IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ALOHA PETROLEUM, LTD., Plaintiff, vs. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., and AMERICAN HOME ASSURANCE COMPANY, Defendants.	CIVIL NO: 1:22-cv-00372-JAO-WRP (Contract) **MEMORANDUM IN SUPPORT OF MOTION**

MEMORANDUM IN SUPPORT OF MOTION

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I. INTRODUCTION

This is an insurance coverage dispute brought by Aloha Petroleum, Ltd. ("Aloha"), a subsidiary of Sunoco LP, which is being held to account for the future cost of abating the impacts of climate change allegedly caused by its five-decade "campaign of deception" intended to protect its profits by concealing the catastrophic effects of fossil fuel pollution. Aloha seeks to shift those costs to National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") and American Home Assurance Company ("American Home") (together, the "AIG Insurers") under general liability insurance policies that provide coverage *only* for past damages caused by fortuitous events. Under settled Hawaii law, and the plain terms of those policies, Aloha is not entitled to the relief it seeks.

Aloha is one of several defendants in two climate change lawsuits, captioned *City and County of Honolulu, et al. v. Sunoco LP, et al.*, Case No. CV-20-0000380 (Haw. 1st Cir.) and *County of Maui v. Sunoco LP, et al.*, Case No. CV-20-0000283 (Haw. 2d Cir.) (the "Underlying Lawsuits"). (SOF 1.) The Underlying Lawsuits allege that Aloha (and others) "ha[s] *known for more than 50 years* that greenhouse gas pollution from their fossil fuel products would have a significant adverse impact on the Earth's climate and sea levels." (Ex. 15, ¶ 7 (emphasis added).)[1]

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[1] References to "Ex. _" are to the Exhibits attached to the Declaration of Kari K. Noborikawa ("Noborikawa Decl.") and cited in the Defendants' Concise Statement of Facts ("SOF") filed herewith.

Despite this alleged knowledge, the rate at which Aloha and others have extracted and sold fossil fuel products, and the resulting emissions, have exploded over the past half century. Instead of warning of the known consequences of using its products, Aloha allegedly engaged in a coordinated, multi-front effort to conceal and deny those consequences, influence legislation intended to address or mitigate those consequences, discredit scientific evidence relating to those consequences, and otherwise create doubt in the minds of the public about the consequences of the unlimited production, sale, and use of its fossil fuels.

According to the allegations in the Underlying Lawsuits, the impacts of Aloha's actions will be devastating to Honolulu and Maui, who brought those lawsuits "to ensure that the parties who have profited from . . . global warming," including Aloha, "bear the costs of those impacts[.]" (Ex. 15, ¶ 15; Ex. 16, ¶15.) Aloha cannot use liability insurance as a shield to evade the financial repercussions of the foreseeable consequences of its decades of intentional conduct. The AIG Insurers are entitled to summary judgment on Count I and Count II of Aloha's First Amended Complaint on four independent grounds:

- *First*, the allegations against Aloha in the Underlying Lawsuits—that it aggressively promoted the unrestricted use of its fossil fuel products and concealed the connection between its products and the climate crisis—defy the foundational premise of liability insurance, which is to protect against

fortuitous losses. Thus, Aloha cannot meet its burden to establish the liability it faces arises from an "occurrence"—defined as an "accident."

- *Second*, Aloha cannot meet its burden to establish that the Underlying Lawsuits allege "property damage" that occurred during the policy periods of the AIG Insurers' policies.
- *Third*, Aloha cannot meet its burden to establish the relief sought by Honolulu and Maui—requiring Aloha to bear the costs of abating the public nuisance it allegedly helped create—are "damages because of" property damage, another foundational premise of liability insurance.
- *Fourth*, the allegations of the Underlying Lawsuits establish that the release of greenhouse gas emissions from the use of Aloha's products into the atmosphere triggers certain of the policies' pollution exclusions.

II. BACKGROUND

A. The Underlying Lawsuits

Sea levels are rising, beaches are eroding, ocean temperatures are warming, ice caps are melting, wildlife are dying, and extreme weather events are increasing in frequency and duration. (*See* Ex. 15, ¶ 36.) The leading cause of this climate disruption is human-driven emissions of greenhouse gases, which are "largely byproducts of humans combusting fossil fuels to produce energy . . . ." (*Id.*) This is not new information; in fact, according to the Underlying Lawsuits, the fossil fuel

industry—including Aloha, which is in the business of marketing, distributing, and selling fossil fuel products in Hawaii—has "known for nearly half a century that unrestricted production and use of their fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate," with "catastrophic" impacts. (*Id.* ¶¶ 1, 20.)

