District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3750	DATE FILED: June 21, 2024 6:43 PM CASE NUMBER: 2018CV30349
BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY; CITY OF BOULDER, **Plaintiffs,** **v.** **SUNCOR ENERGY (U.S.A.), INC.; SUNCOR ENERGY SALES, INC.; SUNCOR ENERGY, INC.; EXXONMOBIL CORPORATION,** **Defendants**	**▲ COURT USE ONLY ▲**
	Case Number: 2018CV30349 Division 2 Courtroom H
ORDER RE DEFENDANTS' MOTIONS TO DISMISS	

Through this litigation, Plaintiffs seek compensation from Defendants for climate change related impacts within Plaintiffs' jurisdictions. Plaintiffs maintain that they have experienced substantial and rising costs to mitigate the impacts of Defendants' alteration of the climate. According to the Amended Complaint, Plaintiffs have spent and will continue to spend millions of dollars to mitigate these impacts.

Defendants have filed several Motions to Dismiss. Based on the Court's review of the Amended Complaint, extensive core briefing and supplemental briefing on the Motions to Dismiss, the file herein, the arguments advanced by counsel at the oral arguments, and the pertinent legal authorities, the Court issues the following ruling:

I. PARTIES & RELIEF SOUGHT

Plaintiffs are two[1] local governments - the City of Boulder ("City"), a home rule municipality, and Boulder County, a subdivision of the State of Colorado ("County"). Plaintiffs will collectively be referred to as the "Local Governments."

Defendant ExxonMobil Corporation is a New Jersey corporation, with its principal place of business in Texas ("ExxonMobil"). The Amended Complaint has named three Suncor entities. Defendant Suncor Energy, Inc. is a Canadian corporation, with its principal place of business in Calgary, Alberta ("Suncor Canada"). Amended Complaint, ¶¶ 47, 89. Suncor Energy (U.S.A.), Inc. ("Suncor Energy") is a subsidiary of Suncor Canada, and operates the oil and gas refinery in Commerce City, Colorado. Amended Complaint, ¶ 57. Suncor Energy Sales, Inc. ("Suncor Sales") is a subsidiary of Suncor Canada, and operates 47 retail gasoline and/or diesel fuel stations in Colorado. Amended Complaint, ¶ 58. Defendants will collectively be referred to as the "Energy Companies."

Through the Amended Complaint, the Local Governments have brought six causes of action against the Energy Companies:

First Cause of Action: Public Nuisance

Second Cause of Action: Private Nuisance

Third Cause of Action: Trespass

Fourth Cause of Action: Unjust Enrichment

Fifth Cause of Action: Violation of the Colorado Consumer Protection Act

Sixth Cause of Action: Civil Conspiracy

[1] At the outset of the litigation, the list of Plaintiffs also included the Board of County Commissioners of San Miguel County. By Order dated January 25, 2021, the Court granted the Suncor Defendants' Motion to Dismiss or Transfer Venue. San Miguel County's claims are currently pending in Denver County District Court, Case No. 21CV150.

As relief, the Local Governments primarily seek money damages to compensate the Local Governments for their past and future damages and costs to mitigate the impact of climate change. They also seek remediation and/or abatement of the hazards by any other practical means. In accordance with C.R.S. § 6-1-113(2) (Colorado Consumer Protection Act), the Local Governments seek treble damages, and recovery of reasonable attorney fees. The Local Governments also request the Energy Companies to be held jointly liable under C.R.S. § 13-21-111.5(4) based on the conspiracy claim.

II. PROCEDURAL HISTORY

This long-running litigation has journeyed through the state and federal court system, including two brief layovers at the U.S. Supreme Court. The Local Governments commenced this action in April 2018. In June 2018, the Energy Companies filed a Notice of Removal in the U.S. District Court of Colorado, asserting seven grounds for removal to federal court. The Local Governments responded by filing a Motion to Remand. Rejecting all seven asserted grounds for removal, the U.S. District Court remanded the action back to this Court. The Energy Companies appealed the remand order on six grounds.

