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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

N[.] F., a Minor, by and through her natural guardian, *et al.*,

Plaintiffs,

v.

DEPARTMENT OF TRANSPORTATION, STATE OF HAWAI‘I, *et al.*,

Defendants.

CIVIL NO. 1CCV-22-0000631
(Environmental Court)

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Hearing Date: To Be Scheduled
Hearing Time: To Be Scheduled
Judge: Hon. Jeffrey P. Crabtree
Trial Date: September 26, 2023

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I. INTRODUCTION

It is undisputed that our government is focused and actively working on climate change. As Plaintiffs admit, "climate change is not a problem the legislature has proven incapable of handling." Plaintiffs' Opposition to Motion to Dismiss ("Opp.") 13 (internal quotation marks omitted). In compliance with the many climate change related laws the legislature has enacted, state agencies like the Hawai‘i Department of Transportation ("HDOT") are weighing the options, timing, costs, and benefits of a wide range of responses to climate change.

Still, Plaintiffs are impatient and believe that they know best how to address our "climate emergency." Opp. 1, 4, 11, 13, 15, 18. Indeed, Plaintiffs bring this lawsuit, although they are unable to allege a violation of any of Hawaii's climate change related laws. Instead, they insist that Defendants must take more drastic actions than defined in the law, starting right now. The supposed authority for demanding these actions is Plaintiffs' understanding of the Hawai‘i legislature's aspirations. The actions would influence the transportation choices of millions of private individuals and would be imposed by leaping ahead of the political branches and resolving important policy questions in litigation.

Plaintiffs say that their programmatic challenge to "Defendants' operation of the state transportation system," Opp. 11, accords with "established" law, Opp. 1, 2, 3, but Plaintiffs are mistaken. Their claims are unprecedented. The relief they request—such as appointing a special master to oversee HDOT—is unprecedented. And their interpretations of Sections 1 and 9 of Article XI of the Hawai‘i Constitution are unprecedented. The Constitution does not codify a one-sided, at-any-cost approach to the State's environmental problems. Nor does it suggest that the solutions are obvious and straightforward and should be drawn up by the courts. The Constitution "directs the State and its agencies to assess and balance 'protection' and 'utilization' of public trust resources." *Matter of Maui Elec. Co., Ltd.*, 150 Hawai‘i 528, 536–37, 506 P.3d 192, 201 (2022) ("*Matter of MECO*"). Because of the number of people affected and the varied and competing interests and approaches to addressing climate change, the balancing is complex and the legislature reasonably set long-term deadlines for achieving its emissions reduction goals for the State. And the legislature may change those deadlines and goals. The House of Representatives, for instance, is considering a bill to accomplish one of Plaintiffs' demands, banning sales of new gasoline-powered automobiles, by 2030. *See* H.B. No. 393, 31st Leg. (2021), *available at* http://www.capitol.hawaii.gov/session2021/bills/HB393_.HTM. Unless and

until the legislature makes such a change, however, Defendants' compliance with the State's reasonable climate change related laws disposes of Plaintiffs' constitutional claims.

Dismissing Plaintiffs' claims will not "eviscerate" or "nullify" constitutional protections for public trust resources and a clean and healthful environment. Opp. 3. Sections 1 and 9 will continue to function as they always have—in connection with discrete agency actions and in accordance with statutory law. For these reasons, the Court should grant the motion to dismiss.

II. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED OR SUBSTANTIALLY NARROWED FOR PRUDENTIAL REASONS

In novel cases such as this one, it is critical for the Court to consider "prudential rules of judicial self-governance founded in concern about the proper and properly limited role of courts in a democratic society." *Life of the Land v. Land Use Comm'n ("Life of the Land II")*, 63 Haw. 166, 172, 623 P.2d 431, 438 (1981). Those prudential rules include standing, ripeness, and the political question doctrine. *See Ching v. Case*, 145 Hawai'i 148, 172–76 & n.44, 449 P.3d 1146, 1170-4, n.44 (2019) (distinguishing the three doctrines). All three require dismissal here.

