, Judge Seabright considered the application of the Total Pollution Exclusion to personal injury claims based on the alleged negligent use of an "extremely strong drain cleaner" while inside a store, which generated "noxious fumes." *Apana*, 504 F. Supp. 2d at 1001. In describing the debate around interpretation of the exclusion, Judge Seabright explained:

> [t]here is a deep split among state courts regarding whether Total Pollution Exclusion Endorsements preclude coverage in cases of personal injury *resulting from relatively isolated inhalation or exposure to pollutants* or whether such clauses only preclude coverage in cases of 'traditional' environmental pollution.

Id. at 1003 (emphasis added). Judge Seabright found it was an "open question" under Hawaii law whether the exclusion would apply to instances of isolated

exposure to pollutants *like in that case*, and, therefore, there was a possibility of coverage requiring a defense of the personal injury claims. *Id.* at 1004.[10]

By contrast, four years after *Apana*, Judge Ezra found the Total Pollution Exclusion barred defense coverage for a variety of claims, including state law claims of trespass and nuisance, based on the intentional dumping of hazardous substances on land used for agricultural purposes. *Hawk Transport Servs.*, 792 F. Supp. 2d at 1125–26. Judge Ezra noted the split of authority discussed in *Apana*, but found he did not have to "resolve the issue of which test Hawaii would apply" because "the pollutants alleged to have been dispersed . . . involve 'traditional environmental pollution'" as would be commonly understood by a reasonable policyholder. *Id.* at 1134.

Reading *Apana* and *Hawk Transport Services* together, it cannot be credibly disputed that the pollution exclusions apply to bar coverage for the Underlying Lawsuits. Nothing in the language of the exclusions limits their application to "traditional" environmental pollution or otherwise carves out product liability claims. Tellingly, Aloha makes no attempt to argue that the allegations can withstand the plain, unambiguous terms of the exclusions. Regardless, even

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[10] Ultimately, however, Judge Seabright concluded the insurer had no duty to indemnify "under a plain, common, and ordinary understanding" of the policy language. *Id.* at 1006.

assuming "traditional" environmental pollution must be present for the exclusion to apply, the Underlying Lawsuits allege just that. Unlike *Apana*, the Underlying Lawsuits do not allege isolated, accidental, or limited exposure to toxins in a confined setting.[11] As discussed at length above and in the AIG Motion, they involve Aloha's repeated and intentional sale of products that resulted in the gradual discharge of known pollutants into the atmosphere.

In sum, it does not matter whether Hawaii courts would side with those state courts interpreting the exclusion more narrowly as applying only to "traditional" environmental pollution, or more broadly giving effect to the literal meaning of the policy language; coverage for the Underlying Lawsuits is barred under either interpretation. As a result, the legal uncertainty rule cannot apply to trigger defense coverage as there is no open question of Hawaii law that has to be resolved for this Court to determine whether the exclusion applies.

III. CONCLUSION

For the foregoing reasons and those set forth in the AIG Motion, the AIG Insurers respectfully request that the Court deny the Aloha Motion, grant the AIG Insurers' Motion, and grant such further relief as the Court finds just and proper.

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[11] Aloha also cites *MacKinnon v. Truck Insurance Exchange*, 73 P.3d 1205 (Cal. 2003) as a case imposing limits on the pollution exclusion. (Aloha Mot. at 23.) Like *Apana*, *MacKinnon* involved a personal injury claim based on the alleged negligent and isolated use of toxic chemicals. 73 P.3d at 1207. These are not the facts alleged in the Underlying Lawsuits.

DATED: Honolulu, Hawaii, July 17, 2023.

/s/ Kari K. Noborikawa

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