On plenary review, the Tenth Circuit Court of Appeals held that its jurisdiction was limited to one of the grounds, federal officer removal, and affirmed the remand order without considering the other grounds for removal. The Energy Companies sought review in the U.S. Supreme Court. While that petition was pending, in a similar proceeding, the U.S. Supreme Court clarified that the entire order of remand was reviewable on appeal. The Supreme Court therefore vacated the Tenth Circuit's opinion and remanded for reconsideration. On remand, the Tenth Circuit held that none of the six grounds relied upon by the Energy Companies supported federal removal jurisdiction,

and affirmed the remand order. *Board of County Commissioners of Boulder County v. Suncor*, 25 F.4th 1238, 1246, 1249 (10th Cir. 2022).

The Energy Companies then filed a petition for certiorari with the U.S. Supreme Court. On April 24, 2023, the Court denied the petition. Thereafter, the litigation landed back in this Court, to issue rulings on the pending Motions to Dismiss filed by the Energy Companies. In particular, the following Motions to Dismiss were pending before this action moved to the federal court system:

(1) ExxonMobil's Motion to Dismiss for Lack of Subject Matter Jurisdiction, under C.R.C.P. 12(b)(2).

(2) Suncor Canada's Motion to Dismiss for Lack of Subject Matter Jurisdiction, under C.R.C.P. 12(b)(2).

(3) The Energy Companies' Motion to Dismiss the Amended Complaint for Failure to State a Claim, under C.R.C.P. 12(b)(5).

Given the passage of time and significant developments in the law, the parties submitted supplemental briefing from June 2023 to December 2023, along with a copy of the transcript of the oral argument conducted before the Honorable Judge LaBuda on June 1, 2020. Due to the extensive relevant legal developments that occurred after June 2020, the Court conducted a supplemental oral argument on February 1, 2024, and took the matter under advisement. The parties have since filed several notices of supplemental authority.

III. AMENDED COMPLAINT ALLEGATIONS

As set forth below, for purposes of evaluating the Motions to Dismiss for failure to state a claim under C.R.C.P. 12(b)(5), the Court must accept the factual allegations of the Amended Complaint as true, and draw all inferences in favor of the Local Governments, as the non-moving

parties. The lengthy Amended Complaint ("AC"), filed June 11, 2018, contains extensive factual allegations, including the following:

The Local Governments allege that Colorado's climate has been altered. In particular, they assert that the combustion of fossil fuels has increased the atmospheric concentration of greenhouse gases ("GHGs"), mostly carbon dioxide, to levels unseen in human history. AC, ¶¶ 127-31. Temperatures in Colorado have risen 2 degrees Fahrenheit since 1983 and are projected to rise an additional 2.5 to 5 degrees Fahrenheit by 2050, with a "five-to ten-fold increase in heat waves." *Id.*, ¶¶ 145-49. The altered climate is affecting communities, ecosystems, and public health, including prolonged periods of excessively high temperatures, more heavy downpours, increase in wildfires, and more severe droughts; resulting in loss of snowpack, precipitation changes, worsened air quality, and insect and disease outbreaks. *Id.*, ¶¶ 155-67, 183-96.

The Amended Complaint next alleges that the Energy Companies knew their fossil fuel activities were altering the climate and profited from unchecked fossil fuel sales. The Local Governments assert that as early as the 1960s, the Energy Companies knew fossil fuel use was increasing GHGs in the atmosphere, which would alter the climate. *Id.*, ¶¶ 337-61. By 1968, the American Petroleum Institute ("API") warned that "significant temperature changes are almost certain to occur by the year 2000," and API reports from the 1980s forecast a 4.5-degree Fahrenheit rise by 2038, bringing "major economic consequences," a 9-degree Fahrenheit rise by 2067 with "catastrophic effects," and "serious consequences for man's comfort and survival since patterns of aridity and rainfall can change." *Id.*, ¶¶ 345, 350, 353. The Amended Complaint further alleges that the Energy Companies knew adapting to these changes would be costly. *Id.*, ¶ 358. Additionally, the Local Governments allege that despite this knowledge, the Energy Companies sold "trillions of cubic feet of natural gas, billions of barrels of oil and millions of tons of coal and

petroleum coke," and that when burned by consumers, the fossil fuels emitted billions of tons of GHGs. *Id.*, ¶¶ 61-62, 380-83, 396-99. ExxonMobil earned hundreds of billions of dollars and the Suncor entities earned tens of billions of dollars in profits from fossil fuel sales. *Id.*, ¶¶ 69, 84.