A. Standing and Ripeness

Plaintiffs' essential problem is that they do not allege how Defendants are causing them present harm. *See* Motion to Dismiss ("MTD") 17–20. Plaintiffs are seeking to avoid future harms that they expect will be caused, not by Defendants, but by the accumulated GHG emissions of millions of private individuals using the State's roads, harbors, and airports. *See* Opp. 9; *see also id.* 18 (citing allegations that drivers and pilots are emitting more GHGs than policymakers expected many years ago). Plaintiffs' repeated assertion that Defendants operate the "transportation system" where third parties emit GHGs from private vehicles, *id.* 1, 4, 6, 8, 9, 11, 14, 16, 17, 18, 20, does not create a live dispute *with Defendants*. It is an artful attempt to downplay that Plaintiffs' case is fundamentally concerned with third parties' future conduct.

Plaintiffs nevertheless contend that they can maintain suit because the three-part injury-in-fact test does not apply to claims under the Declaratory Judgment Act, HRS § 632-1. *See id.* 16–17. That contention is unavailing. While HRS § 632-1 does have its own statutory standing requirements, *see Tax Foundation of Hawai'i v. State*, 144 Hawai'i 175, 188, 188, 439 P.3d 127, 140 (2019), Plaintiffs here demand more than declaratory relief: *they also demand transformative injunctive relief*. As the Supreme Court recently held, a cause of action for injunctive relief to remedy constitutional violations "exists independently of HRS § 632-1," *Ching*, 145

Hawai‘i at 184 n.57, so Plaintiffs' tactical decision to defend only their standing to demand declaratory relief under HRS § 632-1 says nothing about their standing to demand injunctive relief under the Hawai‘i Constitution. At a minimum, the Court must dismiss or strike Plaintiffs' injunctive demands.[1]

Yet, even as to declaratory relief, Plaintiffs have not demonstrated their standing under HRS § 632-1. Generally speaking, HRS § 632-1 authorizes declaratory judgments when there is either an "actual controversy" or "antagonistic claims." *Tax Found.*, 144 Hawai‘i at 200. Plaintiffs wrongly contend that they have both when they have neither.

- Plaintiffs contend that an "antagonistic claims" case exists because a declaratory judgment would resolve "uncertainty" about the extent of the constitutional duties Defendants supposedly owe to Plaintiffs. Opp. 16–17, 18 n.15. That contention lacks merit. Judicial remedies must be "tailored to eliminate only the specific harm alleged," *Ching*, 145 Hawai‘i at 184–85 (quoting *Quiksilver, Inc. v. Kymsta Corp.*, 360 F. App'x 886, 889 (9th Cir. 2009)), and Plaintiffs do not allege that they are being harmed by mere uncertainty. Plaintiffs allege that they will be harmed by third parties' GHG emissions. Declaratory judgments *about Defendants' duties* will not eliminate *those third-party harms*. The Court should reject Plaintiffs' broad view of HRS § 632-1, which, if accepted, would allow private parties to sue any state agency for any harm third parties are causing.
- Plaintiffs alternatively argue that this is an "actual controversy" case because of "ongoing legal violations." *See* Opp. 17–20. But, again, the "violations" Plaintiffs recite relate to third

[1] In positing that it is "premature" to decide whether they have standing to seek injunctive relief, Opp. 12 n.9, Plaintiffs misunderstand the relationship between declaratory and injunctive relief in a case such as this one. Plaintiffs must have standing for each cause of action they assert, and, as noted above, *Ching* holds that a cause of action for injunctive relief under the Hawai‘i Constitution "exists independently of HRS § 632-1." *Ching*, 145 Hawai‘i at 184 n.57. Plaintiffs suggest that the Court can grant them injunctive relief because HRS § 632-3 authorizes injunctive relief in declaratory judgment cases. *See* Opp. 12 n.9. HRS § 632-3, however, authorizes only "ancillary" relief. *Ching*, 145 Hawai‘i at 156. True "ancillary" relief provides clarity to or gives effect to declaratory relief. *See, e.g.*, *Costa v. Sunn*, 5 Haw. App. 419, 426, 697 P.2d 43, 48 (1985) (reinstating an old set of regulations where, without that relief, "invalidation of [new regulations] would have been a Pyrrhic victory for Plaintiffs and would have caused rather than avoided future litigation"). The injunctive relief Plaintiffs seek is not ancillary—it is dramatically larger than, and different from, the declaratory relief Plaintiffs seek because it would have the Court design, implement, and supervise a brand-new regulatory scheme and appoint a special master to administer it.

