IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware,

Plaintiff,

v.

BP AMERICA INC., BP P.L.C., CHEVRON CORPORATION, CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, XTO ENERGY INC., HESS CORPORATION, MARATHON OIL CORPORATION, MARATHON OIL COMPANY, MARATHON PETROLEUM CORPORATION, MARATHON PETROLEUM COMPANY LP, SPEEDWAY LLC, MURPHY OIL CORPORATION, MURPHY USA INC., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, CITGO PETROLEUM CORPORATION, TOTAL S.A., TOTAL SPECIALTIES USA INC., OCCIDENTAL PETROLEUM CORPORATION, DEVON ENERGY CORPORATION, APACHE CORPORATION, CNX RESOURCES CORPORATION, CONSOL ENERGY INC., OVINTIV,

C.A. No. N20C-09-097-MMJ CCLD

INC., and AMERICAN PETROLEUM INSTITUTE,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants submit this joint response to Plaintiff's November 9, 2023 Notice of Supplemental Authority[1] regarding *City & County of Honolulu v. Sunoco LP*, 2023 WL 7151875 (Haw. Oct. 31, 2023), in which the Hawai'i Supreme Court concluded the plaintiffs in that case had stated a claim under Hawai'i state law arising from energy companies' alleged contributions to climate change.[2] For the following reasons, including the fact that it is in direct conflict with the Second Circuit's decision in *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), and that it fails to consider governing legal principles about federalism and our constitutional structure, the decision in *Honolulu* should not be followed here.

First, Plaintiff errs in contending that *Honolulu* renders Defendants' reliance on *City of New York* "misplaced." Notice at 3. *Honolulu* disagreed with *City of New York* on the rationale that "federal common law is displaced," 2023 WL 7151875, at *17, but that conclusion misunderstands defendants' constitutional-structure argument (which Defendants also made in this Court) and the Second Circuit's reasoning in concluding that state claims are barred. Like *Honolulu*, *City of New York* acknowledged the displacement of federal common law. 993 F.3d at 95–98 & n.7. That did not end the inquiry, however. Instead, the Second Circuit held that a

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1 Trans. ID 71373985.

2 Defendants submit this filing subject to, and without waiver of, any jurisdictional objections.

lawsuit "seeking to recover damages for the harms caused by global greenhouse gas emissions" still must be governed by federal law because it "implicate[s] two federal interests that are incompatible with the application of state law"—namely, the "overriding need for a uniform rule of decision" to govern transboundary emissions disputes and the "basic interests of federalism." *Id.* at 91–92 (cleaned up) (drawing on the historical reasoning applying federal law to disputes involving interstate air or water pollution).

Plaintiff's claims also are preempted because, like in *City of New York*, they are based on undifferentiated greenhouse gas emissions and thus seek to impose liability for foreign emissions emanating from every country in the world. As the Second Circuit explained, but the Hawai'i Supreme Court failed to recognize, while the Clean Air Act displaces claims concerning *domestic* emissions, "claims concerning [foreign] emissions still require [the court] to apply federal common law," and "federal common law preempts state law." *Id.* at 95 & n.7. Plaintiff's lawsuit, which seeks to hold Defendants liable "for the effects of emissions made around the globe[,] . . . is simply beyond the limits of state law." *Id.* at 92.

Plaintiff claims that emissions from all over the world comingle in the atmosphere and contribute to climate-change impacts felt across the world and, in turn, are causing injury in Delaware. As the Second Circuit explained: "It is precisely *because* fossil fuels emit greenhouse gases—which collectively

'exacerbate global warming'—that the [plaintiff] is seeking damages." *Id.* at 91. The Second Circuit emphasized that, "[t]o state the obvious," climate-change plaintiffs attempt to hold defendants liable "for the effects of emissions made around the globe over the past several hundred years" and request "damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet." *Id.* at 92. It was precisely for these reasons that the Second Circuit affirmed dismissal on the merits and held that "[s]uch a sprawling case is simply beyond the limits of state law." *Id.*

Moreover, that federal common law is displaced does not give rise to a state-law claim because, "where a federal statute displaces federal common law, it does so not in a field in which the states have traditionally occupied, but one in which states have traditionally *not* occupied." *Id.* at 98 (cleaned up). Thus, "state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *Id.* The *Honolulu* court's rejection of *City of New York* ignores these governing legal principles and is unpersuasive. *See* Mot. to Dismiss for Failure to State a Claim, Trans. ID 70037733, at 14–19.