On March 9, 2020, the City and County of Honolulu and Honolulu Board of Water Supply filed a lawsuit against Aloha and others seeking to hold them accountable for the climate change impacts of their "campaign of deception." (*See id.* ¶ 3.) The County of Maui filed a similar lawsuit on October 12, 2020. (*See* Ex. 16.) Those Underlying Lawsuits allege that Aloha and others are "directly responsible for the substantial increase in all CO_2 emissions between 1965 and the present." (*See* Ex. 15, ¶ 9; Ex. 16, ¶ 9.) According to Honolulu and Maui, human-driven greenhouse gas pollution is "far and away the dominant cause of global warming," which results in severe impacts including "sea level rise, disruption to the hydrologic cycle, more frequent and intense extreme precipitation events and associated flooding, more frequent and intense heatwaves, more frequent and intense droughts, and associated consequences of those physical and environmental changes." (*See* Ex. 15, ¶ 5; Ex. 16, ¶ 5.)

Honolulu and Maui allege that Aloha has known for more than 50 years that use of its fossil fuel products would have this very impact. (*See* Ex. 15, ¶ 7; Ex. 16,

¶ 7.) Instead of warning of those "known consequences," Honolulu and Maui claim that Aloha "concealed the dangers, promoted false and misleading information, sought to undermine public support for greenhouse gas regulation, and engaged in massive campaigns to promote the ever-increasing use of their products at ever-greater volumes" to preserve and maximize its profits. (*See* Ex. 15, ¶ 8; Ex. 16, ¶ 8.) As a result, Honolulu and Maui allege, they will experience severe "climate crisis-caused environmental changes" unless and until steps are taken to abate the nuisance created, in part, by Aloha. (Ex. 15, ¶¶ 155-207; Ex. 16, ¶¶ 204-255.)

B. This Action

Aloha filed its First Amended Complaint on April 28, 2023 (the "FAC"). (*See* ECF 47.) The FAC seeks coverage under eight policies issued to Aloha or E-Z Serve, Inc. (Aloha's former parent company) by National Union and four issued by American Home (collectively, the "AIG Policies"), covering portions of the period from February 1, 1984 to April 1, 2010. *Id.* The FAC asserts causes of action for, among other things, breach of the duty to defend and indemnify Aloha for the Underlying Lawsuits, and corresponding declaratory judgment claims.

At the parties' request, the Court deferred discovery on the duty to indemnify until after the duty to defend issues are resolved. (*See* ECF 38, 46, 51.) The parties agree that the policies cited in the SOF are true and correct copies for purposes of their cross-motions and that the question of whether the AIG Insurers have a duty to

defend Aloha in the Underlying Lawsuits under those policies is ripe and properly resolved on summary judgment. *See Nautilus Ins. Co. v. Hawk Transp. Servs., LLC*, 792 F. Supp. 2d 1123, 1131 (D. Haw. 2011) (when material facts are undisputed, as is the case here, construction of an insurance policy is a question of law for the court and summary judgment is appropriate).

III. ARGUMENT AND AUTHORITIES

An insurance policy dictates the scope of an insurer's duty to defend. *See Hawaiian Holiday Macadamia Nut Co. v. Industrial Indem. Co.*, 872 P.2d 230, 233 (Haw. 1994).[2] In determining whether an insurer has a duty to defend, Hawaii follows the "complaint allegation rule," which requires courts to determine whether the facts *as alleged in the complaint* fit within the policy terms. *Hawaiian Holiday*, 872 P.2d at 233; *see also Allstate Ins. Co. v. Riihimaki*, Civ. No. 11–00529 ACK–BMK, 2012 WL 1983321, at *4 (D. Haw. May 30, 2012). Although an insurer's duty to defend is broader than its duty to indemnify, it is not unlimited; where, as here, "the pleadings fail to allege any basis for recovery within the coverage clause, the insurer has no obligation to defend." *Hawaiian Holiday*, 872 P.2d at 233.

[2] A federal court sitting in diversity must apply the forum state's choice of law analysis. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In Hawaii there is "a presumption that Hawaii law applies unless another state's law 'would best serve the interests of the states and persons involved.'" *Abramson v. Aetna Cas. & Sur. Co.*, 76 F.3d 304, 305 (9th Cir. 1996). The AIG Insurers do not challenge application of Hawaii law in this case.