The Local Governments also allege that despite knowing the dangers of unchecked fossil fuel use, the Energy Companies concealed and misrepresented the truth to their consumers in Colorado and elsewhere. According to the Amended Complaint, the Energy Companies knew in the 1980s that mitigation of global climate change would require major reductions in fossil fuel combustion, and that "there was no leeway for a transition away from fossil fuels because it would take time for other energy sources to penetrate the market." *Id.*, ¶¶ 367-68. The Energy Companies were warned that if action to reduce carbon dioxide emissions was delayed until impacts "are discernible, then it is likely that [it] will occur too late to be effective." *Id.*, ¶ 369. Despite this knowledge, the Amended Complaint alleges that the Energy Companies spent decades concealing and misrepresenting the dangers of unchecked fossil fuel use from the public and consumers. *Id.*, ¶¶ 415-16. While recognizing that "contrarian theories" were not credible, the Local Governments assert that the Energy Companies set out to get "a majority of the American public" to recognize that "uncertainties exist in climate science." *Id.*, ¶¶ 425-27.

Based on these and similar factual allegations and the six claims for relief, the Local Governments seek monetary relief from the Energy Companies to cover their damages and the cost of mitigating the hazards of an altered climate. The Local Governments assert that their communities have suffered from discrete and local injuries, and that their property has been damaged by fires, floods, extreme precipitation, drought, pest infestations, and other climate impacts. *Id.*, ¶¶ 222-23. Plaintiffs allege they currently face enormous expenses to lessen the hazards posed by climate change. *Id.*, ¶¶ 243-48, 250-92, 300-17. The Local Governments have

brought claims for relief under Colorado's common law (public nuisance, private nuisance, trespass, unjust enrichment, and conspiracy) and the Colorado Consumer Protection Act, seeking monetary relief to compensate for their damages and abatement efforts.

IV. STANDARD OF REVIEW

A court may address a C.R.C.P. 12(b)(2) motion either solely upon documentary evidence, or it may require the parties to appear for a contested evidentiary hearing. *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1192 (Colo. 2005). The plaintiff's burden of proof on the question of personal jurisdiction depends on the method the court employs to decide the motion. *Id.* If the court decides the motion based solely on documentary evidence, only a prima facie showing is required by the plaintiff to defeat the motion. *Id.* A prima facie showing exists where the plaintiff raises a reasonable inference that the court has jurisdiction over the defendant. *Id.* Documentary evidence includes allegations in the complaint, as well as affidavits and any other evidence submitted by the parties. *Id.; Martinez v. Farmington Motors, Inc.*, 931 P.2d 546, 547 (Colo. App. 1996).

Similar to a court's role in addressing a motion for summary judgment, a court addressing a Rule 12(b)(2) motion based on documentary evidence acts as a "data collector" and not a factfinder. *Archangel*, 123 P.3d at 1192 (citing *Leidy's Inc. v. H20 Engineering, Inc.* 811 P.2d 38, 40 (Colo. 1991)). Therefore, the allegations in the complaint must be accepted as true to the extent they are not contradicted by the defendant's competent evidence, and where the parties' competent evidence presents conflicting facts, these discrepancies must be resolved in the plaintiff's favor. *Id.* The light prima facie burden of proof is intended to screen out cases in which personal jurisdiction is obviously lacking. *Id.*

C.R.C.P. 12(b)(5) provides for dismissal of a complaint for failure to state a claim upon which relief can be granted. The purpose of a motion under Rule 12(b)(5) is to test the formal sufficiency of the complaint. *Dorman v. Petrol Aspen, Inc.*, 914 909, 911 (Colo. 1996). When reviewing a motion to dismiss, the Court must accept the material allegations of the complaint as true and draw all inferences in favor of the plaintiff. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). To survive a C.R.C.P. 12(b)(5) motion to dismiss, the complaint must state a plausible claim for relief by alleging facts sufficient "to raise the right to relief above the speculative level." *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016). The plaintiff has the burden to frame a complaint with "sufficient factual matter, accepted as true" to suggest that the plaintiff is entitled to relief. *Id.* Motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are viewed with disfavor. *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010).