Second, Plaintiff cites *Honolulu* for the flawed proposition that the claims in that case "do[] not seek to regulate emissions" but, rather, merely "challenge the promotion and sale of fossil-fuel products without warning and abetted by a

sophisticated disinformation campaign." Notice at 1–2 (quotation marks omitted). The Hawai‘i Supreme Court reached that conclusion based on the notion that the plaintiffs "d[id] not ask th[e] court to limit, cap, or enjoin the production and sale of fossil fuels." 2023 WL 7151875, at *17.

But the relevant question is not whether Plaintiff's claims explicitly seek production or emissions caps but whether they seek remedies based on harms purportedly arising from transboundary emissions. *See City of New York*, 993 F.3d at 93 ("[T]hough the City's lawsuit would regulate cross-border emissions in an indirect and roundabout manner, it would regulate them nonetheless."); *see also* Mot. to Dismiss for Failure to State a Claim, Trans. ID 70037733, at 21–23. Here, Plaintiff's complaint demands recovery of damages caused by transboundary emissions—as even the Hawai‘i Supreme Court elsewhere acknowledged. 2023 WL 7151875, at *1 (noting the plaintiffs' "theory of liability" asserts that the defendants' conduct "caus[ed] increased fossil fuel consumption and greenhouse gas *emissions*, which then caused property and infrastructure damage in Honolulu" (emphasis added)). This is consistent with the Third Circuit's rejection of Plaintiff's attempt "to cast [its] suit[] as just about misrepresentations," when in reality Plaintiff "charge[s] the oil companies with not just misrepresentations, but also trespasses and nuisances" allegedly "caused by burning fossil fuels and emitting carbon dioxide." *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 712 (3d Cir. 2022).

For the same reason that federal common law applied to these claims before the Clean Air Act, the Constitution continues to bar such disputes from proceeding under state law today. *See, e.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421–22 (2011) ("borrowing the law of a particular State would be inappropriate" when addressing claims concerning "air and water in their ambient or interstate aspects"); *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) ("our federal system does not permit [a] controversy to be resolved under state law" where "the interstate or international nature of the controversy makes it inappropriate for state law to control"); *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) (the "demands for applying federal law are present" "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism").

Third, Plaintiff highlights the Hawai'i Supreme Court's erroneous holding that the Clean Air Act "did not preempt the local governments' claims under express, field, or conflict preemption." Notice at 3. The Hawai'i Supreme Court's conclusion rested on its characterization of the plaintiffs' claims as solely targeting "marketing conduct" and not "emissions-producing activities," 2023 WL 7151875, at *26–27, which was error for the reasons described above. Moreover, this holding is in tension with the Second Circuit's conclusion that New York City's attempt "to impose New York nuisance standards on emissions emanating simultaneously from

all 50 states and the nations of the world" would "undermine" the Clean Air Act and "seriously interfere with" its purposes and objectives, even as it acknowledged that States are permitted to "create and enforce their own emissions standards applicable to in-state polluters." 993 F.3d at 99–100 (cleaned up).[3]

Fourth, Plaintiff cites *Honolulu*'s erroneous conclusion that there was a sufficient "relationship 'among the defendant, the forum, and the litigation' . . . to justify the exercise of specific personal jurisdiction over Defendants under *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1032 (2021)." Notice at 2. The *Honolulu* court reasoned that because "the alleged injury-causing products (oil and gas) were marketed and sold in" Hawai'i, *Ford Motor*'s requirement that there be an "affiliation between the forum and the underlying controversy" was satisfied. 2023 WL 7151875, at *12 (quotation marks omitted).

