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The William S. Richardson School of Law
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Professor & Associate Dean for Academic Affairs

May 21, 2019

Phil Goldberg, Esq.
Shook Hardy & Bacon
1800 K Street NW, Suite 1000
Washington, D.C. 20006

Re: Hawai'i Climate Litigation Conference

Dear Mr. Goldberg:

Thank you for your May 2, 2019 email regarding the "Climate Science and Litigation: Communities Go to Court to Recover Costs of the Climate Crisis" conference held on May 3, 2019 at the Hawai'i State Capitol, an event that was co-organized by the William S. Richardson School of Law's Environmental Law Program.

In your email, which I regrettably did not see in my inbox until several days later, you make a most unusual request: "we ask that you postpone the panel discussion scheduled for after the elected representatives' presentations until you can include panelists who can represent each side of this issue."

I must say that, over my 23-year-career as a law professor, I have never received an email like yours before. Your request to disrupt our public event was quite surprising, especially coming from far across the Continent, from someone I've never heard of, on behalf of a private client with an apparently direct financial interest in chilling debate about climate litigation, with no apparent connection to Hawai'i and with, it seems, no understanding of the climate crisis we are facing in the islands and the Pacific.

Fortunately, just a few hours before I gave the opening remarks at the conference, I was made aware of your concerns from your similarly-worded blog post on the Manufacturers' Accountability Project website, one of two blogs you posted on this topic on the same day.[1] As you may know, during my welcome and introduction, I was able to explicitly acknoweldge your concerns, to convey your blog remarks to the conference participants, and to invite you to further dialogue in Hawai'i.

[1] https://mfgaccountabilityproject.org/2019/05/03/manufacturers-law-schools-should-provide-balanced-discussion-of-climate-litigation/; https://mfgaccountabilityproject.org/2019/05/03/one-sided-university-of-hawaii-event-to-promote-discredited-climate-lawsuits/

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A few days later, I read, again with surprise, your May 10, 2019 Letter to the Editor in the Honolulu Star-Advertiser, on behalf of your client, criticizing my co-authored Island Voices Op-Ed, published in the paper on May 5, 2019. In your letter, you seem to acknowledge that I'm a well-respected faculty member (thank you) but you indicate that I "could not be more wrong." I will address your specific comments about the case law and goals of these lawsuits below.

In addition, as a courtesy to you and your client, I will post your email, my Op-Ed, your two blogs, and your letter to the editor, along with this response, on our Environmental Law Program's Climate Litigation conference website so your concerns and my response are fully accessible to participants and the public.

To enhance the public understanding of these issues, I want to point out several issues where I believe your letter mischaracterizes the facts and issues addressed at the conference.

First, your email states that the efforts of cities, counties, a state, and a commercial fishing trade association to hold fossil fuel companies accountable for climate change-related costs and damages are "controversial." I'm puzzled by your use of this term. The lawsuits that these entities have filed allege traditional tort actions based on fossil fuel companies' over-production, over-promotion, and false and misleading marketing of products that their own experts warned – as long as 50 years ago – would cause rising seas, warming temperatures, and other consequences that could be "severe" or even "catastrophic."

Perhaps by "controversial" you mean that your client is opposed to these lawsuits because they are aimed at companies affiliated with MAP? It's understandable that your client would take this position but that does not mean the lawsuits, brought by governments on behalf of injured communities, are "controversial."

As you are undoubtedly aware from your prior work for defendants in this and other areas of corporate liability (listed on your web site as "Pharmaceutical and Medical Device Life Sciences and Biotechnology Food, Beverage and Agribusiness Automotive"[2]), courts around the country have held this kind of corporate malfeasance can support liability. *See, e.g., People v. ConAgra Grocery Products Co.*, 17 Cal. App. 5th 51, 91 (2017) ("basis for defendants' liability for the public nuisance created by lead paint is their *affirmative promotion of lead paint for interior use,* not their mere manufacture and distribution of lead paint or their failure to warn of its hazards.") (emphasis in original, citing Santa Clara v. Atlantic Richfield Co., 137 Cal. App. 4th 292, 309-10 (2006)); *Soto v. Bushmaster Firearms International, LLC,* 331 Conn. 53, 66 (CT 2019) (rejecting preemption defense to gun manufacturer liability because "The regulation of advertising that threatens the public's health, safety, and morals has long been considered a core exercise of the states' police powers").

[2] https://www.shb.com/professionals/g/goldberg-phil

You also state in your May 10 letter that the pending climate litigation cases discussed in the conference are "baseless." In your May 2 email you call them "meritless." Based on my many years of experience as a litigator, teacher tort law, and author of scholarship in this area of common law remedies, I respectfully disagree with your view. Of course, ultimately the courts will determine the legal merit of these cases, and the validity of industry's defenses. I hope you, as an experienced attorney, would agree that the determination of merit is sometimes a lengthy complex judicial process, based on the rule of law. I don't see that as controversial either.

Second, your email grossly mischaracterizes the relevance of the U.S. Supreme Court's decision in AEP v. Connecticut, 131 S. Ct. 2527 (2011). Specifically, your May 10 letter misappropriates the quote – and gravitas -- of Associate Justice Ruth Bader Ginsburg, deliberately, it seems, to create confusion in the mind of the reader. She did not broadly say, as you indicated, "there is 'no room' for litigation over climate change public policy."

Similarly, in your May 2 email to me, you state:

> In 2011, the Supreme Court dismissed *Am. Elec. Power v. Connecticut*, 564 U.S. 410 (2011), issuing a broad warning against climate change tort suits, including those filed by states and localities. The Court explained that there is "no room for a parallel track" of tort litigation over climate change public policy and that setting climate change public policies were solely "within national legislative power."