V. ANALYSIS

A. ExxonMobil's Motion to Dismiss for Lack of Personal Jurisdiction

To invoke a Colorado court's jurisdiction over a non-resident defendant, plaintiffs must comply with Colorado's long-arm statute (C.R.S. § 13-1-124) and constitutional due process. *Keefe v. Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1270-72 (Colo. 2002). Because Colorado's long-arm statute "extends the jurisdiction of Colorado courts to the maximum limit permitted by the due process clauses of the United States and Colorado Constitutions," the jurisdictional analysis under federal and state law is the same. *Goettman v. North Fork Valley Restaurant*, 176 P.3d 60, 66 (Colo. 2007). Colorado state courts may therefore look to federal precedent for guidance. *Archangel*, 123 P.3d at 1194.

The Due Process Clause (U.S. Constitution, 14th Amendment) "sets the outer boundaries of a state tribunal's authority to proceed against a defendant." *Goodyear Dunlop Tires Operations,*

S.A. v. Brown, 564 U.S. 915, 923 (2011). These outer boundaries have generated two categories of personal jurisdiction: "general jurisdiction" and "specific jurisdiction." *Ford Motor Company v. Montana Eighth Judicial District Court*, 592 U.S. 351, 358 (2021).

General personal jurisdiction, often referred to as "all-purpose" jurisdiction, allows a court to exercise jurisdiction over a defendant for any claim or cause of action arising from any of a defendant's activities, even if they did not occur in the forum state. *Id.*; *Magill v. Ford Motor Company*, 379 P.3d 1033, 1037 (Colo. 2016). However, "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction" in a particular forum. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). In contrast, specific jurisdiction permits adjudication of only those claims arising out of the defendant's in-state activities, and thus requires a substantial connection between the forum and the specific claims asserted. *Magill*, 379 P.3d at 1039.

1. General Jurisdiction

Due process permits courts to exercise general jurisdiction over a defendant only when it is "at home" in the forum state. *Magill*, 379 P.3d at 1037. A corporate defendant is "at home" in the forum state if it: (1) is incorporated in the forum; (2) has its principal place of business in the forum; or (3) in the "exceptional case," has operations that are "so substantial and of such a nature as to render the corporation at home." *Daimler*, 571 U.S. at 137, 139, n.19; *Clean Energy Collective, LLC v. Borrego Solar Systems, Inc.*, 394 P.3d 1114, 1117 (Colo. 2017). In *Magill*, the Colorado Supreme Court observed:

> [d]etermining that a corporation is at home simply because it does business in Colorado would be unacceptably grasping. General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them.

Magill, 379 P.3d at 1039.

Based on this standard, a nonresident defendant's contacts with a state will rarely justify exercising general jurisdiction. *Id.* at 1037.

The Local Governments contend that this Court has both general and specific jurisdiction over ExxonMobil. Plaintiffs base the general jurisdiction argument on the theory of consent by registration (section A(1)(a) below), and have not argued that the Court has general jurisdiction over ExxonMobil by virtue of it being "at home" in Colorado.