A. Aloha Cannot Establish A Potential For Coverage Under The Insuring Agreements Of The AIG Policies.

The Insuring Agreements require the AIG Insurers to pay on behalf of Aloha *only* those sums Aloha "shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies caused by an occurrence[.]" (*See, e.g.*, SOF 15-18; Noborikawa Decl. ¶¶ 38-41; Exs. 1-12.) Under Hawaii law, Aloha, the insured, has the burden of establishing that the allegations in the Underlying Lawsuits satisfy these requirements and are potentially covered. *See State Farm Fire & Cas. Co. v. Gorospe*, 106 F. Supp. 2d 1028, 1031 (D. Haw. 2000).

Aloha cannot satisfy its burden for three distinct and equally dispositive reasons. First, the Underlying Lawsuits do not allege that the property damage at issue was caused by an "occurrence." Second, the Underlying Lawsuits do not allege property damage during the policy periods of the AIG Policies. Third, the Underlying Lawsuits do not seek "damages because of" any such property damage. Each of these reasons is dispositive, and Aloha must overcome *all of them* to establish the AIG Insurers owe it a defense for the Underlying Lawsuits.

1. Aloha Cannot Establish That Any Alleged Property Damage Was Caused By A Fortuitous Event, And Thus An Occurrence.

"Fortuity is perhaps the most fundamental principle of insurance and insurance law." 16 Appleman, *Insurance Law & Practice* § 116.1(B) (2000); *see also* 7 Couch on Insurance 3d § 101:2 (2022) (to be covered, an insured's loss "must occur as a result of a fortuitous event, not one planned, intended, or anticipated"). This basic principle reflects the foundation of liability insurance, which exists to facilitate socially beneficial commercial activity by broadly spreading the costs of *accidental* injuries.

Each of the AIG Policies incorporates this fundamental principle by covering Aloha *only* for damages caused by an "occurrence"—which, in relevant part, is defined as an "accident." (*See* SOF 19-20; Noborikawa Decl. ¶¶ 42-43; Exs. 1-12.) Although the AIG Policies do not define "accident," "[n]early all of the courts which have decided this issue agree that an accidental injury is one that occurs unexpectedly, fortuitously—an event which could not have been foreseen or anticipated." 10 Couch on Insurance 2d § 41:8 (1962); *see also* 21f Appleman *Insurance Law & Practice* § 391 (2023). The courts of Hawaii are in accord.

As the Hawaii Supreme Court has explained, "[t]he teaching of [its cases] . . . is that, in order for the insurer to owe a duty to defend or indemnify, *the injury cannot be the expected or reasonably foreseeable result of the insured's own intentional acts or omissions*." *Hawaiian Holiday*, 872 P.2d at 234 (emphasis

added) (citing *Hawaiian Ins. & Guaranty Co. v. Brooks*, 686 P.2d 23, 26-28 (Haw. 1984) and *Hawaiian Ins. & Guaranty Co. v. Blanco*, 804 P.2d 876, 880-81 (Haw. 1990)); *Burlington Ins. Co. v. Oceanic Design & Constr., Inc.*, 383 F.3d 940, 946 (9th Cir. 2004) (applying Hawaii law) (same).

Under Hawaii law, there are two relevant considerations when determining whether an "accident" has been alleged. First, as noted, the allegations of the complaint in the underlying action determine whether an accident has been alleged. *Hawaiian Holiday*, 872 P.2d at 234-35 (finding conduct *as alleged* was not accidental and, therefore, not an occurrence). Second, the focus of the inquiry is the conduct of the insured from an *objective* viewpoint. *See id.; see also State Farm Fire & Cas. Co. v. Certified Mgmt., Inc.*, Case No. 17-00056, 2018 WL 1997533, at *1, 8 (D. Haw. Apr. 27, 2018) (no duty to defend because the alleged injury—payment of excessive fees—was the "expected and reasonably foreseeable result" of charging the fees in exchange for documents; it did not matter that the homeowners' association "believed that its fees were [not] excessive").

Many courts in Hawaii have relied on *Brooks* and *Blanco* to determine no "accident" was alleged. *See, e.g., Hawaiian Holiday*, 872 P.2d at 234-235 (finding no accident where alleged property damage "was part and parcel of" intentional acts committed by insured); *State Farm Fire & Cas. Co. v. Alualu*, Case No. 16-00039, 2016 WL 7743036, at *3 (D. Haw. Nov. 22, 2016) (finding no accident where

alleged injuries were expected result of a violent shove); *State Farm Fire & Cas. Co. v. GP West, Inc.*, 190 F. Supp. 3d 1003, 1015-20 (D. Haw. 2016) (damages resulting from faulty installation of HVAC system not an accident triggering duty to defend). The same conclusion should be reached here.