parties' GHG emissions. *See id.* 18. Plaintiffs ultimately acknowledge that there is no actual controversy between them and Defendants when Plaintiffs admit that they want the Court to "declare whether Defendants' conduct today is consistent with achieving" the State's long-term goals for reducing private parties' GHG emissions. *Id.* 19; *see id.* 9 (asserting that the "gravamen" of Plaintiffs' case is that Defendants have no "plan or prospect for meeting the Zero Emissions Target"). The Court cannot make that determination without "speculation as to conditions that would exist" in the long term. *Ching*, 145 Hawai'i at 174. To be clear, Defendants are not arguing that Plaintiffs "cannot allege any violation of climate mandates until 2045," Opp. 1. Defendants are arguing only that there is, at present, no "actual controversy" about those 20-years-from-now mandates that a simple declaratory judgment could resolve.

B. Political Question Doctrine

Even if Plaintiffs had not abandoned their requests for injunctive relief and/or could satisfy the standing requirements of HRS § 632-1, their claims still founder on the political question doctrine. *See* MTD 14–17. Plaintiffs' rejoinder to the doctrine misses the mark. Defendants do not argue that the Court lacks capacity, ability, or authority to interpret the Hawai'i Constitution or that Sections 1 and 9 are inherently nonjusticiable. *See* Opp. 11. Defendants argue that the second, third, and fourth *Baker* factors are present on the facts of this unique case: Plaintiffs' demand that the Court go beyond the requirements of the State's climate change related laws, develop its own policies for mitigating third-party GHG emissions, and then manage HDOT's implementation of those policies is unsupported by judicially discoverable and manageable standards, requires judicial policymaking, and expresses disrespect for coordinate branches of government. *See* MTD 14–16.

To minimize those political questions, Plaintiffs argue that the first *Baker* factor—a textual commitment of an issue to a coordinate branch—is more important than the "lesser" factors. *See* Opp. 11–12. That argument is wrong: the law is clear that the presence of any *Baker* factor requires dismissing the case on political question grounds. *Trustees of Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 737 P.2d 446, 447 (1987) (dismissal warranted where "one of" the factors is "inextricable from the case at bar"). So, while the Hawai'i Constitution does not textually preclude courts from enforcing Sections 1 and 9 of Article XI, that does not mean that every case brought to enforce Sections 1 and 9 is automatically justiciable. It means that courts asked to enforce Sections 1 and 9 must examine the other *Baker* factors to determine if any is present in a

particular case. *See Ching*, 145 Hawai‘i at 175 (distinguishing a public trust claim for land management from a public trust claim for funding because the latter presented political questions).

Plaintiffs' other, more direct objections to Defendants' arguments about the three *Baker* factors also lack merit:

- Judicial policymaking: Plaintiffs contend that the Court will not need to make policy in this case because the legislature already made all necessary policy choices. *See* Opp. 12. That contention is disproved by Plaintiffs' failure to allege that Defendants have violated any statutory requirements that embody the legislature's policy choices. For Plaintiffs to prevail, the Court will have to make policy decisions the legislature has not made. Tellingly, Plaintiffs do not dispute that the Court will have to set the (many) targets and deadlines Plaintiffs believe are necessary to achieve the legislature's 20-years-from-now mandates.

- Disrespect for other branches: Plaintiffs contend that the "climate emergency" overrides the need for this Court to respect legislative decisions. *See* Opp. 13 & n.10. But exigencies and political failures are not exceptions to the political question doctrine. *Cf. Gil v. Whitford*, 138 S. Ct. 1916, 1929 (2019). And the Court should not ignore the intrusiveness of the relief Plaintiffs seek, *see* Opp. 13. Instead, it should recognize that appointing a special master to direct the discretionary actions of a state agency would be an affront. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (holding that partisan-gerrymandering claims present political questions because courts "have no license to" grant the relief the plaintiffs sought).

