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CHEVRON CORPORATION and CHEVRON U.S.A., INC.

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

COUNTY OF MAUI,

Plaintiff,

v.

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

Defendants.

CIVIL NO. 2CCV-20-0000283 (Other Non-Vehicle Tort)

DEFENDANTS' JOINT REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM; CERTIFICATE OF SERVICE

HEARING:
Date: August 18, 2022
Time: 8:30 a.m.
The Honorable Judge Jeffrey P. Crabtree

NO TRIAL DATE SET

DEFENDANTS' JOINT REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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I. INTRODUCTION

Through this lawsuit, Plaintiff seeks a radical expansion of Hawai'i tort law that obliterates all distinctions between product liability and nuisance law, disregards pleading standards and justiciability principles, and erases all temporal and geographic limitations on liability and damages. Plaintiff's novel claims have no precedent in Hawai'i or anywhere else, would extend the reach of Hawai'i law far beyond any reasonable bounds, and should be dismissed.

First, Plaintiff concedes that the Complaint fails to identify a single alleged misrepresentation within the *last 20 years*, and certainly none within the two-year limitations period. Plaintiff's claims are, therefore, untimely under any colorable application of the statute of limitations. For this reason, Plaintiff is reduced to claiming that *no* statute of limitations applies. But this argument fails. The *nullum tempus* doctrine is reserved for the State and its agencies, *not* counties like Plaintiff. And Plaintiff's belated "discovery" of novel tort theories—not *facts*—cannot save its untimely claims from the now-long-ago expiration of any limitations period.

Second, Plaintiff's claims are barred by laches because the Complaint makes clear that Plaintiff has known for decades that fossil fuels pose climate-related risks, yet it did nothing to pursue its claims.

Third, Plaintiff all but concedes that it lacks authority to bring the claims it has asserted. It attempts to cherry-pick favorable language to expand its authority beyond any previously recognized, but ignores that Hawai'i law strictly limits counties such as Plaintiff—which are creatures of state law and possess only those powers affirmatively granted to them by state law—to enacting and enforcing *ordinances*, not common law torts such as those Plaintiff asserts here.

Fourth, Plaintiff fails to distinguish its claims from those that have been dismissed as nonjusticiable political questions. There is no way for this Court (or any court) to resolve Plaintiff's claims without making policy determinations balancing society-wide economic, energy, environmental, and national security interests—determinations that rest firmly with the state and federal political branches, not the courts. Plaintiff's claims thus lack judicially discoverable and manageable standards by which a court could properly resolve them.

Fifth, Plaintiff lacks standing to bring its claims because its theory hinges almost entirely on speculative future injuries—none of which are fairly traceable to any Defendant's conduct, much less any Defendant's specific "misrepresentations." Nor are Plaintiff's injuries redressable: any damage award would be speculative about potential future conduct and impacts, and no Hawai'i

court has recognized an abatement fund as an available remedy.

Finally, the Complaint fails to allege facts necessary to support the elements of each claim. Plaintiff's "anything can be a nuisance" theory fails as a matter of law. Even if Plaintiff's boundless theory were permissible, Plaintiff does not and cannot allege facts showing that Defendants exercised control over the instrumentality allegedly causing the nuisance—*i.e.*, atmospheric greenhouse gas concentrations. The failure-to-warn claims similarly fail because Defendants do not owe Plaintiff a legal duty and because the alleged danger of using fossil fuel products was—based on Plaintiff's own allegations—"open and obvious." Further, Hawai'i law has never recognized a tort of trespass based on purported "misrepresentations," and the claim also fails because it does not allege that Defendants or their products unlawfully entered Plaintiff's property. Lastly, Plaintiff's claims fail as a matter of state law because it cannot seek damages for future, speculative harms, which constitute the bulk of the damages sought in the Complaint.

II. ARGUMENT

A. Plaintiff's Claims Are Time-Barred

Plaintiff does not dispute that HRS § 657–7 establishes a two-year limitations period for actions seeking damages for alleged injury to property, and concedes that its Complaint does not identify a single instance of purported deception within the last two years. In fact, Plaintiff does not dispute that the most recent misstatements alleged in the Complaint were made in 2000, *more than 20 years* before the Complaint was filed. Joint Br. at 5–9; Opp. at 29 (citing Compl. ¶¶ 97–130). These concessions are dispositive. Because the Complaint does not identify *a single misrepresentation or act of deception that occurred within the two years* before it was filed, Plaintiff's claims are untimely and must be dismissed. Attempting to save its facially time-barred claims, Plaintiff argues that *no* limitations period should apply. But each of its arguments fails.

1. The Discovery Rule Does Not Save Plaintiff's Untimely Claims

It is well-established that time-barred claims should be dismissed at the pleading stage when their untimeliness "is apparent from the face of the pleading." *Office of Hawaiian Affairs v. State*, 110 Hawai'i 338, 364 (2006) (quoting *Romero v. Star Mkts., Ltd.*, 82 Hawai'i 405, 416 (App. 1996)); *see also Anderson v. State*, 88 Hawai'i 241, 249 n.8 (App. 1998) (listing cases barred at the pleading stage by the statute of limitations). Here, the Complaint makes "apparent" that Plaintiff had actual knowledge, or at a minimum could have discovered, the potential climatic effects of fossil fuel use, acted on that knowledge, and was aware of Defendants' alleged connection to its

claims well before 2018. Accordingly, Plaintiff's claims are barred as a matter of law and should be dismissed on the pleadings.

The discovery rule does not extend the statute of limitations because, as the Complaint shows, Plaintiff had knowledge of the claimed effects of fossil fuels on the climate long before 2018. Plaintiff concedes that, under the discovery rule, a claim accrues when a plaintiff "discovers, *or through the use of reasonable diligence should have discovered*, (1) the damage; (2) the violation of the duty; and (3) the causal connection between the violation of the duty and the damage." *Hays v. City & Cnty. of Honolulu*, 81 Hawai'i 391, 396 (1996) (emphasis added). Plaintiff does not meaningfully dispute that these elements are satisfied—which precludes any tolling argument. After all, Plaintiff alleges that Defendants engaged in a "*public* campaign aimed at deceiving the *public*." Joint Br. at 6; *see also* Compl. ¶¶ 99 (alleging a "public campaign aimed at deceiving the public about and evading regulation"), 103 ("Defendants embarked on a concerted public-relations campaign to cast doubt on the science"). Plaintiff's claims are based on public statements that Plaintiff knew about or could have discovered long before the limitations period expired.

Plaintiff also does not, and cannot, dispute that for many years it has been on notice of the basis for its claim that the alleged statements and omissions were false or misleading, because the Complaint affirmatively alleges that there has been widespread knowledge for decades that fossil fuels may contribute to climate change. In fact, Plaintiff does not dispute that the United Nations' Intergovernmental Panel on Climate Change ("IPCC") Report from 2014 warned that "[a]nthropogenic greenhouse gas pollution . . . is far and away the dominant cause of global warming, resulting in severe impacts including, but not limited to, sea level rise." Compl. ¶ 5 & n.3. Nor does Plaintiff dispute that the Hawai'i Climate Change Mitigation and Adaptation Commission's 2017 report concluded that "the risks posed by climate change and sea level rise to Hawai'i were recognized as early as 1984." Joint Br. at 7; *see* Compl. ¶ 192. Because the Complaint makes clear that Plaintiff knew, or could have discovered, the basis for its current claim that any public statements purportedly made by Defendants to "conceal, discredit, and/or misrepresent information" about climate change were false or misleading, Plaintiff undeniably knew the basis of its claims well before 2018. Compl. ¶ 102. Indeed, Plaintiff asserts that it was actively preparing for the effects of climate change *before* 2018. *See, e.g., id.* ¶ 192.

Any doubt that Plaintiff knew or could have "discovered" its claims before 2018 is eliminated by the simple fact that other local governments filed virtually identical climate change-

related lawsuits against many of the same Defendants in 2017. Joint Br. at 8–9. Plaintiff's argument that its notice of those lawsuits is speculative misses the mark. Opp. at 30–31. That four California counties filed lawsuits asserting the same claims based on essentially the same allegations demonstrates that, at a minimum, Plaintiff could have discovered the basis for its claims and brought its own lawsuit by 2017—at least one year outside the limitations period.