First, the allegations in the Underlying Lawsuits leave no doubt that the liability Aloha faces is based on its intentional conduct.[3] The claims against Aloha do not, for example, involve an accidental oil or gasoline spill, the sinking of an oil tanker resulting in the fouling of a protected waterway, or an explosion at an oil refinery. Instead, the Underlying Lawsuits are indisputably based on the fundamental assertion that Aloha *intentionally* placed its fossil fuel products into the stream of commerce. As Honolulu explains, Aloha's "principal line of business includes the marketing, terminaling, and distribution of gasoline, diesel, ethanol, lubricants, and other petroleum products in Hawaii." (Ex. 15, ¶ 20; Ex. 16, ¶ 19.)

In addition, the Underlying Lawsuits describe the decades-long efforts by Aloha and others to sell and to promote the increased use of fossil fuel products. It is alleged that, "by 1965, Defendants and their predecessors-in-interest were aware that the scientific community had found that fossil fuel products, if used profligately, would cause global warming by the end of the century, and that such global warming

[3] The AIG Insurers take no position as to whether these allegations are true, nor do they have to prove that they are.

would have wide-ranging and costly consequences." (Ex. 15, ¶ 55; Ex. 16, ¶ 62.) Yet, instead of warning of those "known consequences," Aloha allegedly "concealed the dangers, promoted false and misleading information, sought to undermine public support for greenhouse gas regulation, and engaged in massive campaigns to promote the ever-increasing use of their products at ever-greater volumes"—all in an effort to preserve and maximize its profits. (Ex. 15, ¶ 8; Ex. 16, ¶ 8.)

The allegations in the causes of action also establish that the Underlying Lawsuits are based on Aloha's intentional conduct. For example, in the First Cause of Action, plaintiffs assert that Aloha created and contributed to a "Public Nuisance" by:

- "[a]ffirmatively and knowingly concealing the hazards that Defendants knew would result from the normal use of their fossil fuel products by misrepresenting and casting doubt on the integrity of scientific information related to climate change";
- "[d]isseminating and funding the dissemination of information intended to mislead customers, consumers, and regulators regarding the known and foreseeable risk of climate change and its consequences"; and
- "[a]ffirmatively and knowingly campaigning against the regulation of their fossil fuel products, despite knowing the hazards associated with the normal use of those products."

(Ex. 15, ¶ 158; Ex. 16, ¶ 207.)

Nor does it matter that one cause of action in the Underlying Lawsuits is styled as a "negligent" failure to warn. Hawaii courts rely on the totality of the factual allegations asserted in the underlying complaint, not on the legal theories pled, when determining if the claim arises from an "accident." *See Alualu*, 2016 WL 7743036, at *3. As the Hawaii Supreme Court has cautioned, an insured cannot be permitted to "bootstrap the availability of insurance coverage" by claiming the underlying lawsuit purports to "state a claim for negligence based on facts that, in reality, reflected manifestly intentional, rather than negligent, conduct." *Dairy Rd. Partners v. Island Ins. Co.*, 992 P.2d 93, 112 (Haw. 2000).

Here, the Negligent Failure to Warn claim incorporates the same allegations of intentional conduct discussed above, and also asserts that Aloha's "wrongful conduct" "was committed with actual malice." (Ex. 15, ¶¶ 185, 195; Ex. 16, ¶¶ 235, 245.) Indeed, despite labeling the cause of action as a "negligent" failure to warn, Honolulu and Maui allege that "Defendants [including Aloha] individually and in concert widely disseminated marketing materials in and outside of Hawaii, refuted the scientific knowledge generally accepted at the time, advanced pseudo-scientific theories of their own, and developed public relations materials that prevented reasonable consumers . . . from recognizing the risk that fossil fuel products would cause grave climate changes . . . ." (Ex. 15, ¶ 192; Ex. 16, ¶ 240.) Simply put, any

property damage alleged in the Underlying Lawsuits was caused by Aloha's intentional conduct.

Second, any alleged property damage suffered by Honolulu and Maui was the *reasonably foreseeable consequence* of Aloha's intentional conduct. This is not mere conjecture; it is *the* fundamental premise of the allegations in the Underlying Lawsuits. For example, Honolulu and Maui alleged that "Defendants *have known* for more than 50 years that greenhouse gas pollution from their fossil fuel products would have a significant adverse impact on the Earth's climate and sea level." (Ex. 15, ¶ 7 (emphasis added); Ex. 16, ¶ 7; *see also* Ex. 15, ¶ 55; Ex. 16, ¶ 62 (quoted above).)

