RULING

RE: City & County of Honolulu and BWS v. Sunoco, LP, et al;
Civ. No. 1CCV-20-0000380 (First Circuit Court, State of Hawai‘i)

RE: Ruling on Defendants' Motion to Dismiss for Failure to State a Claim;
(motion filed 6/2/21; Dkt. 347)

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1. The above motion was heard on the record via Zoom on August 27, 2021. The court took this motion and several related motions under advisement, and hereby issues its ruling only on the Rule 12(b)(6) motion.

2. This ruling is a brief outline of the court's analysis. It is not meant to include all legal citations, reasons, and issues underlying the court's ruling. Full particulars, correct citations, and other elements can be included through the Rule 23 process.

3. The Rule 12(b)(6) Motion to Dismiss is DENIED.

4. Legal Standard.

A. This is a Rule 12(b)(6) motion for failure to state a claim. Such motions are viewed with disfavor and rarely granted. Marsland v. Pang, 5 Haw. App. 463, 474 (1985).

B. Review of a motion to dismiss is generally limited to the allegations in the complaint, which must be deemed true for purposes of the motion. Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel, 113 Hawai‘i 251, 266 (2007). However, the court is not required to accept conclusory allegations.

C. On a 12(b)(6) motion, the issue is not solely whether the allegations as currently pled are adequate. A complaint should not be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief under any set of facts *or any alternative theory*. In re Estate of Rogers, 103 Haw 275, 280-281 (2003); Wright v. Home Depot U.S.A., Inc., 111 Hawai'i 401, 406-07 (2006); Malabe v. AOAO Exec. Ctr., 147 Hawai'i 330, 338 (2020).

D. Hawai'i is a notice pleading jurisdiction. Our Hawai'i Supreme Court expressly rejected the federal "plausibility" pleading standard (Twombly/Iqbal) in Bank of America v. Reyes-Toledo, 143 Hawai'i 249, 252 (2018).

5. This is an unprecedented case for any court, let alone a state court trial judge. But it is still a tort case. It is based exclusively on state law causes of action.

6. This motion relies heavily on *City of New York v. Chevron*, 993 F.3d 81 (2nd Cir. 2021). This court spent extensive time reviewing that decision multiple times, and considered it carefully. This court respectfully concludes that *City of New York* has limited application to this case, because the claims in the instant case are both different from and were not squarely addressed in the *City of New York* opinion.

A. Plaintiffs emphasize repeatedly that this case is based on state law tort claims, especially *failures to disclose and deceptive promotion*. State law tort claims traditionally involve four elements: duty, breach, causation, and harm or damages. Plaintiffs allege that Defendants had a *duty* to disclose and not be deceptive about the dangers of fossil fuel emissions, and *breached* those duties. As the court understands it, Plaintiffs claim Defendants thereby *exacerbated the costs* to Plaintiffs adapting to and mitigating impacts from climate change and rising sea levels (*causation*). Finally, Plaintiffs allege harms include flooding, a rising water table, increased damage to critical infrastructure like highways and utilities, and the costs of prevention, mitigation, repair, and abatement -- to

the extent *caused* by Defendants' breach of recognized duties. Plaintiffs double-down on this theory of liability by expressly arguing that if Defendants make the disclosures and stop concealing and misrepresenting the harms, *Defendants can sell all the fossil fuels they are able to without incurring any additional liability*.

B. Defendants frame Plaintiffs' claims very differently, saying Plaintiffs actually seek to regulate global fossil fuel emissions, or alternatively, that the claims amount to *de facto* regulation. This framing also appears in the *City of New York* opinion, which expressly stated that New York City's claims targeted "lawful commercial activity," and Defendants would need to "cease global production" if they wanted to avoid liability. The Second Circuit Court of Appeals added that the threat of such liability would compel Defendants to develop new pollution control measures, and therefore the City of New York's lawsuit would "regulate" cross-border emissions. This conclusion was important to the ultimate holding that Plaintiffs' claims in this case are preempted by federal law (whether common law or under the Clean Air Act) (discussed further, below).

