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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) **REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF ALOHA PETROLEUM, LTD.'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE DUTY TO DEFEND [Dkt.**

Defendants.	**54]; CERTIFICATE OF COMPLIANCE WITH WORD LIMIT; CERTIFICATE OF SERVICE** Hearing: Date: August 24, 2023 Time: 9:00 a.m. Judge: Honorable Jill A. Otake

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF ALOHA PETROLEUM, LTD.'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE DUTY TO DEFEND

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I. INTRODUCTION

AIG's Opposition to Aloha's Motion for Partial Summary Judgment on the Duty to Defend highlights the weakness of its argument by essentially ignoring the seminal Hawai'i Supreme Court case governing this dispute, and attempting to substitute its own insurer-friendly legal standard. Yet, try as AIG might to distract from the proper legal analysis, the fact remains that there are sufficient allegations in the Climate Lawsuits' complaints that, if proven, would fall within the scope of coverage of the AIG Policies. That there is a *possibility* of coverage under the policies for some of the claims in these lawsuits is a sufficient basis to trigger AIG's duty to defend under Hawai'i law. Hence Aloha's Motion should be granted.[1]

II. ARGUMENT

A. Aloha Properly States the Duty-to-Defend Standard under Hawai'i Law

AIG begins its Opposition Brief ("Opp.") with a false contention that Aloha believes the duty to defend is "absolute" or an "insurmountable" barrier for an insurer. *See* Opp., at 2-3. Aloha has made no such assertion. Rather, Aloha has merely restated the duty-to-defend standard under Hawai'i law – that only a *possibility* of coverage is required to trigger the duty to defend, and that all doubts as to the existence of that duty are resolved in the policyholder's favor – and Aloha

[1] Aloha incorporates herein all defined terms as used in Aloha's Opening Brief ("Aloha Br.").

has applied that standard to the Climate Lawsuits. *See 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)). Any inference AIG draws from Aloha's statement of this standard is AIG's alone, and simply a reflection of the fact that the duty to defend exists even if the possibility of coverage is "remote." *See id.*

Therefore, AIG's citation to various cases finding no duty to defend does not assist in determining whether AIG has a duty to defend Aloha.[2]

[2] Most of the cases cited by AIG in its Opposition stand for the irrelevant point that contractual claims are categorically not occurrences under Hawai'i law. *See St. Paul Fire & Marine Ins. Co. v. Bodell Constr. Co.*, 601 F. Supp. 3d 858 (D. Haw. 2022) (no occurrence where underlying lawsuit premised on contractual relationship); *Nautilus Ins. Co. v. RMB Enters., Inc.*, 497 F. Supp. 3d 936 (D. Haw. 2020) (same); *State Farm Fire & Cas. Co. v. Chung*, 882 F. Supp. 2d 1180 (D. Haw. 2012) (same). The remaining cases cited by AIG merely apply unambiguous exclusions not contained in the AIG Policies. *See Dairy Rd. Partners*, 992 P.2d at 122 (negligent supervision claims barred by exclusion if employee acting within scope of employment, or, if employee was not, barred by fact that plaintiffs failed to state negligent supervision claim); *Keown v. Tudor Ins. Co.*, 293 P.3d 137 (Haw. Ct. App. 2012) (underlying lawsuit barred by exclusion precluding coverage for services performed by policyholder for entity he controlled).

B. AIG Does Not Demonstrate that No Possibility of Coverage Exists

1. AIG erroneously asserts that recklessness constitutes intentional conduct that precludes a defense duty[3]

AIG maintains that certain allegations in the Climate Lawsuits, which Aloha identifies as allegations of recklessness, do not constitute an "occurrence" under the AIG Policies. *See* Opp., at 4-5. AIG's position fundamentally misunderstands – or ignores – established Hawai'i law to the contrary.

As an initial matter, AIG does not actually dispute that the underlying complaints allege reckless conduct. AIG acknowledges the allegations of "actual malice," while recognizing Hawai'i law defines actual malice as including "reckless disregard of the law or of a person's legal right." Opp., at 5. AIG further highlights the allegations (contained in the same paragraphs alleging "actual malice") that Aloha "acted with conscious disregard for the probable dangerous consequences" of its conduct, *i.e.*, the very definition of "reckless." *See* Aloha Br., at 9 n.3.

AIG instead brushes aside Aloha's discussion of recklessness as a mere "suggest[ion]" that "'reckless' conduct might still be fortuitous conduct." *See* Opp., at 4 n.2. "[R]eckless[ness]," AIG asserts, is "precisely the type of injury" that "is not an accident under Hawaii law." *See* Opp., at 4 n.2.