The Underlying Lawsuits also allege that Aloha and the other defendants received regular reports and updates—including in 1968, 1969, 1972, 1977, 1979, 1980, 1981, 1982 and beyond—about the foreseeable consequences of the unchecked use of their fossil fuel products from multiple sources, including industry trade associations such as the American Petroleum Institute, U.S. Government Advisory Committees, and the in-house research divisions of other industry participants. (Ex. 15, ¶¶ 55-86; Ex. 16, ¶¶ 56-96.) As a result, it is alleged, Aloha "had actual knowledge that their products were defective and dangerous" yet "acted with actual malice" and a "conscious disregard for the probable dangerous

consequences of their conduct's and products' foreseeable impact" on plaintiffs. (Ex. 15, ¶ 206; Ex. 16, ¶ 254.)

Liability insurance does not exist to insulate commercial actors from the costs of their conscious decisions to flood markets with dangerous products in the pursuit of profits. Because the allegations of the Underlying Lawsuits establish that any alleged property damage to Honolulu and Maui was the reasonably foreseeable consequence of Aloha's intentional conduct, Aloha cannot—under settled Hawaii law—satisfy the "occurrence" requirement and trigger a duty to defend under the AIG Policies. *See Hawaiian Holiday*, 872 P.2d at 234 (The Hawaii Supreme Court has instructed that "in order for the insurer to owe a duty to defend or indemnify, *the injury cannot be the expected or reasonably foreseeable result of the insured's own intentional acts or omissions*.") (emphasis added).

Notably, the only other court that has considered this very issue held that the insurer had no duty to defend a climate change claim because no occurrence was alleged. *See AES Corp. v. Steadfast Ins. Co.*, 725 S.E.2d 532, 538 (Va. 2012). In *AES*, an Alaskan village sued an energy company alleging it "intentionally released carbon dioxide into the atmosphere as a regular part of its energy-producing activities" and that it "knew or should have known of the impacts of its emissions[.]" *Id.* at 534, 537. The village further alleged "there is a clear scientific consensus that the natural and probable consequence of such emissions is global warming and

damages such as [those it] suffered." *Id.* at 537. Because AES was alleged to have intentionally released carbon dioxide into the atmosphere, and the damage to the village was a natural and probable consequence of that release, the Virginia Supreme Court held the damage to the village was *not* the result of an accident and did not trigger insurance coverage. *Id.* at 538; *see also id.* at 537 ("[T]he natural or probable consequence of [an] intentional act is not an accident under Virginia law.").[4]

2. Aloha Cannot Establish The Alleged Property Damage Occurred During The Policy Period Of The AIG Policies.

The Insuring Agreements provide that the AIG Insurers will pay all sums Aloha becomes legally obligated to pay as damages because of property damage caused by an occurrence, and define property damage, in relevant part, as "physical injury to or destruction of tangible property *which occurs during the policy period* . . . ." (*See, e.g.*, SOF 21; Noborikawa Decl. ¶ 44; Ex. 2 (emphasis added); *see also*

[4] The court reached the same conclusion in *AIU Insurance Co. v. McKesson Corp.*, 598 F. Supp. 3d 774 (N.D. Cal. 2022). There, multiple cities and counties alleged that McKesson had created a public nuisance—the opioid crisis—through the improper distribution of and misleading statements about the dangers of its products. *Id.* at 780-82. Under California law, like Hawaii law, "an accident . . . is never present when the insured performs a deliberate act *unless* some additional, unexpected, independent, and unforeseen happening occurs that produces the damage." *Id.* at 788 (emphasis in original). The court determined National Union had no duty to defend McKesson because the suits against McKesson were "based on alleged deliberate conduct—McKesson's distribution of opioids" and, even "[r]esolving all doubts in McKesson's favor," there were no allegations of "additional, unexpected, independent, and unforeseen happening[(s)] that produced the injuries." *Id.* at 798.

SOF 16-17; Noborikawa Decl. ¶¶ 39-40; Exs. 5-12 (insurance applies to property damage that "occurs during the policy period").) There are very few allegations of specific property damage in the Underlying Lawsuits, and *none* state that any climate change-related property damage in Honolulu or on Maui occurred during the policy periods of the AIG Policies. Instead, all specific damage is alleged to have occurred *in 2018, 2019, or 2020*—years after the AIG Policies expired.