C. This court concludes that Plaintiffs' framing of their claims in this case is more accurate. The tort causes of action are well recognized. They are tethered to existing well-known elements including duty, breach of duty, causation, and limits on actual damages caused by the alleged wrongs. As this court understands it, Plaintiffs do not ask for damages for *all* effects of climate change; rather, they seek damages primarily for the effects of climate change allegedly *caused* by Defendants' breach of long-recognized duties (without deciding the issue, presumably by applying Hawai‘i's substantial factor test). Plaintiffs do not ask this court to limit, cap, or enjoin the production and sale of fossil fuels. Defendants' liability in this case, if any, results from alleged tortious conduct, and not on lawful conduct in producing and selling fossil fuels.

D. This court concludes that Plaintiffs' claims as pled here were not squarely addressed in *City of New York* given the way that opinion frames those claims. This is especially true in the opinion's preemption analysis, which was key to its ruling.

7. Preemption.

A. Defendants argue that federal law preempts the claims in this case. The argument is that Plaintiffs seek to regulate out-of-state and international fossil fuel emissions, and therefore interfere with the need for a consistent national response based on federal common law or the Clean Air Act. Defendants argue in the alternative that if Plaintiffs do not seek actual regulation, then Defendants' activity is *de facto* "regulated" by the threat of a damages award. To apply federal preemption at all, generally this court needs to answer "yes" to at least three questions: 1) is there a unique federal interest? 2) is there a "significant conflict" in this case between a federal policy or interest and applying state law? 3) do Plaintiffs' claims really seek to regulate out-of-state, national, and international GHG emissions? The court answers "no" to all three of these questions, as discussed below.

B. Unique federal interest. This court concludes there is no unique federal interest in the alleged failure to disclose harms in this case, nor in alleged deceptive promotion. Under our state-federal system, states have broad authority to protect residents' health, safety, property, and general welfare. This broad power of the states is not to be preempted unless that was the clear and manifest purpose of Congress. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). *See also*, *In re MTBE Product Liability Litigation*, 725 F.3d 65, 96 (2nd Cir. 2013) (state tort law fell within the state's historic powers to protect health, safety, and property rights, and therefore there was no presumption for preemption). States also have a legitimate interest in combatting the adverse effects of climate change. *Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007). In other words, any federal interest in the local impacts of climate change is an interest shared with the states – and is not unique to federal law.

C. No "significant conflict." The court also concludes there is no "significant conflict" in this case between a federal policy or interest and applying Hawai'i state law. Such a conflict is key to preemption, because federal and state policies and law can co-exist and supplement each other. This court is not aware of any doctrine where federal common law broadly

replaces state-law tort claims, *per se*. To the contrary, federal preemption requires a real and significant conflict: e.g., the state-law duty requires Defendants to do something that federal law forbids. See, e.g., *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472 (2013); *Cipollone v. Liggett Grp*, 505 U.S. 504 (1992). The federal policy or interest must be concrete and specific, and not judicially constructed, and not speculative. *O'Melveny & Myers v. FDIC*, 512 US 79 (1994); *Miree v. DeKalb Cty*., 433 US 25, 32 (1977). This court concludes there is no federal policy (whether common law or statutory) against timely and accurate disclosure of harms from fossil fuel emissions.

D. No "regulation." Defendants are correct that the claims here involve fossil fuel emissions, and the complexity of global climate change involves matters of federal concern. But there is no concrete showing that a damages award in this case would somehow regulate emissions. Black's Law Dictionary (11th ed. 2019) defines regulation as "*control* over something *by rule or restriction*," (emphasis added) and gives the example of federal regulation over the airline industry. How would a damages award actually "control" Defendants? Under the limits imposed by a Rule 12(b)(6) motion, how does a trial court make a "regulation" finding, and based on what criteria exactly? The court currently sees nothing in the record that tethers the claim of "regulation" (whether it be of emissions, disclosures, or something else) to a possible award of damages. The federal court opinions cited to this court do not clearly require that any potentially large damages award constitutes "regulation" for purposes of preemption. See *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). Again, the damages claims made here focus primarily on failures to disclose, failures to warn, and deceptive marketing. *See*, *Minnesota v. Am. Petroleum Inst*., No. CV 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. March 31, 2021). As Plaintiffs repeatedly concede, this case does not impact Defendants from producing and selling as much fossil fuels as they are able, as long as Defendants make the disclosures allegedly required, and do not engage in misinformation. The court does not agree that this amounts to control by rule or restriction.