- Judicially manageable standards: Plaintiffs' reliance on *Ching* for their position that the "common law of trusts" provides judicially manageable standards for their public trust claim is unpersuasive. *See* Opp. 13. The claim in *Ching* challenged the state's management of real property and a lessee, a task for which the common law was well suited. *See Ching*, 145 Hawai‘i at 175–76. Here, Plaintiffs' challenge Defendants' regulatory activities, such as the pace at which Defendants are adopting rules and approving projects, for which no analogy exists in the common law. Indeed, as in *Yamasaki*, where the court held that weighing in on how state agencies should determine the "boundaries" of the public trust in allocating funds was not "traditional fare for the judiciary," Plaintiffs would have this Court "intrude in an area committed to the legislature." 69 Haw. at 173, 737 P.2d at 447. Plaintiffs also contend that various climate change related laws provide standards for evaluating Plaintiffs' Section 9 claim. *See* Opp. 14. But Plaintiffs identify no violation of those laws, and, as Defendants elsewhere explain, the requirements of those laws (*e.g.*, to "endeavor" or

to meet goals "as soon as practicable") are hortatory and aspirational, not rules or standards the Court can meaningfully apply. Plaintiffs urge that the Court can simply do "what science dictates," Opp. 14, but science is not a source of "*legal* standards …, let alone limited and precise standards that are clear, manageable, and politically neutral," *Rucho*, 139 S. Ct. at 2500 (emphasis added). Policymakers may consider scientific data when making policy choices, and courts may instruct policymakers to consider such data, but that is far from what Plaintiffs seek here—to have this Court determine that "science" mandates the precise actions HDOT must take to address climate change and order HDOT to take those actions. That is a serious oversimplification of how "science" can aid in choosing among numerous different policies to address a complex problem.

III. PLAINTIFFS FAIL TO STATE CLAIMS UNDER THE CONSTITUTION

A. Section 9

Plaintiffs agree that to state a Section 9 claim, they must allege facts demonstrating a violation of a state environmental law. *See* MTD 4–12. Yet, Plaintiffs cannot plausibly explain how HDOT has specifically violated any state environmental law. They merely assert that Defendants are "establishing, maintaining, and operating a transportation system" that is "at odds" with the legislature's long-term goals, Opp. 8, and that "exacerbates the climate emergency recognized by … the legislature," *id.* 11. That contention shows no violation of a specific law, regardless of Plaintiffs' desire that Defendants take different actions to address climate change. *See County of Haw. v. Ala Loop*, 123 Hawai'i 391, 406, 235 P.3d 1103, 1118 (2010), *abrogated on other grounds by Tax Found. of Haw. v. State*, 144 Hawai'i 175, 439 P.3d 127 (2019). There is no warrant for Plaintiffs' assumption that, after the legislature sets a long-term deadline for responding to an environmental problem, Section 9 gives private plaintiffs the right to demand faster or different responses to the environmental problem.

The many laws Plaintiffs cite in their Complaint do not sustain their Section 9 claim. Plaintiffs do not dispute that several of those laws do not apply to HDOT or that several of those laws do not relate to the environment, including HRS Chapters 261 and 266, HRS § 26-19, and HRS § 279A-2.[2] Plaintiffs admit that a law must "relate[] to environmental quality" to be

[2] The only statutes that Defendants and Plaintiffs appear to disagree about are HRS §§ 264-142 and 20.5(a), which Plaintiffs argue are "environmental" because of a reference to climate change goals in the preamble of the bill that established those programs. *See* Opp. 8 (citing 2021 Haw. Sess. Laws Act 131 § 1). That argument misses the mark because that preamble language described one of several goals of a multi-part bill. Some of the bill's provisions (like those

enforceable under Section 9. *See* Opp. 6. And the few laws Plaintiffs spotlight as related to the environment—HRS § 225, HRS § 196-9, HRS §§ 226-17, -18, and HRS §§ 264-143—are laws that Defendants *agree* relate to the environment and are potentially enforceable under Section 9. *See* MTD 8–10. The problem here is that Plaintiffs allege no violation of those few laws.