[3] AIG's heading states that Aloha "cannot establish" the existence of an occurrence. *See* Opp., at 4. For avoidance of doubt, the standard is a *possibility* of an occurrence; Aloha need not prove, for duty-to-defend purposes, that an occurrence exists.

The Hawai‘i Supreme Court, however, has rejected AIG's argument, holding that recklessness "does not involve intent or expectation of injury" and is "a covered occurrence." *Tri-S Corp.*, 135 P.3d at 103 (Haw. 2006); *see also* Aloha Br., at 11-12. AIG does not even try to reconcile its position on recklessness with *Tri-S*. Instead, it merely distinguishes the holding of *Tri-S* on an insignificant factual basis.[4] Even if *Tri-S* can be distinguished on that factual basis, which Aloha disputes, that does not address *Tri-S*'s holding that recklessness is not intentional conduct.

Accordingly, because AIG concedes the Climate Lawsuits allege reckless conduct, because the Climate Lawsuits allege causes of action that do not require intentional conduct,[5] and because AIG offers no explanation for why *Tri-S* does not apply here (nor could it), Aloha has demonstrated the possibility of an occurrence, and met its burden on this point for the duty to defend.

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[4] AIG attempts to distinguish *Tri-S* on the basis that, unlike here, there were "undisputed statements" in the policyholder's affidavit that an accident occurred. *See* Opp., at 10 n.5. AIG overemphasizes the affidavit. The court's discussion in *Tri-S* focuses heavily on the fact that the complaint alleged the potential of reckless conduct. *See Tri-S*, 135 P.3d at 102-03. Moreover, AIG's focus on this affidavit is inconsistent with AIG's own view of the duty to defend, that the complaint's allegations are all that matters. *See* Opp., at 9.

[5] *See* Aloha Br., at 10-11. Aloha does not contend, as AIG implies, that the mere presence of causes of action that may be satisfied by non-intentional conduct means there is an occurrence. *See* Opp., at 9.

2. AIG does not establish that there is no possibility of property damage during the policy periods

AIG does not dispute that the Climate Lawsuits include allegations of undated property damage. Nor does AIG identify any statements that conclusively establish those allegations cannot possibly refer to property damage occurring during any of the AIG Policies' periods (generally 1984-1989, 2004-2010). Instead, AIG offers only an assumption, supported by cherry-picked historical sources excerpted in the complaints which predicted that the effects of climate change would not arise until 2000. *See* Opp., at 13.

AIG's argument implicitly asks the Court, without citing to any authority, to ignore black-letter law that "[a]ll doubts as to whether a duty to defend exists are resolved against the insurer and in favor of the insured." *Tri-S*, 135 P.3d at 97. The Climate Lawsuits allege a necessary condition for property damage (ongoing emissions since at least the 1950s),[6] and allegations of resulting property damage taking place at unspecified time periods. It is therefore possible that property damage allegedly occurred during the AIG Policies' periods, and that is enough to trigger the duty to defend.[7]

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[6] *See* Aloha Br., at 15-16. Aloha does not argue that this fact (and the untraceable nature of CO2) is alone a sufficient condition to trigger coverage, as AIG suggests. *See* Opp., at 14.

[7] Other jurisdictions agree. *See, e.g.*, *Nat'l Fire & Marine Ins. Co. v. Redland Ins. Co.*, No. 3:13-CV-00144-LRH-VPC, 2014 WL 3845153, at *5 (D. Nev. Aug. 5,

Regardless, AIG's conclusion that the complaints allege "scientists uniformly predicted" that anthropogenic "climate disruption," the "necessary precursor" to property damage, would not be detected until at least 2000 is plainly contradicted by specific allegations in the complaints. For example:

- "[An Exxon 1982 publication] indicated that Exxon estimated that by 1979 a global warming effect of approximately 0.25° C may already have occurred." Ex. 15 at ¶74 n.51; Ex. 16 at ¶81 n.52.

- "In 1988, National Aeronautics and Space Administration (NASA) scientists confirmed that human activities were actually contributing to global warming." Ex. 15 at ¶89.a; Ex. 16 at ¶99.a.

- A mid-1990s environmental report from industry sources provided "[t]he long-term tide gauge records at a number of locations along the N.S. coast have shown sea level has been rising over the past century[.]" Ex. 15 at ¶84; Ex. 16 at ¶94.