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E. Common law or statutory preemption? This court also struggled with the *City of New York*'s apparent reliance on both federal common law and the Clean Air Act as grounds to preempt. This issue was discussed in the briefing, including supplemental briefing following the hearing (Dkt. 581 filed 9/9/22; and Dkt. 587 filed 2/17/22). The court agrees with Plaintiffs that the Clean Air Act supplants federal common law, and that the Clean Air Act does not forbid the duties alleged at the heart of this case. Alternatively, as discussed above, if federal common law still exists on these issues, it does not preempt the state law claims in this case.

F. States' rights. A broad doctrine that damages awards in tort cases impermissibly regulate conduct and are thereby preempted would intrude on the historic powers of state courts. Such a broad "damages = regulation = preemption" doctrine could preempt many cases common in state court, including much class action litigation, products liability litigation, claims against pharmaceutical companies, and consumer protection litigation.

8. Out-of-state and international activities. Out-of-state and international events does not mean preemption is appropriate. Without the power to hold tortfeasors liable for out-of-state conduct, municipalities such as Honolulu could be hard-pressed to seek redress. See *Young v. Masci*, 289 U.S. 253, 258-59 (1933); *Watson v. Emps. Liab. Assurance Corp*., 348 U.S. 66, 72 (1954). There are limits on claims involving out-of-state activity, (choice of law, foreign affairs, due process limits on punitive damages, and due process limits on personal jurisdiction, among others). In fact, Defendants have asked this court to dismiss most of the Defendants for lack of personal jurisdiction/due process concerns. These issues are not part of the instant Rule 12 (b)(6) motion, and will be decided by separate order(s).

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9. HRCP 9(b). Defendants also argue dismissal is warranted for alleged shortcomings under HRCP Rule 9(b). The court disagrees. Hawai‘i is a notice-pleading jurisdiction and Plaintiffs are not required to cite every bad act in their operative complaint. Defendants clearly have reasonably particular notice. (*See* Plaintiffs' opposition to this motion, Dkt. 375, especially pages 38-45.) To the extent more details can be fleshed out, that is for discovery and standard motions practice.

10. The common law adapts. Defendants argue (and the *City of New York* opinion expresses) that climate change cases are based on "artful pleading." Respectfully, we often see artful pleading in the trial courts, where new conduct and new harms first arise:

> The argument that recognizing the tort will result in a vast amount of litigation has accompanied virtually every innovation in the law. Assuming that it is true, that fact is unpersuasive unless the litigation largely will be spurious and harassing. Undoubtedly, when a court recognizes a new cause of action, there will be many cases based on it. Many will be soundly based and the plaintiffs in those cases will have their rights vindicated. In other cases, plaintiffs will abuse the law for some unworthy end, but the possibility of abuse cannot obscure the need to provide an appropriate remedy.

Fergerstrom v. Hawaiian Ocean View Estates, 50 Haw. 374 (1968) (opinion by Levinson, J.) Here, the causes of action may seem new, but in fact are common. They just seem new -- due to the unprecedented allegations involving causes and effects of fossil fuels and climate change. Common law historically tries to adapt to such new circumstances.

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10. This court notes its ruling is not a decision of Hawaii's Environmental Court. This is a civil tort case originally assigned to Judge Cataldo, and then temporarily re-assigned to the undersigned when Judge Cataldo was assigned to a criminal calendar. Now that Judge Cataldo is back in the Civil Division, the undersigned understands this case will be re-assigned back to Judge Cataldo as soon as this court decides the motions which remain under advisement. The court sincerely thanks the parties for their patience, and apologizes for the delay, and is working to finish its remaining rulings this week or next.

11. The parties shall follow the usual CCR Rule 23 process to formalize the above ruling. This includes adding particular findings, analysis, or citations to the above outline of the court's ruling, if necessary.

Dated: Honolulu, Hawai'i, February 22, 2022.

/s/ Jeffrey P. Crabtree

JUDGE OF THE ABOVE-TITLED COURT

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