Faced with the untimeliness of its claims, Plaintiff resorts to a sleight of hand, arguing that the discovery rule extends the limitations period because Defendants allegedly "hid" or "concealed" their involvement in certain aspects of the purported deception campaign. *Id.* at 29. But it is irrelevant whether certain *aspects* were unknown or whether Plaintiff did not fully appreciate the extent of its injuries; what matters is whether Plaintiff had the necessary "factual foundation" to bring its claims, which it did. *Hays*, 81 Hawai'i at 397.

The Supreme Court's decision in *Hays*, on which Plaintiff heavily relies, is directly on point and precludes Plaintiff's claims. In *Hays*, the plaintiff suffered a serious spinal injury at a public beach in Honolulu in 1986. *Id.* at 392. In 1994, after watching a news segment about a similar injury and the resulting settlement, the plaintiff contacted a lawyer and sued Honolulu. *Id.* Like here, the plaintiff argued his claims should be tolled because "he did not know: (1) the city's negligent act or omission; and (2) the connection between the city's negligent act or omission and his injury." *Id.* at 396. The court ruled this was insufficient to toll the claims:

> The purported deficiencies in [plaintiff]'s knowledge regarding both the [defendants'] negligent act and the connection between the negligent act and [the] injury stem from [plaintiff]'s admitted lack of knowledge regarding the [defendants'] legal duty to warn, which is a pure question of law, . . . the failure of which to discover does not delay the start of the two-year limitations period under HRS § 657–7.

Id. at 397. In other words, the plaintiff had the "necessary factual foundation" to bring his claims and the "lack of knowledge regarding the city's legal duty to warn . . . does not delay the start of the two-year limitations period under HRS § 657–7." *Id.* Here, Plaintiff had the "necessary factual foundation" to bring its claims before 2018. *See also N.K. Collins, LLC v. William Grant & Sons, Inc.*, 472 F. Supp. 3d 806, 841–42 (D. Haw. 2020) ("[Plaintiff]'s delay cannot be justified by ignorance of the law, when [plaintiff] had knowledge of the relevant facts supporting its claim.").

Plaintiff asserts that its claims are all "premised on a theory of misrepresentation and disinformation." Dkt. 272 at 2. More specifically, Plaintiff alleges that Defendants downplayed the risks of fossil fuels and deceived "the public about the role of their products in causing the

global climate crisis." Compl. ¶ 4. Plaintiff alleges that Defendants' statements were false and misleading because, in reality, their "fossil fuel products play[] a direct and substantial role in the unprecedented rise in emissions of greenhouse gas pollution." *Id.* But the Complaint makes clear the *fact* that the use and consumption of fossil fuels may contribute to climate change has been widely known for decades, and *certainly before 2018*. Indeed, Plaintiff itself alleges: "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." *Id.* ¶ 60. In 1990, the IPCC issued its First Assessment report, warning that "emissions resulting from human activities are substantially increasing the atmospheric concentrations of greenhouse gases," which "will enhance the greenhouse effect." *Id.* ¶ 99(d). By at least 2007, public polling indicated that a majority of Americans believed global warming was occurring. *Id.* ¶ 93. And, as noted above, the risks posed by climate change and sea level rise to Hawai'i were recognized as early as 1984, and Plaintiff indicates it was actively preparing for the effects of climate change *before* 2018. *See*, *supra*, at 3. Accordingly, before 2018, Plaintiff's own allegations in the Complaint demonstrate that it knew, or at least should have discovered, the "factual foundation" of its claims—that is, contrary to the public statements Defendants allegedly made about their products, those products posed a risk to global climate change. Plaintiff has not identified any additional facts supporting its argument that it was not on notice before 2018 or that Defendants made any misstatements within the limitations period. Because the most recent alleged misrepresentation occurred long before 2018, the statute of limitations has run and the Complaint should be dismissed in its entirety. *See Weidenbach v. Koolau Agr. Co., Ltd.*, 120 Hawai'i 254, 2009 WL 537098, at *6 (App. 2009).

2. *Nullum Tempus* Does Not Apply

Counties, such as Plaintiff, are not entitled to invoke the sovereign privilege of *nullum tempus* under Hawai'i law. "The maxim *nullum tempus*, 'is generally considered to be an attribute of sovereignty only, and cannot be invoked by counties or other subdivisions of the state.'" *Water Comm'n of County of Hawaii v. National Am. Ins. Co.*, 930 F. Supp. 1411, 1424 (D. Haw. 1996) (quoting 51 Am. Jur. 2d *Limitation of Actions* § 418). "Accordingly, in the absence of a statutory provision to the contrary, the statute of limitations is ordinarily available against counties in an action brought by them." *Id.* There is no Hawai'i statute that exempts counties from statutes of limitations. To the contrary, HRS § 657–1.5 confirms that *nullum tempus* is limited to the State: "No limitation of actions provided for under this or any other chapter shall apply to bar the

institution or maintenance of *any action by or on behalf of the State and its agencies*" (emphasis added).

3. The Continuing Tort Doctrine Does Not Apply

Neither the "continuing tort" doctrine nor the "continuous-injury" doctrine saves Plaintiff's time-barred claims. Opp. at 32–33. "[A] continuing tort is a tortious act that occurs so repeatedly that it can be termed 'continuous,' such that one may say that the tortious conduct has not yet ceased." *Anderson*, 88 Hawai'i at 248. Here, Plaintiff alleges a "decades-long course of injury-causing conduct," but does not identify any continuing or sufficiently recent tort. Opp. at 32 (citing Compl. ¶¶ 1, 4, 8, 28, 97–130). Defendants allegedly "conceal[ed]" dangers, "promot[ed] false and misleading information," and "engag[ed] in massive campaigns to promote increasing use of their fossil fuel products," Compl. ¶ 8, but the Complaint fails to identify any such conduct or statements since 2000. *Id.* ¶ 116. The 20-year gap between the last alleged misstatement and the filing of this lawsuit alone shows there is no continuing tort.

Plaintiff asserts that its "greenwashing" allegations support its invocation of the continuing tort doctrine. But those allegations concern entirely different conduct and subject matter. Plaintiff's claims are premised on Defendants' alleged "campaign of deception" to obscure the alleged connection between the use of fossil fuels and climate change. *See id.* ¶¶ 1, 4, 8, 28, 97–130. The greenwashing allegations, conversely, concern Defendants' purported efforts to market themselves as "sustainable energy companies committed to finding solutions to climate change." *Id.* ¶¶ 152–53. Plaintiff cannot conflate two distinct theories of liability based on different, distinct conduct to assert a continuing or ongoing tort. And even if it could, Plaintiff fails to identify any greenwashing statements or allege how those statements are false or misleading. *Id.*

Plaintiff's attempted invocation of the "continuous injury" doctrine is misplaced because that doctrine is simply an extension of the continuing tort doctrine and still requires that the alleged tortious conduct remains ongoing. As the Hawai'i Supreme Court explained in *Anderson*, "generally, a continuing tort is a tortious act that occurs so repeatedly, that it can be termed 'continuous,' such that one may say that the tortious conduct has not yet ceased." 88 Haw. at 248. The only two cases considering the "continuous injury" doctrine in Hawai'i history—*Wong Nin* and *Anderson*—confirm that Plaintiff must allege continuing conduct *and* a continuous injury to

toll the statute of limitations.[1] In *Wong Nin*, the plaintiff sued the City and County of Honolulu because the county's pipe continuously diverted streamflow from the plaintiff's property, thus injuring his crops. *Wong Nin v. City & Cnty. of Honolulu*, 33 Haw. 379, 379–80 (1935). And in *Anderson*, the plaintiff alleged that the defendant's use of a state-owned and state-operated ditch was causing water to be diverted onto the plaintiff's land. 88 Hawai'i at 242. In both cases, it was the continued use of *a single instrumentality* causing the same injury over time that tolled the limitations period. Both cases also involved a unique and narrow circumstance—the continuing diversion of water from an identifiable source. Here, by contrast, the Complaint is devoid of any allegations that Defendants engaged in consistent and ongoing conduct. Plaintiff cites no case, and Defendants are aware of none, where a court has applied the continuing tort doctrine to a series of separate acts, let alone the "cumulative effect" of separate past acts committed by separate Defendants (and countless third-party actors that are not named in this lawsuit), in different parts of the world, at different times over the course of multiple decades, the most recent of which allegedly occurred more than 20 years ago. Opp. at 30, 32. Plaintiff cannot invoke the continuing tort or continuous injury doctrines, and under HRS § 657–7 its claims are barred.[2]

4. HRS § 657–7 Bars All Of Plaintiff's Claims

Plaintiff agrees that HRS § 657–7 bars its claims to the extent Plaintiff seeks compensation for physical injury or damage to property. Opp. at 33–34. Because all of Plaintiff's alleged injuries involve property damage (*see, e.g.*, Compl. ¶¶ 163–81, 195–98, 200–01), physical injury, (*see, e.g.*, *id.* ¶¶ 182–90), or planning costs to mitigate potential property damage (*id.* ¶¶ 191–93, 199), HRS § 657–7 bars *all* of Plaintiff's claims.