Even if AIG's argument were accepted at face value, the conclusion AIG draws is suspect. The AIG Policies were in force over several decades, including, *inter alia*, the years 2004 through 2010. Thus, AIG seemingly argues not only that property damage did not occur until after 2000, but that it actually did not occur until *after 2010* – notwithstanding its assertion that "scientists uniformly predicted" that

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2014) (finding duty to defend where complaint did not "affirmatively foreclose[] the possibility that the property damage occurred during the relevant policy periods"); *Valley Forge Ins. Co. v. Am. Safety Risk Retention Grp., Inc.*, 2006 U.S. Dist. LEXIS 24915, at *13-14 (D. Or. Feb. 9, 2006) (finding duty to defend even though date of property damage was ambiguous, and insurer argued complaint "necessarily lead[] to only one reasonable inference" that damage predated policy period).

climate change effects "would not arise until 'the end of the century [*i.e.*, 2000].'" *See* Opp., at 13.

AIG's final argument, that the Climate Lawsuits are "fundamentally about abating future damages and are replete with allegations of anticipated future harms," *see* Opp., at 14-15, misses the point. Those allegations do not negate the other allegations of undated property damage from which the possibility of coverage arises.

Accordingly, Aloha has established the possibility that the Climate Lawsuits allege property damage during the AIG Policies' periods, thereby satisfying its burden for the duty to defend.

3. AIG does not establish that there is no possibility the Climate Lawsuits seek damages "because of property damage"

That the Climate Lawsuits allege damages "because of property damage" is not, as AIG declares, "boundless speculation." *See* Opp., at 16. As set forth in Aloha's Brief, the Climate Lawsuits: (1) allege undated property damage, and (2) request judgment for "[c]ompensatory damages in an amount according to proof." *See* Aloha Br., at 17. Because the Climate Lawsuits do not confine the recovery of compensatory damages to any specific injury, it is clearly possible that the compensatory damages are sought, at least in part, to compensate the Climate Plaintiffs for property damage allegedly occurring during an unspecified time

period. That "mere *potential* for coverage," even if "remote," is all Aloha must show to trigger the duty to defend on this issue. *See Tri-S*, 135 P.3d at 97.[8]

Notwithstanding that possibility, AIG suggests that because the Climate Lawsuits are *also* about recovery sought for "'increased economic costs' in responding to the global warming crisis," such as costs to prevent future property damage, those are the *only* compensatory damages the Climate Plaintiffs seek. *See* Opp., at 17-18. AIG then concludes, relying on out-of-circuit case law concerning bodily injury from opioid use, that those increased economic costs are not "because of" the alleged property damage.

Although it is certainly a *possibility* that Aloha is eventually found liable only for costs unrelated to past property damage, a contrary finding is also possible. AIG cannot skirt its defense duty by identifying only those possibilities precluding coverage. The opioid cases cited by AIG do not disturb this conclusion.

In those cases, the underlying governmental plaintiffs did not seek to recover derivative damages for bodily injury on behalf of injured citizens, nor did the

[8] To the extent AIG is contending that a greater showing is necessary – that Aloha must definitively "establish the liability it faces *is for* 'damages because of' actual property damage," *see* Opp., at 18 (emphasis added), rather than "possibly for" damages because of property damage – AIG is wrong.

plaintiffs contend that they themselves suffered bodily injury.[9] Consequently, the dispute concerned the degree of causal relationship tolerated by the term "because of," as between the economic harms incurred by the government plaintiffs, and the bodily injuries their citizens allegedly suffered.

In contrast, here, despite AIG's attempt to narrowly characterize the damages sought as "abat[ing] the impacts of climate change" and "prevent[ing] potential future property damage," *see* Opp., at 18, the Climate Lawsuits describe property damage the Climate Plaintiffs *themselves* allegedly suffered in the past. In conjunction with the request for compensatory damages, it is clear that these damages could be "because of" that past property damage incurred by Climate Plaintiffs – even if "because of" means something more than "but for" as AIG asserts.[10]

In sum, AIG does not identify any allegations in the complaints that conclusively foreclose the possibility that the compensatory damages are sought for

[9] *See Ace Am. Ins. Co. v. Rite Aid Corp.*, 270 A.3d 239, 248 (Del. 2022); *Acuity v. Masters Pharm., Inc.*, 205 N.E.3d 460, 473 (Ohio 2022); *Westfield Nat'l Ins. Co. v. Quest Pharms., Inc.,* 57 F.4th 558, 560 (6th Cir. 2023).

[10] AIG declines to engage with the definition of "because of" as set forth in the case it cites for the point that "because of" is analogous to "arising out of." *See* Opp., at 16 (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), *aff'd*, 731 F. App'x 713 (9th Cir. 2018)).

pre-existing, covered property damage. Accordingly, that possibility means Aloha has met its burden on this issue.