Nor could they plausibly do so. ExxonMobil is incorporated in New Jersey, and has its principal place of business in Texas. AC, ¶ 105. Thus, the first two bases for general jurisdiction are plainly not satisfied. Likewise, the jurisdictional allegations in the Amended Complaint do not meet the rigorous requirements for the third potential basis (operations are so substantial and of such a nature as to render the corporation at home) to be satisfied. The Local Governments allege that ExxonMobil is a "multinational, vertically integrated, fossil fuel company." *Id.*, ¶ 73. There are no allegations that ExxonMobil's contacts with Colorado are more substantial than its contacts with other states or nations. In the absence of any allegations or evidence that ExxonMobil's contacts with Colorado are significantly more substantial than its contacts and operations elsewhere, the Local Governments have not and cannot establish that the Court has general jurisdiction over ExxonMobil under the traditional three-part test for general jurisdiction. *See Magill*, 379 P.3d at 1035 (trial court erred in exercising general jurisdiction over Ford Motor Company, because although Ford conducts business throughout the country, there was no evidence that Ford's contacts with Colorado were different or more substantial than its contacts with other states where it sells cars).

a. General Jurisdiction by Consent

In support of their argument that the Court has general jurisdiction over ExxonMobil, the Local Governments posit that ExxonMobil consented to general jurisdiction in this forum by registering as a foreign corporation with the Colorado Secretary of State. The prime mover for this argument is *Mallory v. Norfolk Southern Railway Co.,* 600 U.S. 122 (2023). In *Mallory*, the U.S. Supreme Court held that Pennsylvania's consent statute requiring an out-of-state corporation to consent to personal jurisdiction as a condition of registering to do business within the state did not violate the Due Process Clause of the Fourteenth Amendment. *Id.* at 146.[2] The Court further explained that personal jurisdiction can arise from "express or implied consent" and consent may be manifested in various ways by word or deed. *Id*. at 138.

The Supreme Court clarified that *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.,* 243 U.S. 93 (1917) and *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), with its progeny, "sit comfortably side by side." *Mallory*, 600 U.S. at 137. As explained by the *Mallory* plurality:

> *Pennsylvania Fire* held that an out-of-state corporation that has consented to in-state suits in order to do business in the forum is susceptible to suit there. *International Shoe* held that an out-of-state corporation that has not consented to in-state suits may also be susceptible to claims in the forum State based on "the quality and nature of [its] activity" in the forum. Consistent with all this, our precedents applying *International Shoe* have long spoken of the decision as asking whether a state court may exercise jurisdiction over a corporate defendant "'that *has not consented* to suit in the forum.'" Our precedents have recognized, too, that "express or implied consent" can continue to ground personal jurisdiction—and consent may be manifested in various ways by word or deed.

Id. at 138 (emphasis in original and citations omitted).

[2] Pennsylvania law is explicit that "qualification as a foreign corporation" shall permit state courts to "exercise general personal jurisdiction" over a registered foreign corporation[.]") 42 Pa. Cons. Stat. § 5301(a)(2)(i).

In other words, *Mallory* recognizes that the jurisdictional due process "minimum contacts" or "at home" analysis is not applicable where a party consents to a state's jurisdiction. *Id*. The *Mallory* Court therefore concluded that the Pennsylvania statute which required foreign entities to register to do business in the state and, simultaneously, provided that such registration amounted to the entity's consent to personal jurisdiction in the state, did not violate the Due Process Clause. *Id.* at 145-46.

As applied here, the question is whether ExxonMobil, by registering to do business in and designating a registered agent in Colorado, consented to the personal jurisdiction of Colorado courts for all purposes. The Local Governments argue that in accordance with *Mallory*, ExxonMobil consented to general personal jurisdiction in Colorado state courts when the corporation appointed an in-state registered agent. They assert that *Packaging Store, Inc. v. Kwan Leung*, 917 P.2d 361, 363 (Colo. App. 1996), is "the most on-point and only Colorado precedent on consent" and argue Colorado law is clear that "one of the most solidly established ways of giving such consent is to designate an agent for service of process within the state." Response to ExxonMobil's *Lumen* Supplemental Authority Notice, p. 1 (October 3, 2023). The Local Governments additionally point to *Budde v. Kentron Hawaii, Limited*, 565 F.2d 1145, 1149 (10th Cir. 1977), to assert that compliance with Colorado business-registration statutes results in consent to personal jurisdiction. Supplemental Brief, p. 3 (August 23, 2023).