For example, Honolulu alleges that "[f]looding and intense runoff during rain bomb events has destroyed sections of the City's drainways normally used to divert rainfall away from populated areas," and attaches a supporting image of a section of Hahaione Channel destroyed *in April 2018*. (Ex. 15, ¶ 152(a).) Honolulu and Maui support their allegations that "[w]ater mains in the BWS drinking system have corroded due to subsurface saltwater intrusion, resulting in failure and breakage," and that "[e]rosion, storm surges, flooding, and wave run-up at the City's network of beach parks have damaged infrastructure and facilities," with images of a broken water main *in 2018* and damage at Maunalahilahi Beach Park *in 2018*. (*Id.* ¶ 152(b)(c).) Finally, Maui alleges climate change-related damages from fires *in 2019* and flooding of a state beach *in July 2019 and August 2020*. (Ex. 16, ¶¶ 196-198, 201.)

Further, the Underlying Lawsuits, which are fundamentally about abating *future* damages, are replete with allegations of anticipated future harms. (*See, e.g.*,

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

The remaining allegations of property damage are undated. For example, Honolulu generally alleges they "have, are, and will experience significant adverse impacts," including beach erosion, flooding and loss of roads, and corrosion of freshwater supply lines and wastewater infrastructure. (*See, e.g.*, Ex. 15, ¶ 150.) However, in a complaint containing concrete dated allegations and replete with allegations of potential future damage, sweeping, vague and undated allegations cannot establish, as Aloha must, that the Underlying Lawsuits allege property damage *during* the policy periods of the AIG Policies. *See Sentinel Ins. Co., Ltd. v. First Ins. Co., of Hawaii, Ltd.*, 875 P.2d 894, 909 n.13 (Haw. 1994) ("insured has the burden to prove that a loss is covered"); *see also Delta Air Lines v. State Farm Fire & Cas. Co.*, No. 95-35706, 95-35759, 1996 WL 511575, at *1 (9th Cir.

Sept. 9, 1996) (insurer can rely on other information "to prove that coverage is unavailable" where complaint contains undated allegations).

3. Aloha Cannot Establish It Faces Liability For "Damages Because Of" Property Damage.

The AIG Policies only cover sums the insured shall become legally obligated to pay as "damages *because of*" property damage. (*See* SOF 15-18; Noborikawa Decl. ¶¶ 38-41; Exs. 1-12.) In a general liability policy, "because of" means more than "but for." It requires the damages sought to be a measure of the cost to remediate specifically identified past property damage. The damages sought in the Underlying Lawsuits, which are unrelated to the cost of remediating any *specific* past damage to any *specific* property and instead relate to the cost to abate anticipated *future* damages caused by climate change, are not "damages because of" property damage as that phrase is used in the AIG Policies.

The District of Hawaii, in analyzing the phrase "because of property damage" in a liability policy, acknowledged "[t]he Hawaii Supreme Court has not defined 'because of,'" but noted "it has defined the synonymous term 'arising out of'[.]" *Association of Apartment Owners of the Moorings, Inc. v. Dongbu Ins. Co.*, Case No. 15-00497 BMK, 2016 WL 4424952, at *4 (D. Haw. Aug. 18, 2016) (quoting *C. Brewer & Co. v. Marine Indem. Ins. Co. of Am.*, 347 P.3d 163, 166 (Haw. 2015)), *aff'd*, 731 F. App'x 713 (9th Cir. 2018). "Arising out of," "[i]n the insurance context is often interpreted to require a causal connection between the injuries alleged and

the objects made subject to the phrase." *C. Brewer*, 347 P.3d at 166 (quotation omitted). For example, in analyzing an exclusion containing the phrase "arising out of," the Supreme Court explained the "causal requirement" that an injury arise out of a particular incident "has been held *to be more than 'but-for' causation* . . . ." *See Oahu Transit Servs., Inc. v. Northfield Ins. Co.*, 112 P.3d 717, 723 n.11 (Haw. 2005) (quoting 6B Appleman, *Insurance Law & Practice* § 4316, Supp. at 103 (Supp. 2004)) (emphasis added).

The limited case law in Hawaii on this key issue is consistent with several recent coverage decisions from appellate courts around the country in nuisance cases brought by government entities that held "because of" requires more than a tenuous "but for" connection.[5] For example, in *Ace American Insurance Co. v. Rite Aid Corp.*, 270 A.3d 239 (Del. 2022), the Delaware Supreme Court held that two Ohio counties seeking to hold opioid dispensers responsible for the future costs of abating a public nuisance created by the opioid crisis were not seeking "damages because of" bodily injury, even though their economic injury may not have occurred *but for* the bodily injury:

> [T]he Counties' claims stem from a particular action—Rite Aid's negligent distribution of opioids to the public. This claim is not directed to an individual injury but to a public health crisis. It is analogous to a

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

> city suing an insured soda distributor for increasing its citizens' obesity rates. The city might claim costs for expanding its parks and recreational activities to address weight gain or increased public hospital expenditures for treating the population . . . [b]ut these economic claims would not stem from any individual injury. In other words, the city would not be bringing a personal injury claim or one for derivative loss, but rather a direct claim for its own aggregate economic injury.