Plaintiff attempts to salvage its claims by arguing that a "person cannot gain 'a prescriptive

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[1] *All* other States that have applied the "continuous injury" doctrine require ongoing activity to toll the limitations period. *See, e.g.*, *Wilson Rd. Dev. Corp. v. Fronabarger Concreters, Inc.*, 971 F. Supp. 2d 896, 915–16 (E.D. Mo. 2013) (Missouri law); *Meadows v. Union Carbide Corp.*, 710 F. Supp. 1163, 1165 (N.D. Ill. 1989) (Illinois law); *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 426 (2007) (Nebraska law).

[2] Even if the statute of limitations were tolled, any recovery by Plaintiff would be limited to damages that accrued in the last two years. *See Anderson*, 88 Hawai'i at 250 ("[T]he statute of limitations is tolled by a continuing tortious act, . . . 'a recovery may be had for all damages accruing within the statutory period before the action, although not for damages accrued before that period.'") (quoting *Wong Nin*, 33 Haw. at 386). Thus, even if the limitations period were tolled, and it is not, the Complaint should be dismissed to the extent it seeks damages for alleged acts that occurred before October 2018.

right or any other right to maintain a public nuisance,' . . . and a trespasser cannot gain prescriptive or proprietary rights over public property." Opp. at 33 (citations omitted). But here, unlike in the cases Plaintiff cites, the Complaint does not allege that Defendants are attempting to claim land or an easement via a taking or adverse possession. *See Cabral v. City & Cnty. of Honolulu*, 32 Haw. 872, 881–82 (1933) (holding plaintiff did not assume the risk of building a house on his property, even though defendant's flooding of the property preceded construction of the house); *In re Real Prop.*, 49 Haw. 537, 552 (1967) (government cannot "permit the acquisition of title to government land by adverse possession or by possession akin to prescription"). Rather, the Complaint alleges that Defendants' past statements could lead to the movement of water onto Plaintiff's property. Plaintiff does not (and cannot) attempt to explain how alleged misstatements constitute adverse possession or a prescriptive right. And Plaintiff's prayer for relief explicitly seeks redress for "*past tortious conduct*" only—it expressly renounces seeking to enjoin or prevent Defendants from continuing to maintain any nuisance or trespass. Opp. at 9 (emphasis added); *see id.* at 27 (Plaintiff "merely seeks abatement of local harms caused by Defendants' *past conduct*") (emphasis added).

Plaintiff also halfheartedly asserts that it seeks other relief, including equitable relief and "the costs of fighting wildfires and providing emergency shelters to evacuees." *Id.* at 34. But Plaintiff does not and cannot explain how wildfire damage is not property damage. *See State Farm Fire and Cas. Co. v. Pacific Rent-All, Inc.*, 90 Hawai'i 315, 326 (1999) (fire damage was property damage). In any event, it is the "nature" of the claims, not the remedies, that determines the applicable limitations period. *See Au v. Au*, 63 Haw. 263, 214 (1981) ("The proper standard to determine the relevant limitations period is the nature of the claim or right, not the form of the pleading."). The Complaint shows that the core "nature" of Plaintiff's claims concerns alleged physical injury and property damage. *See, e.g.*, Compl. ¶ 198 ("The County's property and resources have been and will continue to be inundated and/or flooded by sea water and extreme precipitation."). Accordingly, HRS § 657–7 bars Plaintiff's claims in their entirety.

B. Plaintiff Cannot Avoid The Doctrine Of Laches

Plaintiff concedes that laches applies when "all the elements of laches are apparent from the pleadings." Opp. at 34. The doctrine has "two components": "First, there must have been a delay by the plaintiff in bringing his claim, and that delay must have been unreasonable under the circumstances. . . . Second, that delay must have resulted in prejudice to defendant." *Ass'n of Apartment Owners of Royal Aloha v. Certified Mgmt., Inc.*, 139 Hawai'i 229, 234 (2016) (quoting

Adair v. Hustace, 64 Haw. 314, 321 (1982), *abrogated in part on other grounds by Royal Aloha*, 139 Hawai'i 229). The Complaint confirms that both elements are satisfied, and Plaintiff fails to demonstrate that laches should not apply. *See Yokochi v. Yoshimoto*, 44 Haw. 297, 301 (1960) ("[W]hen the suit is brought after the statutory time has elapsed, the burden is on the complainant to establish circumstances making it inequitable to apply laches to his case.").

First, Plaintiff's delay was patently unreasonable. In fact, Plaintiff does not dispute that it delayed filing this suit, but seeks to excuse the delay by citing Defendants' purported "use of front groups to hide their deception campaigns from the public's eye." Opp. at 35. But despite alleging that Defendants' supposed misrepresentations were "public" and that the risks from climate change have been widely studied and publicized for decades, Compl. ¶¶ 4, 103, 124, 192, Plaintiff fails to identify any false or misleading statement by any Defendant or any purported "front group" within the last 20 years. *See id.* ¶ 116. And the Complaint demonstrates that Plaintiff could have sued at least by 2007, when the IPCC issued its Fourth Assessment Report highlighting for the world that "'there is *very high confidence* that the net effect of human activities since 1750 has been one of warming,'" by which time Plaintiff knew or should have known that any contrary statements were potentially false. *Id.* ¶ 124 (emphasis in original). Instead, Plaintiff waited over a decade, which was unreasonable. *See Royal Aloha*, 139 Hawai'i at 232 ("wait[ing] 10 years to file [a] Complaint" was "unreasonable").

Second, Plaintiff does not seriously dispute that its delay prejudiced Defendants; rather, it asserts that any such prejudice is "speculative." But by sitting on its hands for years, Plaintiff increased its potential recovery and Defendants' potential liability. Most defendants, and certainly Defendants here, maintain that they have not committed any wrongdoing and that plaintiff is not entitled to any relief, but it is the threat of additional liability and an increased damages award that causes prejudice. This is exactly the kind of prejudice that the laches doctrine is meant to prevent. Joint Br. at 10 (citing *Adair*, 64 Haw. at 321 ("Common but by no means exclusive examples of such prejudice" include "changes in the value of the subject matter")). Plaintiff also altogether ignores the perverse incentives and benefits it received from its delay. *See id.* at 10–11. Plaintiff's unreasonable delay in bringing its claims long after it had reason to know of their purported factual basis is prejudicial to Defendants. The doctrine of laches requires dismissal.[3]

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[3] Plaintiff argues that *nullum tempus* and the continuing tort and continuous injury doctrines

C. State Law Does Not Authorize Plaintiff's Claims

Plaintiff does not dispute that counties in Hawai'i, like Plaintiff, are a "creation of the state" with limited authority, capable of exercising only those powers *expressly granted* to them by state law. Joint Br. at 11 (quoting *State v. Medeiros*, 89 Hawai'i 361, 365 (1999)). And Plaintiff does not and cannot identify any statute that authorizes it to bring any of the common law tort claims it brings here. While HRS § 46–1.5(12)—a provision Plaintiff ignores—provides counties with the power to enact and enforce *ordinances*, including "ordinances necessary to prevent or summarily remove public nuisances," Plaintiff does not suggest that it has enacted an ordinance to address the type of nuisance, trespass, and failure-to-warn claims asserted in the Complaint, let alone that it is seeking to enforce any such ordinance. Because Plaintiff does not identify the authority permitting it to bring the common law tort claims it purports to plead against Defendants, it effectively concedes that it lacks authority to bring them. *Syngenta Seeds, Inc. v. Cnty. of Kauai*, 842 F.3d 669, 676 (9th Cir. 2016) ("Hawai'i law is clear that counties lack inherent authority under the Hawaii Constitution."); *accord Endo Health Sols., Inc. v. Second Jud. Dist. Ct.*, 492 P.3d 565, 567 (Nev. 2021) ("The City has not pointed to any express authority granting it the power to maintain the underlying [public nuisance] action.").