It does not aid Plaintiffs to insist that Defendants must act now or never to meet the 2045 zero emissions target. *See* Opp. 9. While the State has recognized that addressing climate change is a pressing issue, such exigency does not excuse Plaintiffs' failure to allege how Defendants have violated any environmental statute. Indeed, Plaintiffs do not even allege that Defendants are violating any subsidiary requirements of the law setting the 2045 emissions target. Plaintiffs have not pointed to a single action in which HDOT has failed to '"manage . . . fleets to achieve the clean ground transportation goals," HRS § 225P-7, or neglected to "give consideration" to climate objectives. HRS § 225P-5. Defendants do not claim that they have discretion to "engage in violations of their duties." Opp. 9.[3] Defendants are simply not violating their duties.

Finally, Plaintiffs' failure to reconcile their Section 9 claim with the Hawai'i Administrative Procedure Act ("HAPA") is telling. Defendants are not arguing that HAPA is the "exclusive means," Opp. 10, for all plaintiffs to litigate all Section 9 claims. Rather, Defendants argue that, when a particular Section 9 claim is about official action of a state agency like HDOT, a plaintiff cannot invoke Section 9 to obtain review that would otherwise have been available under HAPA. Section 9 explicitly states that a person's right to "enforce" under Section 9 is "subject to reasonable limitations and regulation as provided by law." Haw. Const. art. XI § 9. Plaintiffs do not dispute that the legislature has authority to channel Section 9 claims through particular causes of action. Indeed, Plaintiffs themselves try to challenge their Section 9 claim through HRS § 632-1, *see* Opp. 5. Plaintiffs also do not dispute that, when HAPA applies, it is reasonable. Plaintiffs simply claim that HAPA does not apply here, *see* Opp. 10–11, but it plainly does. Insofar as Plaintiffs challenge any action that *could have been* judicially reviewed after a contested case proceeding, Plaintiffs cannot now pursue that challenge here.

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codified in HRS §§ 264-143) were environmental in nature, but that does not render the instructions to HDOT in Sections 264-142 and 20.5(a) to construct a contiguous and accessible network of highways and pathways "environmental."

[3] Plaintiffs' "evidence" that Defendants are disclaiming their duties misquotes Defendants' motion. Plaintiffs quote Defendants as arguing that "plaintiffs cite no law requiring plans," Opp. 10, but Defendants actually wrote that "plaintiffs cite no law requiring *such* plans," referring to a specific set of plans that Plaintiffs alleged needed to be created. *See* MTD 10.

B. Section 1

Plaintiffs argue that they do not need to identify any particular agency action in which HDOT has failed to fulfill its public trust duties because Section 1 imposes "independent and affirmative duties." Opp. 3. But they misunderstand the way in which Section 1 is "independent." Section 1 is "independent" in that it provides an additional consideration for agencies exercising their statutory duties. It does not supplant statutory requirements but rather works "in tandem" with them by guiding their application because an agency must "perform its statutory function in a manner that fulfills the State's affirmative constitutional obligations." *Matter of MECO*, 150 Hawai'i at 538. Conversely, "an agency's governing statutes and regulatory provisions provide the context for applying the broad principles of the public trust doctrine *to the specific task faced by the agency*." *Id*. (emphasis added). Thus, the Supreme Court held that an agency can "fulfill[] its public trust obligations by complying with its statutory duties." *Id.* at 541.[4]

Plaintiffs seek to make the public trust doctrine larger—to make it independent of specific agency actions—and they ask the Court to mandate additional "measures Defendants can take to reduce transportation related greenhouse gas emissions consistent with the best available science." Opp. 5. They assert that such measures are not constrained by HDOT's statutory authority because statutes cannot "override the constitutional public trust." *Id.* Such a reading would divorce the public trust doctrine from statutory duties entirely, allowing Plaintiffs to sue any state agency, any time, for not sufficiently protecting the public trust, even if the agency otherwise lacks authority to do the things Plaintiffs want. That end run around the legislature's policy judgments is foreclosed by Hawai'i precedent. The Supreme Court has made clear that an agency "can only wield powers expressly or implicitly granted to it by statute" in implementing its public trust obligations. *Matter of MECO*, 150 Hawai'i at 538.