But *Ford Motor* held only that a defendant "will be subject to jurisdiction in the State's courts *when the product malfunctions there* (regardless where it was first sold)." 141 S. Ct. 1017, 1030 (emphasis added); *see also* Personal Jurisdiction Opening Br., Trans. ID 70038428, at 15–24. As the Rhode Island Supreme Court has since explained, this phrasing means that personal jurisdiction lies when the "allegedly defective merchandise has *there* [*i.e.*, in the forum State] been the source

[3] Indeed, the defendants in *Honolulu* anticipate filing a petition for a writ of certiorari to seek the U.S. Supreme Court's review of the Hawai'i Supreme Court's erroneous holding and the resulting conflict it created.

of injury to its owners or to others." *Martins v. Bridgestone Americas Tire Operations, LLC*, 266 A.3d 753, 760 (R.I. 2022) (emphasis added) (quotation marks omitted).

Here, Defendants' products did not *malfunction* in Delaware—or anywhere else, for that matter. And Plaintiff has not alleged that the use of Defendants' products *in Delaware* injured Plaintiff,[4] because it is undisputed that total energy consumption in Delaware accounts for only a negligible fraction of worldwide greenhouse gas emissions (and could not alone cause the climate change that Plaintiff alleges harmed Delaware). *See* Compl., Trans. ID 65917326, ¶¶ 2, 47–49. The absence of these key allegations places this case on a fundamentally different footing than the claims in *Ford Motor*.

Even if, for the sake of argument only, one were to accept Plaintiff's allegation that Defendants marketed and sold products in Delaware, those allegations would still be insufficient to establish personal jurisdiction because Plaintiff does *not* allege it suffered injury from the malfunction (or even the use) of Defendants' products *in Delaware*. As the Second Circuit explained in *City of New York*, suits like this are not about oil-and-gas use in the forum State but, rather, "global greenhouse gas emissions." 993 F.3d at 91. Accordingly, Delaware's claims lack the necessary

[4] Indeed, Plaintiff does not even allege that Defendant American Petroleum Institute sold any products.

relationship with Defendants' alleged forum activities for the Court to exercise personal jurisdiction under *Ford Motor*.

Fifth, Plaintiff seeks support from the Hawai'i Supreme Court's conclusion that personal jurisdiction was reasonable in that case insofar as "'Defendants purposefully availed themselves of Hawai'i markets.'" Notice at 2–3 (quoting *Honolulu*, 2023 WL 7151875, at *16). But this argument is ultimately irrelevant. Specific jurisdiction exists only if (1) the defendant purposefully availed itself of the privilege of conducting activities in the State, (2) the plaintiff's claims arise out of or relate to those activities, and (3) the exercise of personal jurisdiction would be constitutionally reasonable. *Outokumpu Engineering Enters., Inc. v. Kvaerner EnviroPower, Inc.*, 685 A.2d 724, 731–32 (Del. Super. 1996). Defendants' Motion does not challenge the first element but instead argues that Plaintiff's claims do not arise out of or relate to Defendants' in-state conduct and that the exercise of personal jurisdiction is not constitutionally reasonable. *See* Personal Jurisdiction Opening Br., Trans. ID 70038428, at 12–30.

Sixth, Plaintiff places undue emphasis on the Hawai'i Supreme Court's conclusion that the "clear notice" requirement for personal jurisdiction is not "'a separate requirement (on top of the minimum contacts test) necessary for the exercise of specific jurisdiction.'" Notice at 3 (quoting *Honolulu*, 2023 WL 7151875, at *16). In reaching that conclusion, the Hawai'i Supreme Court reasoned

that *Ford Motor* required only that a defendant has "fair warning" that its in-forum activities might subject it to personal jurisdiction and that *Ford Motor* used the phrase "clear notice" only to describe situations where "a defendant's contacts were so pervasive that the defendant had *more than 'fair warning'* they could be subject to specific jurisdiction in a forum." 2023 WL 7151875, at *16 (emphasis added). Regardless of whether the requirement is labeled "fair warning" or "clear notice," however, Defendants did not have sufficient notice that they would be haled before Delaware courts to answer here for a complex, worldwide phenomenon resulting from the cumulative emissions of greenhouse gases by countless sources (including Plaintiff itself).

For each of these reasons, this Court should disregard the deeply flawed *Honolulu* decision.

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Respectfully submitted,

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