Plaintiff mistakenly invokes HRS § 46–1.5(3) to suggest that a county can bring "all claims" of any type or sort. Opp. at 20–21. This provision, however, addresses and is limited to *contractual* claims: Counties may "enforce all claims on behalf of the county and approve all lawful claims against the county, but shall be prohibited from entering into, granting, or making in any manner any contract, authorization, allowance payment, or liability contrary to the provisions of any county charter or general law." Reading this provision as a whole, "all claims" refers to the claims identified in the provision itself—that is, all *contractual* claims. The Supreme Court of Hawai'i has repeatedly warned against reading words out of context and employed the canon of construction *noscitur a sociis*, which translates to "the meaning of a word is to be judged by the company it keeps." *Priceline.com, Inc. v. Dir. of Taxation*, 144 Hawai'i 72, 90 n.33 (2019) ("[W]ords of a feather flock together") (citing BLACK'S LAW DICTIONARY (10th ed. 2014)). "When two or more words are grouped together, *noscitur a sociis* requires that the more general and the more specific words of a statute must be considered together in determining the meaning of a statute, and that the

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"exempt[]" it from a laches defense. Opp. at 34–35. But both arguments fail for the reasons explained above. *See*, *supra*, Sections II.A.2, II.A.3.

general words are restricted to a meaning that should not be inconsistent with, or alien to, the narrower meanings of the more specific words of the statute." *Stop Rail Now v. De Costa*, 122 Hawai'i 217, 224 n.7 (App. 2009) (citing *In re Pac. Marine & Supply Co. Ltd.*, 55 Haw. 572, 578 n.5 (1974)). Here, the general term "all claims" must be read in conjunction with the more specific words in the subsection, which focus entirely on a county's power to enter into *contracts*.

Moreover, Plaintiff's broad interpretation of HRS § 46–1.5(3) would render HRS § 46–1.5(12) superfluous because a county would not need to enact an ordinance if it could simply pursue "all claims." Such an interpretation would violate clear Supreme Court precedent: "Our rules of statutory construction require us to reject an interpretation of [a] statute that renders any part of the statutory language a nullity." *Potter v. Hawaii Newspaper Agency*, 89 Hawai'i 411, 422 (1999); *see also Lales v. Wholesale Motors Co.*, 133 Hawai'i 332, 371 (2014) ("[I]t is a fundamental principle of statutory construction that '[c]ourts are bound to give effect to all parts of a statute, and . . . no clause, sentence, or word shall be construed as superfluous, void, or insignificant.'").

Plaintiff's reliance on HRS § 46–1.5(22), which provides that "[e]ach county shall have the power to sue and be sued in its corporate name," is also misplaced. Opp. at 22. Subsection (22) merely establishes Plaintiff as a distinct legal entity with *capacity* to sue and be sued—it does *not* affirmatively authorize Plaintiff to bring any particular claim. *See Bd. of Cnty. Comm'rs of Dolores Cnty. v. Love*, 172 Colo. 121, 126 (1970) ("The right 'to sue' relates to the county's function as a body corporate and can only be exercised within the framework of the specific powers granted [to] counties . . . . Such [a sue and be sued provision] does not grant a general power to sue in any and all situations."); *Premium Standard Farms, Inc. v. Lincoln Twp. of Putnam Cnty.*, 946 S.W.2d 234, 240–41 (Mo. 1997) (dismissing locality's public nuisance claim as *ultra vires* even though state law granted the locality capacity to "sue and be sued"). Indeed, "sue and be sued" provisions are generally construed to be waivers of sovereign immunity, not authority to bring suit. *See, e.g.*, *College Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 676 (1999); *Florida Dep't of Health and Rehab. Servs. v. Florida Nursing Home Ass'n.*, 450 U.S. 147, 149–150 (1999).[4] And any reliance on HRS § 663–1 is even further afield because it does not provide

[4] None of Plaintiff's authorities supports reading subsection (22) as an affirmative grant of power. *Oahu Plumbing & Sheet Metal, Ltd. v. Kona Construction, Inc.*, 60 Haw. 372, 379–80 (1979), involved a suit between private companies and discussed who is eligible to represent corporations in court. *Hawaii Mill Co. v. Andrade*, 14 Haw. 500, 501 (1902), discussed whether

counties with any powers to sue or otherwise, and Plaintiff does not provide authority to the contrary. In fact, this section does not mention counties at all, and instead specifically refers to "persons," which counties indisputably are not. Haw. Const. art. VIII, § 1 (counties are not "persons"; they are "political subdivision[s]").[5]

D. The Complaint Raises Nonjusticiable Political Questions

Defendants demonstrated that Plaintiff's claims fail because they require the Court to usurp the powers of the political branches to set state and federal energy and climate policy in violation of the political question doctrine. Joint Br. at 12–16. Under Hawai'i law, a political question exists when there is "a lack of judicially discoverable and manageable standards for resolving it" or it is "impossib[le]" to decide "without an initial policy determination of a kind clearly for nonjudicial discretion." *Nelson v. Haw. Homes Comm'n*, 141 Hawai'i 411, 414 (2018) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Plaintiff repeatedly insists that it does "not ask for damages for *all* effects of climate change." Opp. at 38, 40. Contrary to this statement, however, it is clear from the face of the Complaint that Plaintiff *is* seeking damages for *all* effects of global climate change that it alleges it suffered. *See* Compl. ¶¶ 5, 10, 15, 42. According to Plaintiff, if it can prove any one of its claims, it is entitled to recover all damages suffered in Maui that may have been caused by climate change, even though it concedes that climate change is the cumulative result of actions by billions of people, around the world, over more than a century. *See id.* ¶¶ 41–43.[6] Moreover, if

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corporations are required to allege their capacity to sue by affirmative averments. *Thacker v. TVA*, 139 S. Ct. 1435, 1441 (2019), construed a federal agency's "sue and be sued" clause as a waiver of sovereign immunity.

[5] Plaintiff intentionally avoids bringing its claims under the Hawai'i Deceptive Practices Act ("HDPA"), HRS § 480–2, even though its case is "premised on a theory of misrepresentation and deception" to consumers and the public at large. Dkt. 272 at 2. HDPA would prohibit Plaintiff from bringing such claims, as this power is granted exclusively to the "attorney general or the director of the office of consumer protection." HRS § 480–2(d). To permit deception-based claims here would render the limited grant of authority in the HDPA meaningless.

[6] For this reason, Plaintiff's claims are also preempted by the Clean Air Act ("CAA"). The Opposition unequivocally demonstrates that Plaintiff is seeking damages allegedly suffered from emissions released *all over the world*, not just Hawai'i. *See, e.g.*, Opp. at 18 ("Defendants controlled (*i.e.*, inflated) worldwide fossil-fuel consumption and greenhouse gas emissions."). But the CAA preempts claims that seek to use the law of the affected State (here Hawai'i) to recover damages caused by out-of-state emissions. The Supreme Court held that the Clean Water Act ("CWA") preempts state common law claims for injury from interstate water pollution where the plaintiff seeks to apply one state's law to sources outside that state,

these tort theories are allowed to proceed here, other municipalities across the country could seek to duplicate them, as everyone is impacted by climate change to some degree. So, contrary to Plaintiff's suggestion, its lawsuit—and dozens of others like it—most certainly asks the court "who should bear the cost of global warming" and attempts to pin liability for the cumulative effect of decades of greenhouse gas emissions on a select group of publicly-owned energy companies, irrespective of Defendants' overall role in or contribution to global climate change. Opp. at 38. Plaintiff's global policy-setting claims are *precisely* the type that the political question doctrine leaves to the policymaking branches. *See Nelson*, 141 Hawai'i at 412 n.2, 414 ("[C]ertain matters are political in nature and thus inappropriate for judicial review."); *Juliana v. United States*, 947 F.3d 1159, 1164 (9th Cir. 2020) (holding that claims regarding "promot[ing] fossil fuel use despite knowing that it can cause catastrophic climate change . . . must be presented to the political branches of government").