Moreover, even if the relief Plaintiffs seek were within HDOT's statutory authority, Plaintiffs still fail to allege any improper action by HDOT or explain how HDOT violated any

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[4] Plaintiffs misread *Ching*. *See* Opp. 3, 5. In *Ching*, the Court's observation that public trust duties "exist independent of any statutory mandate" was offered in response to the State's argument that "no statute exists setting forth the State's obligations" in that case. *Ching*, 145 Haw. at 178. Since *Ching*, the Supreme Court has noted that *Ching* was a unique case, involving public trust resources the state permitted someone else to use, and thus raised a unique question whether Section 1 imposes a duty to monitor in those situations. *See Matter of MECO*, 150 Haw. at 537 n.13.

specific statutory duty. Without a challenge to a concrete HDOT action, Plaintiffs have not alleged a violation of HDOT's public trust obligations. Plaintiffs' allegation of a "systemic pattern and practice of conduct and decision–making that affirmatively harms public trust resources" is not enough. They are simply disagreeing with HDOT's policy. They have not identified—and cannot identify—any case where a court held that an agency's "systemic pattern and practice" violated Section 1. The available cases have each involved specific agency actions. *See, e.g.*, *Matter of MECO*, 150 Hawai'i at 540 (assessing whether the PUC had appropriately considered impacts on local air, water, and plants when approving a particular power purchase agreement); *Springs, Inc. v. Planning Comm'n of County of Kaua'i*, 133 Hawai'i 141, 173, 324 P.3d 951, 983 (2014) (examining a county planning commission's use of the public trust doctrine to reject a water bottling company's permit application).

Plaintiffs also are wrong in claiming that the public trust doctrine inherently "includes the climate system as a natural resource in itself." Opp. 5. Plaintiffs focus on the word "all" in Section 1, but that word is part of the phrase "all natural resources," which in turn is modified by the word "Hawaii's." *See* Haw. Const. Art. XI, Section 1 (directing state agencies to conserve and protect "Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources"). While climate change undoubtedly affects Hawaii's resources, the global climate is not itself a state resource. That reality is not "self-defeatist." Opp. 5. It is simply a recognition that the overarching approach and response to climate change is to be determined by the legislature and executive branches in Hawai'i and other governments across the globe, not spelled out in a Hawai'i constitutional provision added in 1978.

So far, cases in Hawai'i have applied the public trust doctrine only to management of local air, water, and land resources. *See In re Molokai Pub. Utils., Inc.*, 127 Hawai'i 234, 237, 277 P.3d 328, 331 (App. 2012) (surface and ground water); *Umberger v. Dep't of Land & Nat. Res.*, 140 Hawai'i 500, 521, 403 P.3d 277, 298 (2017) (marine waters and submerged lands); *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 223, 140 P.3d 985, 1003 (2006) (coastal waters). Plaintiffs portray *Matter of MECO* as linking the public trust doctrine with a "right to a life-sustaining climate system," Opp. 5, but the Supreme Court said that in dictum and only in connection with Section 9. *See* 150 Hawai'i at 538 n.15. Plaintiffs also highlight that the Supreme Court observed that "air and other trust resources" are "affected by climate change," *id.*, but that is not the same as plaintiffs' view that "climate in itself" is a "trust resource[] …

affected by climate change." (That observation, moreover, was in reference to HRS § 269-6(b), not Section 1 or Section 9.).

Finally, just as with their Section 9 claim, Plaintiffs fail to explain how their Section 1 claim can be brought in this proceeding in light of HAPA. As explained above, Plaintiffs cannot challenge here any action for which they could have initiated a contested case proceeding and potentially sought judicial review of the result.

IV. ATTORNEYS' FEES

The Court also must dismiss or strike Plaintiffs' request for attorneys' fees. *See* MTD 20. Plaintiffs do not dispute that Defendants are immune from paying attorneys' fees. Plaintiffs argue only that a request for attorneys' fees cannot be stricken on a motion to dismiss. *See* Opp. 20 n.16. They fail, however, to cite any authority for that argument.

V. CONCLUSION

The Court should dismiss all claims in Plaintiffs' complaint with prejudice or, at a minimum strike Plaintiffs' requests for injunctive relief and attorneys' fees.

DATED: Honolulu, Hawai'i, September 28, 2022.

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