Id. at 252-53.

Similarly, in *Acuity v. Masters Pharmaceutical, Inc.*, 105 N.E.2d 460 (Ohio 2022), the Ohio Supreme Court held that the government entity plaintiffs were seeking only "damages for their own aggregate economic injuries caused by the opioid epidemic" which, though they may not have occurred "but for" the alleged bodily injury to their citizens, were *not* "damages because of" bodily injury because *they were not meant to be a measure of the costs to address any specific bodily injury*. *Id*. at 468. According to the court, while the allegations involving injuries sustained by citizens "provide context" for the governments' claims, the economic damages sought by the governments lacked "more than a tenuous connection" to any individualized bodily injury and, as a result, were not "damages because of" bodily injury. *Id*. at 468-469.

More recently, the Sixth Circuit agreed with the narrower reading of "because of," rejecting the insured's argument that the damages sought by government entities to address the opioid crisis were "because of bodily injury" because they would not have occurred "but for" injuries caused by opioid abuse. *See Westfield Nat'l Ins.*

Co. v. Quest Pharms., Inc., 57 F.4th 558, 562 (6th Cir. 2023). Instead, the Sixth Circuit held that "purely economic damages" for the future abatement of a public nuisance are *not* "damages because of" bodily injury. *Id.*

The same is true here. Honolulu and Maui seek funds for their "increased economic costs" in responding to the global warming crisis, not for the specific costs of repairing any specifically identified past property damage that occurred during the policy periods of the AIG Policies—1984–2010. For example, Honolulu alleges that more than $19 billion in assets and 38 miles of roads are *at risk of damage or destruction* due to sea level rise estimated to occur by the year 2100. (Ex. 15, ¶ 150(b).) And Maui alleges that more than $3.2 billion in assets and 11.2 miles of major roads are *at risk of* inundation and destruction due to sea level rise estimated to occur by the year 2100. (Ex. 16, ¶¶ 170-171.)

Not one of the allegations of property damage, however, includes a reference to any amount incurred to remediate or repair alleged property damage during the policy periods. Instead, as was the case in *Rite Aid*, *Acuity*, and *Quest*, any allegations in the Underlying Lawsuits of property damage already sustained by Honolulu or Maui merely provide context for their claims to abate the alleged nuisance or prevent future damages. Whether under *Dongbu* and *C. Brewer*, or *Rite Aid*, *Acuity*, and *Quest*, Aloha cannot establish the liability it faces is for "damages

because of" actual property damage, as opposed to a concern about, and a desire to prevent, future property damage.

B. Coverage For The Underlying Lawsuits Is Also Precluded By The Pollution Exclusion In Ten AIG Policies.

The allegations in the Underlying Lawsuits establish that the pollution exclusions in ten AIG Policies preclude coverage for the Underlying Lawsuits. There are three variations of the pollution exclusion contained in those ten AIG Policies. Although worded differently, all three bar the coverage Aloha seeks.

1. Exclusion f

The earliest National Union Policies exclude coverage for property damage (i) "arising out of the discharge, dispersal, release or escape"; (ii) "of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants"; (iii) "into or upon land, the atmosphere or any water course or body of water." (*See* SOF 24; Noborikawa Decl. ¶ 47; Exs. 1-12.) The allegations in the Underlying Lawsuits satisfy all three elements.

First, there must be some form of discharge, dispersal, release, or escape. Under Hawaii law those terms must be interpreted according to their plain, ordinary, and accepted meaning in common speech. *Dairy Rd. Partners*, 992 P.2d at 106. The Underlying Lawsuits unequivocally allege that CO_2 and other greenhouse gases are *released* into the atmosphere through the combustion of fossil fuels. (*See, e.g.*, Ex.

15, ¶ 43 ("Normal and intended use of Defendants' fossil fuel products released a substantial percentage of anthropogenic greenhouse gases to the atmosphere[.]").)