No Manageable Standards. The generic tort principles on which Plaintiff seeks to base liability are uniquely ill-suited to the complex and policy-laden fact pattern present in this particular case. Plaintiff's common law claims would necessarily require assessment of not only what statements were permissible or required, but what level of global petroleum production and emissions were permissible under criteria made up, ad hoc, long after the alleged conduct.

Comer v. Murphy Oil USA, Inc. addressed this issue and rejected the argument Plaintiff advances here. 839 F. Supp. 2d 849, 864 (S.D. Miss. 2012). In *Comer*, the plaintiffs filed public and private nuisance, trespass, and negligence claims against a group of insurance companies and energy companies. *Id.* at 854. As here, the plaintiffs argued that they were not seeking to regulate emissions or make policy determinations. *Id.* at 864. The court found, however, that such claims were indeed "asking the Court, or more specifically a jury, to determine without the benefit of legislative or administrative regulation, whether the defendants' emissions are 'unreasonable.'" *Id.* "Simply looking to the standards established by the [state] courts for analyzing nuisance, trespass, and negligence claims would not provide sufficient guidance to the Court or a jury." *Id.* The same

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explaining that "the CWA precludes a court from applying the law of an affected State against an out-of-state source." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). And because the structure of the CAA parallels the structure of the CWA, courts have consistently construed *Ouellette* to mean that the CAA preempts state law claims challenging air pollution originating out-of-state. *See, e.g., Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015).

is true here. Plaintiff's Complaint asks the factfinder not to apply clear standards (because none exist here), but to create them on the fly, which the political question doctrine forbids. *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) ("One of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule*.") (emphases in original).

Initial Policy Determinations. Similarly, Plaintiff's argument that its claims do not rest on any initial policy determinations overlooks this case's parallels with *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009) ("*Kivalina I*"), *aff'd*, 696 F.3d 849 (9th Cir. 2012) ("*Kivalina II*"). There, as here, the plaintiffs alleged energy companies were "substantial contributors to global warming" and had "act[ed] in concert to create, contribute to, and maintain global warming and . . . *conspire[ed] to mislead the public* about the science of global warming." *Kivalina II*, 696 F.3d at 854 (emphasis added). Also like here, the "[p]laintiffs' global warming claim [was] based on the emissions of greenhouse gases from innumerable sources located throughout the world and affecting the entire planet and its atmosphere." *Kivalina I*, 663 F. Supp. 2d at 875. And "[p]laintiffs also fail[ed] to confront the fact that resolution of their nuisance claim requires the judiciary to make a policy decision about *who* should bear the cost of global warming." *Id.* at 876–77 (emphasis in original).

Plaintiff acknowledges that virtually everyone on Earth is responsible on some level for contributing to carbon dioxide emissions and that "it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere." Compl. ¶¶ 42–43, 220. Despite this acknowledgment, Plaintiff functionally asks this Court to make a political judgment that the 18 Defendants named in this action should bear the financial costs for contributions to global climate change shared in greater or lesser degrees by billions of entities and individuals across the globe. As held in *Kivalina I*, the allocation of fault—and cost—of global climate change is a complex matter necessitating a policy determination by the executive and/or legislative branches in the first instance. 663 F. Supp. 2d at 877.

Plaintiff's attempts to distinguish *Comer*, *Kivalina I*, and *General Motors* are unavailing. Plaintiff argues these cases are distinguishable because they "sought to hold the defendants strictly liable for climate-related injuries caused by the defendants' lawful production, promotion, and sale of fossil fuels or fuel-consuming equipment." Opp. at 39. But that is *exactly* what Plaintiff's Complaint asserts here: "that unrestricted production and use of fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate." Compl. ¶ 1. Another

factor leading to dismissal in *General Motors* was the plaintiff's attempt to "impose damages on a much larger and unprecedented scale by grounding the claim in pollution originating both within, and well beyond, the borders of the State of California." *California v. Gen. Motors Corp.*, 2007 WL 2726871, at *15 (N.D. Cal. Sept. 17, 2007). Plaintiff admits it is seeking to hold Defendants liable, with no limitations, for *global* emissions that allegedly impacted Plaintiff locally. *See* Opp. at 24 & n.14. *General Motors* also rejected the notion that global climate change cases are just like any other trans-boundary pollution case because those cases "involved trans-boundary nuisances from identifiable external sources." 2007 WL 2726871, at *15. Here, the Complaint admits "*it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere* attributable to anthropogenic sources because such greenhouse gas molecules do not bear markers that permit tracing them to their source, and because greenhouse gasses quickly diffuse and comingle in the atmosphere." Compl. ¶¶ 220, 232, 244, 253 (emphasis added).

As shown in *Comer*, *Kivalina I*, and *General Motors*, Plaintiff's claims implicate nonjusticaible political questions and therefore should be dismissed.

E. Plaintiff Lacks Standing To Bring The Complaint's Claims

The Complaint fails to plead that (1) Plaintiff has suffered an actual or threatened injury as a result of Defendants' conduct, (2) its injury is fairly traceable to Defendants' actions, and (3) a favorable decision likely would provide relief for its alleged injury. Joint Br. at 16–22 (citing *Sierra Club v. Hawaii Tourism Auth. ex rel. Bd. of Directors*, 100 Hawai'i 242, 250 (2002)). Plaintiff seeks to surmount the standing hurdle by lowering the bar. Plaintiff argues that it "easily satisfies" the test for standing because this court should "lower[its] standing barriers." Opp. at 22 (citing *Sierra Club v. Dep't of Transp.*, 115 Hawai'i 299, 320 (2007)). However, "environmental plaintiffs must [still] meet the three-part standing test," and Plaintiff fails all three parts. *Sierra Club v. Dep't of Transp.*, 115 Hawai'i at 320.

No Injury-In-Fact. Plaintiff does not dispute that the overwhelming majority of its alleged injuries involve *future* damages that it *predicts* may occur. Joint Br. at 17–18. Plaintiff tries to create standing by pointing to a few, isolated costs it claims to have incurred as a result of the future threat of global climate change, but this is precisely the kind of "manufacture[d] standing" by plaintiffs "inflicting harm on themselves based on their fears of hypothetical future harm" that fails to satisfy the injury-in-fact requirement. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). Plaintiff's expenditures on wildfire evacuation and infrastructure improvements are impermissible

attempts to "parlay actions taken in reaction to a risk of harm into the necessary 'certainly impending' injury." *Chamber of Com. of the United States v. City of Seattle*, 2016 WL 4595981, at *4 (W.D. Wash. Aug. 9, 2016). Plaintiff's allegations of potential future injuries, and the costs allegedly incurred to forestall those predicted injuries, cannot establish standing. At a minimum, Plaintiff lacks standing to the extent its claims seek damages based on future harms. "Put another way, 'a plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.'" *Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 369 (5th Cir. 2018); *see also Johnson v. U.S. Office of Personnel Mgmt.*, 783 F.3d 655, 661 (7th Cir. 2015) ("The fact that a plaintiff has suffered an injury that is traceable to one kind of conduct does not grant that plaintiff standing to challenge other, even related, conduct."); *Munns v. Kerry*, 782 F.3d 402, 408–12 (9th Cir. 2015) (permitting limited standing for past injury, but dismissing other claims for failure to allege future injuries beyond mere speculation).