4. AIG previously acknowledged that its newly-asserted grounds for denying a defense were insufficient

In AIG's initial letter denying a defense to Aloha based solely on the pollution exclusion, AIG merely reserved rights on the three issues on which it is now denying a defense. *See* Aloha Br., at 17-18. Specifically, in reserving its rights on the issues of whether there is an "occurrence," whether there is property damage during the policy periods, and whether the Climate Plaintiffs seek damages because of property damage, AIG implicitly acknowledged the possibility of coverage notwithstanding these potential defenses. *See id.*

In raising the point that AIG acknowledged the possibility of coverage under the 1986, 1987, and First and Second 1988 National Union Policies, Aloha did not argue that AIG waived or is estopped from relying on certain coverage defenses. *See id.* Therefore, AIG's citation to *Enoka v. AIG Hawaii Insurance Co.*, 128 P.3d 850 (Haw. 2006), in which the policyholder argued that the insurer waived or was estopped from raising certain policy exclusions, is misplaced. *See* Opp., at 20.

In *Enoka*, in stating "that an insurer's specification of one of several available grounds for disclaimer" does not "operate to bar the later assertion of the grounds for disclaimer" without policyholder prejudice, the Hawai'i Supreme Court was discussing whether estoppel "operates to prevent an insurer from asserting a

previously unmentioned coverage based defense." 128 P.3d at 869-70 (citations omitted).

Aloha is instead focused on the interplay between the duty-to-defend standard, requiring only a *possibility* of coverage, and AIG's acknowledgement in a coverage position letter that certain coverage defenses only *possibly* applied. *See* Aloha Br., at 17-18. As Aloha noted in its Opening Brief, AIG previously had expressed its view that additional provisions (a lack of "damages" "because of" "property damage" occurring during the policy periods caused by an "occurrence") "*may* serve to limit or preclude coverage." *Id.* at 17. "In common and legal usage, 'may' reflects possibility, not certainty." *U.S. v. Arias-Espinosa*, 704 F.3d 616, 619 (9th Cir. 2012) (citing *Webster's Third New International Dictionary of the English Language* 1396 (1993); *Black's Law Dictionary* 1068 (9th ed. 2009)).

Indeed, the two cases Aloha cited in its Opening Brief do not concern waiver or estoppel, but reflect that the use of "may" or similar equivocal language is an acknowledgement of possibility. *See* Aloha Br., at 18. In attempting to distinguish these cases on the basis that "the insurers, uncertain about coverage, did not deny coverage at all," *see* Opp., at 20, AIG proves Aloha's point. For instance, as acknowledged by the Supreme Court of Illinois in *Midwest Sporting Goods Co.*, 828 N.E.2d 1092 (Ill. 2005), because the insurer stated that the claim "may not be covered," the insurer "correctly agreed" to defend. *See* Aloha Br., at 18.

Accordingly, because AIG acknowledged that certain coverage defenses only *possibly* applied, AIG tacitly conceded that those coverage defenses could not preclude its duty to defend.

5. The AIG Policies' pollution exclusions cannot serve as a basis for denying a defense of the Climate Lawsuits

AIG does not dispute that at least two of its twelve policies (the 1986 and 1987 National Union Policies) do not contain a pollution exclusion that precludes a duty to defend Aloha. Hence, regardless of AIG's pollution exclusion argument, it cannot serve as a basis for completely avoiding its defense obligation.[11]

In its Opposition, AIG asserts that whether liability arises from the ordinary and intended use of a policyholder's product is not the test for determining if "traditional" environmental pollution is alleged; that it is instead "whether 'a reasonable policy holder would consider the substance at issue to be a pollutant in the specific context of the underlying case.'" Opp., at 23 (citing *Nautilus Ins. Co. v. Hawk Transport Servs., LLC*, 792 F. Supp. 2d 1123, 1134 (D. Haw. 2011)).

[11] Prior to summary judgment briefing, AIG had not asserted that the pollution exclusion in two other policies – the First and Second 1988 Policies – precluded a duty to defend Aloha. Yet, AIG argues in its Opposition that Aloha did not challenge the application of this particular exclusion. *See* Opp., at 21 n.9. AIG fails to mention, however, that AIG did not deny coverage based on that pollution exclusion in its most recent coverage position letter. *See* SMF ¶44. By now asserting the application of this exclusion, AIG acknowledges that the Climate Lawsuits are products liability cases, arising out of Products/Completed Operations, as defined in its policies.