Second, the release has to be in the form of "smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or *gases*, waste materials or other irritants, contaminants or pollutants." (SOF 24; Noborikawa Decl. ¶ 47; Exs. 1-2 (emphasis added).) The Underlying Lawsuits allege that use of Aloha's fossil fuel products resulted in the release of greenhouse *gases*, and "particularly carbon dioxide ('CO_2') and methane, in the Earth's atmosphere." (Ex. 15, ¶ 2; Ex. 16, ¶ 2.)

Greenhouse gas emissions also qualify as "pollutants," which is defined under Hawaii law to include greenhouse gases. *See* Haw. Rev. Stat. Ann. § 342B-1 (2023); Haw. Code R. 11-60.1-1 (2014); *see also Allen v. Scottsdale Ins. Co.*, 307 F. Supp. 2d 1170, 1178 (D. Haw. 2004) (noting "fugitive dust" qualified as a "pollutant" for purposes of a pollution exclusion *because* it is identified as an air pollutant in the Hawaii Code). And, the United States Supreme Court held that greenhouse gases, including carbon dioxide, fit within the Clean Air Act's definition of "pollutant." *See Massachusetts v. EPA*, 549 U.S. 497, 500 (2007).

Third, the discharge of pollutants must be into or upon land, the atmosphere, or water. The Underlying Lawsuits clearly allege greenhouse gases are released "in the Earth's atmosphere." (Ex. 15, ¶¶ 1-2; Ex. 16, ¶¶ 1-2.) Thus, all three

elements of the exclusion are satisfied and coverage for the Underlying Lawsuits, if any, is precluded.

The "give back" provision in Exclusion f, which states that the "exclusion does not apply if [the] discharge, dispersal, release or escape is sudden and accidental," does not change this outcome. Under Hawaii law, the phrase "sudden and accidental" has two possible meanings: (1) either the discharge, dispersal, release, or escape was "abrupt" or "immediate" in the temporal sense; or (2) the discharge, dispersal, release, or escape was "unexpected or unintended." *See Pac. Emps. Ins. Co. v. Servco Pac., Inc.*, 273 F. Supp. 2d 1149, 1157 (D. Haw. 2003). Neither meaning applies here—the Underlying Lawsuits do not allege an abrupt release of greenhouse gases, but rather a gradual release over decades that was both expected and intended from the normal use of Aloha's products.

2. Total Pollution Exclusion Endorsement

All of the AIG Policies issued after 2004 contain the Total Pollution Exclusion, which is substantially similar to Exclusion f, but does not have the "give back" provision requiring the discharge to be sudden and accidental. (*See* SOF 27-28; Noborikawa Decl. ¶¶ 50-51; Exs. 7-12.) The Total Pollution Exclusion, in relevant part, applies to property damage that "would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage . . . , release or escape of "pollutants" at any time. (*Id.*) "Pollutants" are defined, in

relevant part, as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke . . . ." (SOF 29; Noborikawa Decl. ¶ 52; Exs. 7-12.) For the reasons discussed above, these elements are met; the Total Pollution Exclusion applies and precludes coverage for the Underlying Lawsuits.

3. PCOH Exclusion

Finally, two National Union Policies with a policy period of February 1, 1988–February 1, 1989, include an exclusion that states in relevant part: "THERE IS NO COVERAGE FOR . . . NON-SUDDEN OR GRADUAL EMISSIONS OF POLLUTANTS . . . ARISING OUT OF THE PRODUCT/COMPLETED OPERATIONS HAZARD . . . ." (*See* SOF 25; Noborikawa Decl. ¶ 48; Exs. 5-6.) The policies define "pollutants" in the same way as the policies containing the Total Pollution Exclusion, and the requirement of "non-sudden and gradual emissions" is met here for the same reasons that the discharge(s) at issue was not "sudden and accidental."

The primary difference with this exclusion is that it applies to pollutants arising out of the "products completed operations hazard," which is defined as "all property damage occurring away from premises you own or rent and arising out of your product, except products that are still in your physical possession." (SOF 26; Noborikawa Decl. ¶ 49; Exs. 5-6.) "Your product" is defined to mean "any goods or products, other than real property, manufactured, sold, handled, distributed or

disposed of by: (1) You; [or] (2) Others trading under your name . . . ." (*Id.*) The Underlying Lawsuits undeniably allege property damage occurring away from Aloha's premises and arising out of Aloha's products. (*See* Ex. 15, ¶¶ 1-15; Ex. 16, ¶¶ 1-15.) Thus, any coverage would be barred by this exclusion as well.

IV. CONCLUSION

For the foregoing reasons, the AIG Insurers respectfully request that the Court grant partial summary judgment in their favor, declaring that neither National Union nor American Home has a duty to defend Aloha in the Underlying Lawsuits.

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