Not Traceable. Plaintiff's alleged injuries are not fairly traceable to Defendants' alleged conduct. On its face, the Complaint seeks to hold Defendants liable for statements they made anywhere in the world, over the past many decades, that allegedly led to an increase in fossil fuel demand, that allegedly exacerbated global climate change, which allegedly caused changes in weather and the movement of water onto Plaintiff's property in unspecified ways and locations. It is hard to imagine anything less traceable, more attenuated, more diffused, and more influenced by outside, intervening actions.

Plaintiff argues that Hawai'i courts "take a relaxed view of traceability," but cites only one case without rebutting black-letter Hawai'i law that "a protracted chain of causation fails both because of the uncertainty of several individual links and because of the number of speculative links that must hold for the chain to connect the challenged acts to the asserted particularized injury." *Sierra Club*, 100 Hawai'i at 253 (citation omitted). Far from alleging a "common sense causal chain supported by robustly pleaded links," Opp. at 24, Plaintiff's alleged injury is based on an extremely attenuated chain of events between Defendants' alleged misrepresentations and the billions of intervening choices made by countless third parties around the world to purchase and combust oil and gas products over many years and other sources of emissions, and the complex geophysical phenomena associated with global climate change.

Although Plaintiff asserts it does not concede that it is unable to trace its alleged injuries to

any particular Defendant, Opp. at 26, it makes precisely that concession throughout the Complaint. Plaintiff alleges repeatedly that "it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere attributable to anthropogenic sources because such greenhouse gas molecules do not bear markers that permit tracing them to their source, and because greenhouse gasses quickly diffuse and comingle in the atmosphere." *See, e.g.*, Compl. ¶¶ 220, 232, 244, 253. These are the exact same admissions that doomed the plaintiffs in *Kivalina I*, *Kivalina II*, and *Bellon*.[7] *See* Joint Br. at 19–20. Plaintiff points to a single paragraph in the Complaint asserting that it can "quantify[] greenhouse gas pollution attributable to Defendants' products and conduct," Compl. ¶ 53, but this completely misses the point and is inconsistent with the rest of the Complaint. Even if Plaintiff could attribute a percentage of emissions to each Defendant's products (it cannot), that would be irrelevant because, according to Plaintiff, its claims are based on misrepresentations, not production. Thus, Plaintiff must trace each alleged misrepresentation to its influence on consumer action and policy decisions, and how that resulted in increased use of fossil fuels and emissions. Plaintiff has not even attempted to make such a showing as to any alleged statement. Perhaps even more fatal, Plaintiff does not dispute that Defendants' alleged deception had absolutely no bearing on emissions generated and released in places that account for a substantial percentage of worldwide emissions, such as China, India, Saudi Arabia, and Russia. And because the Complaint concedes that "it is not possible to determine the source of any particular individual molecule of CO_2," Plaintiff cannot trace the emissions that may have resulted from Defendants' alleged deceptions to its alleged injuries. *Kivalina I*, 663 F. Supp. 2d at 880 (holding that where plaintiff conceded the "undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time," "there is no realistic possibility of tracing any particular alleged effect of global warming").

Finally, and critically, Plaintiff concedes that "[t]raceability is not met 'if the injury complained of is the result of the *independent* action of some third party not before the court.'" Opp. at 24 (citing *Bennett v. Spear*, 520 U.S. 154, 169 (1997)). That alone is dispositive as the

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[7] Plaintiff argues *Kivalina I* and *II* lack persuasive force because "only the concurring judge in *Kivalina II* found the plaintiffs lacked standing." Opp. at 26. But *Kivalina I* held plaintiffs lacked standing because they made the same concession regarding their inability to trace injury to any particular defendant, 663 F. Supp. 2d at 878–81. Moreover, Plaintiff's claim that the Ninth Circuit "necessarily rejected" this standing analysis is misleading—the opinion is silent as to standing. Opp. at 26 (citing *Kivalina II*, 696 F.3d at 855–58).

Complaint makes clear that the alleged injuries are a "direct result" of energy choices made by billions of individual consumers and policy decisions by governments that are not before the Court. *Id.* ¶¶ 41–43. Even if some actions theoretically were influenced by Defendants' alleged deception, Plaintiff does not—and cannot—seriously contend that *every* independent decision by an unspecified number of *third parties around the world* to purchase and combust more oil and gas products was influenced by Defendants' alleged deception.

Not Redressable. Plaintiff's alleged injuries are not redressable. Plaintiff does not dispute that the Hawai'i Supreme Court has made clear "that speculative damages are not recoverable in actions arising under contract or in tort." Joint Br. at 21 (quoting *McDevitt v. Guenther*, 522 F. Supp. 2d 1272, 1287 (D. Haw. 2007)). And Plaintiff does not dispute that the vast majority of its alleged injuries are future injuries that have not yet occurred, and thus are entirely speculative. Indeed, the extent of any harm Plaintiff may suffer in the future will be based, at least in part, on actions taken going forward by individual consumers, industry members, and international, federal, state and local governments around the world. This should be dispositive. Even if compensatory damages could allegedly redress *some* of Plaintiff's past injuries (left unspecified in Plaintiff's Complaint and opposition), that does not render *all* of its injuries redressable. Plaintiff cites *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021), for the proposition that redressability is satisfied if the Court can "effectuate a partial remedy." But that case analyzed whether nominal damages conferred standing, not whether a modicum of past injury would permit the pursuit of damages for entirely speculative future injuries. Because speculative future damages constitute almost all of Plaintiff's requested relief, even a favorable disposition on the merits would not yield meaningful redress for Plaintiff.

Nor does Plaintiff's proposed "abatement fund" properly redress its alleged injuries. As an initial matter, Plaintiff assiduously avoids explaining the parameters of its requested fund, what it would entail, or what it would be used for. But since Plaintiff has expressly disclaimed injunctive relief and concedes that the majority of the relief it seeks is for future damages to property and infrastructure, it clearly is seeking a fund to pay for these future injuries. Such a remedy is clearly inappropriate. Indeed, by Plaintiff's own admission, an abatement fund's "sole purpose is to eliminate the hazard," but this lawsuit would do no such thing.[8] Opp. at 27. In any event, Plaintiff

[8] Plaintiff's citation to *People v. ConAgra Grocery Prods. Co.* is inapposite. Opp. at 27 (citing

does not contest that Hawai'i law has never recognized an abatement fund as an available remedy; instead, Plaintiff suggests that receivership cases resemble the massive and novel abatement fund it seeks here. *Id.* A receivership involving a single business, however, in no way resembles the complex abatement Plaintiff seeks here, which would "necessarily require a host of complex policy decisions" to "ameliorate" the "consequences of climate change," likely including a "sustained commitment to infrastructure transformation over decades." *Juliana*, 947 F.3d at 1170–72. Indeed, administering an "abatement fund" of the kind sought here would entail an unprecedented range of policymaking far beyond the Court's power and resources, and "given the complexity and long-lasting nature of global climate change, the Court would be required to supervise the [fund] for many decades," if not forever. *Id.* After all, Plaintiff alleges that "Defendants' past misconduct will continue to harm the County in the coming decades because greenhouse gas emissions can remain in the atmosphere for 'thousands of years.'" Opp. at 2 (quoting Compl. ¶ 137). Plaintiff concedes that a "sustained commitment to infrastructure transformation" would be required, arguing that the Court should supervise construction of "adaptation measures like seawalls, other erosion controls, and measures to move or elevate roads and infrastructure." *Id.* at 27. Such expenditures, however, are not only rife with policy choices that make court supervision unwieldy, but they are also "a thinly-disguised damages award" for speculative future injuries and not "an equitable remedy designed to eliminate the nuisance." *In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig.*, 497 F. Supp. 3d 552, 653 (N.D. Cal. 2020) (internal quotation omitted).

F. Plaintiff Fails To State A Claim Under State Law

Plaintiff fails to plead the recognized elements for any of its five purported state law claims. Plaintiff suggests its lawsuit "applies time-honored principles of nuisance, failure to warn, and trespass to a new set of facts," but in truth it seeks an unprecedented expansion of state tort law. Opp. at 4. It seeks to normalize its outlandish claims by arguing that because the common law adapts to new circumstances, it can be altered at will to address *all* new circumstances. Plaintiff's liability theory is premised on turning *anything* into a "nuisance," which would upend decades of well-established boundaries in tort law, contrary to due process considerations and the well-settled expectations of all persons, including Defendants.