You fail to state, however, that Justice Ginsburg's "no room for a parallel track" quote, 131 S. Ct. at 2538, was within the context of EPA's ongoing federal rulemaking proceeding to regulate "greenhouse gas emissions" from "fossil-fuel fired power plants," which was similar to the relief sought by some of the same plaintiffs in that lawsuit. That context matters.

You also neglect to state that Justice Ginsburg was speaking about *federal* not state common law. She wrote: "We hold that the Clean Air Act and the EPA actions it authorizes displace any *federal* common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." 131 S. Ct. at 2537 (emphasis added).

Again, nothing in *AEP* precludes cities, states, or others from suing fossil fuel companies in *state* court, under *state* laws, over climate change-related costs and damages. In fact, the Court expressly did not decide that issue. The final paragraph of Justice Ginsburg's opinion states unequivocally: "None of the parties have briefed preemption or otherwise addressed the availability of a claim under *state* nuisance law. We therefore leave the matter open for consideration on remand." 131 S. Ct. at 2540 (emphasis added).

I would assume that as a practitioner in this area you would be well versed in this area of the law, so your mixing up of federal v. state law claims is really puzzling.

Third, regarding the "box score," including the two climate damages lawsuits that have been dismissed, this was discussed at the May 3 conference. In your letter, you reference "several federal

courts and judges," without any specifics. In your May 2 email you state: "Further, the Ninth Circuit, as well as federal judges in California and New York, have similarly refused to create the type of category liability over fossil fuels sought in such cases. They each have dismissed cases seeking money from energy companies for so-called climate change-related injuries. Students and others attending this symposium should be educated about this case law."

As I mentioned, it was discussed. And, strangely, in all of these pieces, you omit any mention of the six lawsuits that were remanded to state court for further proceedings, which seems to contradict your overall point. The conference presentation referred to all the cases and gave a balanced discussion on this point, in contrast to your email and letter, which seems designed to create the illusion of pessimism about the chances of success of these cases as they wind their way through the judicial process.

Last but not least, your email mischaracterizes the current wave of lawsuits by questioning whether they are "an appropriate public policy solution to global climate change." While I can understand your client's concerns about the rapid increases in the development of climate policy within the legislative and executive branches of localities, states, and even the federal government in reaction to the climate crises, this is mixing apples and oranges.

These lawsuits are tort-damages cases filed in the judiciary, a separate branch of government and redress pathway from the legislative efforts where communities are also pressing for public policy solutions to the climate crisis. These traditional tort damages actions are intended to resolve through application of the rule of law in the judiciary who is responsible for the costs of adaptation measures needed to protect communities and infrastructure from rising seas, temperature rise, severe weather, and other consequences of climate crisis in their communities.

In fact, as the State of Rhode Island said in its complaint:

> "… Rhode Island seeks to ensure that the parties who have profited from externalizing the responsibility for sea level rise, drought, extreme precipitation events, heatwaves, other results of the changing hydrologic and meteorological regime caused by global warming, and associated consequences of those physical and environmental changes, bear the costs of those impacts on Rhode Island, rather than the State, local taxpayers, residents, or broader segments of the public. Rhode Island *does not seek to impose liability on Defendants for harms other than those to the State …, nor for their direct emissions of greenhouse gases, and does not seek to restrain Defendants from engaging in their business operations."* (Rhode Island Complaint par. 12) (emphasis added).

I note with interest that in your letter to the editor that you seem committed to "new technologies for reducing climate change emissions and impacts." In your May 2 email to me you also state: "there is a need for an earnest public policy debate over the best way to reduce climate change emissions and impacts." These positions are laudable, both because you acknowledge that such impacts exist, that we need to address the impacts, and that your client is committed to reducing them. As you say in both the email and the letter, there are "societal-wide advancements needed here." It's certainly

necessary for industry efforts to be both genuine and massive given the urgent nature of the crisis. Please keep up the good work.

Speaking of your work, I note with interest your acknowledgement that you were retained in early 2019 by your client the Manufacturers' Accountability Project, which was set up in 2017 by the National Association of Manufacturers (NAM). My understanding is that the major fossil fuel producers are part of NAM. I recently read that Exxon and Chevron are investing billions to dramatically increase their oil and gas production in the Permian Basin in West Texas – to nearly two million barrels per day in the next few years.[3] This seems at odds with your client's commitment to examine the "best way to reduce climate change emissions and impacts." I do look forward to learning more about your client and its role in educating the public about these important climate litigation and crisis issues.

In closing, I wish to emphasize that the William S. Richardson School of Law will continue our strong commitment to educate our students and community about important legal issues consistent with our mission to "advance justice and the rule of law" and in recognition of our "special responsibility to our state and the Pacific region." We look forward to continuing a robust and truthful dialogue with you and others about these important climate litigation issues, particularly as they impact the future of Hawai'i and the Pacific islands.

Again, thank you for sharing your concerns and perspectives in your email, your blogs, and your letter to the editor sent from D.C. to our local newspaper.

Best regards,

Denise Antolini

[3] https://www.forbes.com/sites/judeclemente/2019/05/01/exxon-chevron-leading-the-permian-oil-and-natural-gas-surge/#31ba3728c4f2; https://www.cnbc.com/2019/03/05/exxon-chevron-announce-plans-to-surge-output-from-permian-basin.html (citing Chevron's plans for $19 to $22 billion in capital spending per year from 2021 to 2023 in the Permian Basin).