But whether liability arises from the ordinary and intended use of a policyholder's product goes to the heart of whether a reasonable policyholder would expect the pollution exclusion to apply. *Hawk Transport Services*, 792 F. Supp. 2d 1123 (D. Haw. 2011), cited by AIG, is instructive. There, the underlying allegations, concerning a contract for the "dispos[al] of waste generated from road work," so obviously involved "traditional" environmental pollution that the court explained it "[could not] conceive of a scenario which better illustrates 'traditional environmental pollution.'" *Id.* at 1135 n.6. Accordingly, "a reasonable insured could only conclude that the discharged substances in the Underlying Suit were traditional environmental pollutants." *Id.* at 1135.[12]

By contrast, the allegations at issue here, concerning alleged property damage arising from the ordinary, legal use of Aloha's gasoline products, are more like those cases cited in *Hawk Transport Services* as a juxtaposition: "lead gradually flak[ing] away from paint within an apartment, . . . or fumes spread from an insured's paint or solvent while being used for its ordinary purpose[.]" *Id.* (citations omitted).

Nor is non-traditional environmental pollution limited to instances of "isolated exposure" as AIG suggests. *See* Opp., at 23-24. Courts have ruled as to the

[12] For similar reasons, *Allen v. Scottsdale Insurance Co.*, 307 F. Supp. 2d 1170 (D. Haw. 2004) is inapposite. *See id.* at 1172 (non-products liability case concerning recycling plant crushing "concrete, asphalt, and refuse," which it "dump[ed] . . . onto the ground in an open area").

inapplicability of the pollution exclusion to products liability cases generally. *See, e.g.*, *Sullins v. Allstate Ins. Co.*, 667 A.2d 617, 621 (Md. 1995) (stating "Some courts have held that products, despite their toxic nature, are not 'pollutants' or 'contaminants' when used intentionally and legally," and holding pollution exclusion did not bar duty to defend lead paint poisoning action); *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 177 A.D.2d 61, 69 (N.Y. App. Div. 1992), *aff'd*, 609 N.E.2d 506 (N.Y. 1993) (pollution exclusion "does not embrace the harm inflicted by a product fully and finally launched into the stream of commerce, and over which the manufacturer no longer exercises any control"); *Mine Safety Appliances Co. v. AIU Ins. Co.*, No. CV N10C-07-241 MMJ, 2016 WL 498848, at *3 (Del. Super. Ct. Jan. 22, 2016) (pollution exclusion did not bar duty-to-defend action for coal dust inhalation resulting from defective respiratory equipment).

Indeed, as it concerns gasoline specifically, courts have held that gasoline is not a pollutant for purposes of the pollution exclusion where it is used for its intended purpose – as it was alleged to be used here. *See, e.g.*, *Whittier Properties, Inc. v. Alaska Nat'l. Ins. Co.*, 185 P.3d 84, 91 (Alaska 2008) ("[E]ven though gasoline that is in the [underground storage tank] is a 'product' . . . when the gasoline escapes or reaches a location where it is no longer a useful product it is fairly considered a pollutant."); *Federated Mut. Ins. Co. v. Abston Petroleum, Inc.*, 967 So.2d 705, 713 (Ala. 2007) (holding "gasoline, although not a pollutant when properly used for the

purposes for which it is intended," is pollutant when it leaks into soil or fumes from such leak force business to close).

Here, Aloha reasonably expected coverage under the AIG Policies because the Climate Lawsuits allege products liability causes of action, and the policies expressly provide "products liability" or "products hazard" coverage. *See* SMF ¶14. Whether the AIG Policies ultimately preclude coverage for this products liability action, or only for "traditional" environmental pollution, is at least an open question. And under the legal uncertainty rule, this open question means there is a possibility of coverage and thus AIG has a duty to defend. *See* Aloha Br., at 23-25.[13]

[13] AIG also notes that nothing in the language in the pollution exclusions "carves out product liability claims." *See* Opp., at 24. Conversely, nothing in the pollution exclusions in the AIG Policies – other than the exclusions in the First and Second 1988 AIG Policies – explicitly references products liability claims or negates the products liability coverage expressly provided in the AIG Policies. As evidenced by those 1988 AIG Policies, AIG was capable of specifically addressing pollution-related liabilities in the context of products liability claims if that is what it had intended.

III. CONCLUSION

For the foregoing reasons, the Court should grant Aloha's motion for partial summary judgment on the duty to defend with respect to the AIG Policies at issue.

DATED: Honolulu, Hawai'i, August 16, 2023.

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