1. Plaintiff Fails To State A Claim For Nuisance Because Nuisance Law Does Not Apply

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17 Cal.App.5th 51, 132–33 (2017)). There, the abatement fund was used solely to remove lead paint from existing structures, whereas Plaintiff seeks to use a fund to pay for future projects.

To Lawful Consumer Products And Plaintiff Fails To Allege That Defendants Controlled The Instrumentality Causing The Alleged Nuisance

Plaintiff effectively concedes that Hawai'i courts have *never* recognized a nuisance claim based on the production, promotion, sale, and use of a lawful consumer product. Indeed, the only precedent Plaintiff can muster is a 140-year-old treatise cited by 125-year-old cases. *See* Opp. at 7 (citing Wood, *The Law of Nuisances*, at 72–73, 75, 143, 147 (1875); *The King v. Grieve*, 6 Haw. 740, 744–45 (1883); *Cluney v. Lee Wai*, 10 Haw. 319, 322 (1896); *Fernandez v. People's Ice & Refrigerating Co.*, 5 Haw. 532, 533 (1886)). But, as Plaintiff itself notes, these early nuisance cases involving products were based on *legislation* targeting specific products—not an unbounded expansion of common law. *Id.* Moreover, Plaintiff concedes that, in the "modern era," the "Supreme Court [of Hawai'i] has noted that nuisance liability may stem from a defendant's 'act or use of property.'" *Id.* (quoting *Littleton v. State*, 66 Haw. 55, 67 (1982)). Ignoring this modern precedent and the early nuisance cases' deference to the legislature, Plaintiff now asks this Court to declare that "*anything*" can be classified as nuisance under Hawai'i law where a public right is involved. *Id.* at 7–8 (citing *Haynes v. Haas*, 146 Hawai'i 452, 458 (2020)).

Permitting Plaintiff's theory would turn nuisance law into "a monster that would devour in one gulp the entire law of tort." *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993). Courts have long recognized that the boundaries between products liability and nuisance must be respected. *See, e.g.*, *State v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428, 456 (R.I. 2008) (contrasting products liability, which is "designed specifically to hold manufacturers liable for harmful products," with "[p]ublic nuisance [which] focuses on the abatement of annoying or bothersome activities"); *City of Phila. v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 909 (E.D. Pa. 2000) ("refus[ing] to apply" nuisance law "in the context of injuries caused by defective product design and distribution"); *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) (noting that "courts have enforced the boundary between the well-developed body of product liability law and public nuisance law").[9] In fact, just this month, a

[9] *See also, e.g.*, *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192, 196 (N.Y. App. Div. 2003) ("[G]iving a green light to a common-law public nuisance cause of action today will, in our judgment, likely open the courthouse doors to a flood of limitless, similar theories of public nuisance . . . against a wide and varied array of other commercial and manufacturing enterprises and activities."); *City of St. Louis v. Cernicek*, 2003 WL 22533578, at *2 (Mo. Cir. Ct. Oct. 15, 2003) ("The attempt here is not only to blur, but obliterate, the line that s[e]parates *public nuisance* claims from those based on *product liability* law.") (emphasis

Delaware state court rejected a nuisance claim for sale of chemicals allegedly causing pollution because "product claims are not encompassed within the public nuisance doctrine." *State ex rel. Jennings v. Monsanto Company*, 2022 WL 2663220, at *4 (Del. July 11, 2022). And for good reason. Under Plaintiff's "anything is a nuisance" theory, a faulty firework explosion, an addictive video game or device, sugary or fatty foods, harmful medicine, a slip-and-fall accident, or a poorly operated medical clinic could each be classified as a nuisance, rather than being governed by well-established doctrines of products liability, negligence, and medical malpractice, respectively.

As a federal district court recently explained in a bellwether decision rejecting nuisance claims against opioid distributors, a "public nuisance [claim] based on the sale and distribution of a product has been rejected by most courts because the common law of public nuisance is an inept vehicle for addressing such conduct." *City of Huntington v. AmerisourceBergen Drug Corp.*, __ F. Supp. 3d __, 2022 WL 2399876, at *57 (S.D. W. Va. July 4, 2022). There, as here, "[t]he extension of the law of nuisance to cover the marketing and sale of [petroleum products] is inconsistent with the history and traditional notions of nuisance." *Id.* To permit nuisance claims for product sales "would convert almost every products liability action into a public nuisance claim," and force courts to "manage public policy matters that should be dealt with by the legislative and executive branches." *Id.* at 58 (citing *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 730 (Okla. 2021)). As the court aptly summarized, "[t]o apply the law of public nuisance to the sale, marketing and distribution of products would invite litigation against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product." *Id.* at 59. This Court should reject Plaintiff's "clever, but transparent attempt" to evade limits on products liability by invoking the nuisance cause of action as an inapt replacement. *City of Phila.*, 126 F. Supp. 2d at 911.

Plaintiff also fails to allege that Defendants exercised control over the instrumentality that allegedly caused the purported nuisance. *See* Joint Br. at 26–28. In fact, Plaintiff concedes that the emissions from Defendants' products occurred *after* Defendants relinquished control of their products to third parties. Plaintiff does not and cannot allege that Defendants controlled the fossil fuel products at the moment that countless third parties (located overwhelmingly outside of Hawai'i) used and combusted their products, much less that Defendants controlled the resulting

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in original); Joint Br. at 24–25 (collecting cases).

greenhouse gas emissions or emissions from other sources. The Complaint emphasizes that it is "*the buildup* of CO_2 in the atmosphere that drives global warming and its physical, environmental, and socioeconomic consequences, including those affecting the County," Compl. ¶ 8 (emphasis added), and that "*global* atmospheric greenhouse gas concentrations" cause "disruptions to the environment[] and consequent injuries to the County." *Id.* ¶ 54 (emphasis added). Plainly, Defendants lack control over the concentration of greenhouse gases in the Earth's atmosphere—where such gases take "thousands of years" to dissipate, *id.* ¶ 137, where the overall concentration of such gases accumulate "no matter where in the world those emissions were released (or who released them)," and over the "complex web of federal and international environmental law regulating such emissions," *City of New York v. Chevron Corp.*, 993 F.3d 81, 85, 93 (2d Cir. 2021). That is why Plaintiff does not and cannot identify any Hawai'i court that has applied the nuisance doctrine in any remotely analogous context—doing so would obliterate any trace of the long-standing control element.

Because it cannot seriously dispute Defendants' lack of control over this breathtaking scope of conduct, Plaintiff erroneously argues that the nuisance-causing instrumentality here is Defendants' "business activities" in supplying fossil fuels to the market, not the combustion of those fossil fuels. Opp. at 12. Thus, Plaintiff asserts that the control element is met because the Complaint alleges Defendants "dangerously inflated the market for fossil fuels." *Id.* But the Complaint unmistakably alleges that the nuisance-causing instrumentality is the combustion of fossil fuels by end-users. Compl. ¶ 5 ("The primary cause of the climate crisis is the combustion of coal, oil, and natural gas."). Those emissions were caused by billions of individual decisions by consumers and governments that Plaintiff does not—and cannot—reasonably allege were under Defendants' control. *Id.* ¶¶ 41–43. At bottom, Plaintiff "cannot escape the true nature of the nuisance claim it has pleaded," which places the worldwide combustion of fossil fuels "directly at the heart of [its] nuisance claim, regardless of how it otherwise now tries to characterize its claim." *State ex rel. Stenehjem v. Purdue Pharma L.P.*, 2019 WL 2245743, at *12 (N.D. Dist. Ct. 2019) (dismissing opioid-related nuisance claim and rejecting the State's argument that the instrumentality of the nuisance was the opioid manufacturer's marketing rather than third-party opioid use).

2. Plaintiff Fails To State A Claim For Failure To Warn Because Defendants Had No Duty To Warn And Any Risks Of Fossil Fuel Use Were Open and Obvious

Plaintiff agrees that Defendants can be held liable only if they are "subject to a legal duty to warn" and does not dispute that Defendants did not have a "special relationship" with it. *Tabieros v. Clark Equip. Co.*, 85 Hawai'i 336, 370 (1997). Plaintiff insists that Defendants had a duty to "issue adequate warnings" about product dangers to all potential "bystanders" about the use of fossil fuels. Opp. at 14–15. But for bystander liability to apply, the bystander must be *directly* injured by the user's use of the product. *See, e.g., Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38 (3d Cir. 2009) (bystander child who was injured when grandfather drove riding lawnmower in reverse over her leg, allegedly because of defect in mower, could sue manufacturer); *Gourdine v. Crews*, 405 Md. 722, 751 (2008) (distinguishing bystander case because, unlike in the case at hand, "the defective product was directly involved in the accident").

Here, however, Plaintiff does not allege that it was injured by any individual user's use of oil or gas. In fact, Plaintiff does not and cannot allege that a single Defendant's products caused its injuries; it concedes those injuries result from the "cumulative" use of oil and gas from all sources for decades. *See* Compl. ¶¶ 41–43. Plaintiff's theory is essentially that a Defendant had the duty to warn a user that if they use its oil and gas products, and millions of other individuals and entities also use their products, as well as their competitors' products, then the cumulative emissions from global collective use could contribute to global climate change. But no Hawai'i court has ever recognized a duty to warn the world about the externalities of using a product. Besides, the duty to warn is restricted to warnings based on the characteristics of the defendant's own products. Indeed, "a manufacturer owes a duty to warn regarding its *own product*, not regarding products it did not produce, sell, or control." *Acoba v. Gen. Tire, Inc.*, 92 Hawai'i 1, 18 (1999) (emphasis in original).

A defendant also does not have a duty to warn against an open and obvious danger presented by its products. Plaintiff concedes that the Hawai'i Supreme Court has held that a "manufacturer need not provide a warning when the danger, or potentiality of danger, is generally known and recognized." *Tabieros*, 85 Hawai'i at 364. (quoting *Maneely v. Gen Motors Corp.*, 108 F.3d 1176, 1179 (9th Cir. 1997)). Instead, Plaintiff seeks to make this a question of fact, arguing that "reasonable minds can differ about obviousness." Opp. at 17. However, in doing so, Plaintiff asks this Court to ignore Plaintiff's own allegations that the potential climate impacts of fossil fuel emissions have been well known, open and obvious, and widely reported for decades. *See* Joint Br. at 30–32 (citing Compl. ¶¶ 4 ("Decades of scientific research has shown that pollution from Defendants' fossil fuel products plays a direct and substantial role in the unprecedented rise in

emissions of greenhouse gas pollution"), 60 ("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.")). Defendants did not owe a duty to warn about such "generally known and recognized" potential "dangers" of fossil fuels. *Tabieros*, 85 Hawai'i at 364. The failure to warn claim therefore fails as a matter of law. *See, e.g.*, *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 532 (S.D.N.Y. 2003) (dismissing warning claim because it is "well-known that fast food . . . contain[s] high levels of cholesterol, fat, salt, and sugar, and that such attributes are bad for one"); *Garrison v. Heublein, Inc.*, 673 F.2d 189, 192 (7th Cir. 1982) (affirming dismissal of warning claim because "dangers involved in the use of alcoholic beverages" are "common knowledge").

3. Plaintiff Fails To Allege The Required Elements Of A Claim For Trespass

While Plaintiff claims it "treads well-settled precedent," Opp. at 17, it fails to cite any authority finding a trespass based on alleged misstatements and omissions. Plaintiff's reading of trespass law is inaccurate and defies all notions of common sense, let alone legal precedent.

Plaintiff claims that "trespass liability does not require control of the instrumentality." *Id.* at 19. Yet the two forms of trespass at issue require either that the defendant "intentionally causes a thing to enter a plaintiff's land," or that the defendant "tortiously placed [a thing]" on plaintiff's land. *Id.* at 17 (cleaned up). From this language, Plaintiff twists itself into knots to suggest it "handily meets these elements" in pleading that Defendants (1) concealed the climate impacts of their products that (2) caused the hyperinflation of demand for fuels, which then (3) significantly increased greenhouse gas emissions that (4) allegedly brought about sea-level rise and other weather events damaging some portion of Plaintiff's property (which it never identifies). *Id.* at 18. Stretching logic beyond its limits, Plaintiff alleges that Defendants "engaged in conduct knowing to 'a substantial certainty' that the conduct would 'result in the entry of the foreign matter.'" *Id.* at 19. However, Plaintiff does not identify a single trespass case based on an alleged misrepresentation that led to the "entry of [] foreign matter." Instead, in each of Plaintiff's cases, the flooding was caused by a structure the defendant directly controlled and managed, not alleged misstatements accompanied by a complicated and attenuated chain of causation. Unlike the plaintiffs in its cited cases, Plaintiff does not allege Defendants removed or placed anything on or near its land causing trespass. *See Anderson*, 88 Hawai'i at 242 (diverting stream from a state-operated ditch reservation onto a separate property); *Mapco Express v. Faulk*, 24 P.3d 531, 534 (Alaska 2001) (stockpiling snow on adjoining uphill property); *Shaheen v. G & G Corp.*, 230 Ga.

646, 648 (1973) (regrading property and dumping dirt on adjacent parcel); *Kurpiel v. Hicks*, 284 Va. 347, 350 (2012) (stripping adjacent property of all vegetation and altering storm water drain system); *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 144 N.J. 84, 99 (1996) (constructing new school on adjacent, higher elevation property without building a sufficient drainage basin system).

Recent decisions have also rejected Plaintiff's theory of trespass. In *Monsanto*, for example, plaintiffs alleged that defendants had "designed, marketed, and sold" PCBs even though they had been "aware of the toxic effect of PCBs" for decades, and claimed defendants committed a trespass because it was foreseeable that the PCBs would pollute the Delaware River. *Monsanto*, 2022 WL 2663220, at *1, 5. The court dismissed the trespass claim because plaintiff failed to allege "control by [d]efendants of the instrumentality at the time at which the pollution occurred." *Id.* at *6. The same result should follow here—whether the instrumentality is greenhouse gas concentrations or purported misrepresentations that allegedly increased them. Plaintiff's novel theory would extend the tort of trespass beyond all recognizable bounds. Indeed, "modern courts do not favor trespass claims for environmental pollution" and courts should resist efforts "to torture old remedies to fit factual patterns not contemplated when those remedies were fashioned." *In re Paulsboro Derailment Cases*, 2013 WL 5530046, at *8 (D.N.J. Oct. 4, 2013) (internal citation and quotation marks omitted).

4. Plaintiff Fails To Plead Cognizable Damages

Plaintiff does not dispute that actual damages are an essential element of each of its claims. Nor does Plaintiff dispute that "[t]he Hawai'i Supreme Court has noted that speculative damages are not recoverable in actions arising under contract or in tort." *McDevitt*, 522 F. Supp. 2d at 1287 (citing *Roxas v. Marcos*, 89 Hawai'i 91, 140–41 n.33 (1998)). But, as explained above, Plaintiff concedes that the vast majority of the damages it seeks are for speculative injuries that may (or may not) occur in the future, or may occur as a result of future conduct by individuals and entities other than Defendants. These concessions are fatal to Plaintiff's claims. Even if Plaintiff could seek damages for the few past injuries arguably alleged, at a very minimum, Plaintiff's claims based on future damages must be dismissed as a matter of law. *See Haynes*, 146 Hawai'i at 461 ("an award of damages is retroactive, applying to past conduct," such that "for damages to be awarded significant harm must have been *actually incurred*") (emphasis added).

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss Plaintiff's Complaint in its entirety with prejudice.

RESPECTFULLY SUBMITTED,

DATED: Honolulu, Hawaii, July 21, 2022.

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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI`I

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, a copy of the foregoing was duly served electronically through JIMS/JEFS and a copy sent via e-mail to the following parties at their last known addresses:

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