ExxonMobil counters that the Court should follow the reasoning of *Lumen Technologies Service Group, LLC* v. *CEC Group, LLC*, 2023 WL 5822503 (D. Colo. Sept. 8, 2023), and conclude that complying with the Colorado business-registration statutes does not equate to consent for general personal jurisdiction. In particular, ExxonMobil argues that this case is distinguishable from *Mallory*. Supplemental Reply Brief, p. 4 (October 24, 2023). ExxonMobil

maintains that none of Colorado's business-registration statutes purport to have jurisdictional consequences, either explicitly or implicitly. *Id*. at 3. Because Colorado business-registration statutes do not evince any indication of general personal jurisdiction consent, *Mallory* is inapplicable. *Id*.

Here, the U.S. District Court's analysis in *Lumen* is compelling. In *Lumen*, a third-party plaintiff brought a diversity action against a defendant, asserting claims for breach of contract, breach of warranty, and breach of express indemnity, in connection with a business dispute. 2023 WL 5822503, at *1. The third-party defendant moved to dismiss the lawsuit due to lack of personal jurisdiction. *Id*. The defendant's principal place of business was in Ohio and the alleged injury occurred in Florida. *Id*. The third-party plaintiff argued that the defendant, by registering in Colorado and designating an in-state agent, consented to general jurisdiction. *Id*. at *3. The *Lumen* Court ultimately declined to find general jurisdiction over a defendant registered to do business in Colorado because "unlike *Mallory*, Colorado law is not explicit that qualification as a foreign corporation shall permit state courts to exercise general personal jurisdiction over a registered foreign corporation, just as they can over domestic corporations." *Id*. at *6 (citation and internal quotation marks omitted). In reaching its conclusion, the *Lumen* Court conducted a lengthy analysis explaining whether Colorado's business-registration statutes supported express or implied consent to general jurisdiction.

First, *Lumen* determined that Colorado's business-registration statutes do not explicitly permit state courts to exercise general personal jurisdiction over a registered foreign corporation. *Id*. at *6. In reaching the conclusion, the Court compared the business-registration statute at issue in *Mallory*, (42 Pa. Cons. Stat. § 5301(a)(2)(i)), to Colorado's statutes (C.R.S. §§ 7-90-801 & 7-90-805). Unlike the Pennsylvania statute, neither C.R.S. § 7-90-801 nor § 7-90-805 expressly

informs foreign entities that by registering to do business in Colorado, or by designating a Colorado registered agent, they are consenting to the personal jurisdiction of Colorado courts. *Id*. In the absence of explicit consent to general personal jurisdiction, the Court next determined whether Colorado law supports implied consent to general personal jurisdiction. *Id*. at *7.

Lumen examined the third-party plaintiff's argument that *Packaging Store* provides that a foreign corporation consents to general personal jurisdiction when designating an agent for service of process within the state. *Id*. In *Packaging Store*, the parties entered into a contract in which the defendant agreed to appoint a registered agent in Colorado for service of process and agreed all disputes arising under the contract would be resolved in Colorado. *Id*. Specifically, *Packaging Store* holds that parties can contractually agree to consent to general personal jurisdiction, but no state laws imply such consent. *Id*.

Lumen next examined *Budde v. Kentron Hawaii, Limited*, 565 F.2d 1145 (10th Cir. 1977), determining that *Budde* likewise does not support implied general personal consent. *Id*. at *8-10. First, the business-registration statutes at issue in *Budde* were repealed with no corresponding statutory citation currently in effect and applicable. *Id*. at *8. Second, *Budde* did not constitute a "local construction" of state law. *Id*. at * 10. Therefore, *Lumen* concluded there are no Colorado laws to support the conclusion that Colorado business-registration statutes provide for implied consent to general personal jurisdiction. *Id.* at *11.

Based in large part on the *Lumen* analysis, this Court concludes that Colorado business-registration statutes do not explicitly grant state courts with general personal jurisdiction over all foreign entities that comply with the statutes. The registration statute specifies that before a foreign corporation can conduct business in Colorado, it must file a "statement of foreign entity authority" with the secretary of state. C.R.S. § 7-90-801(1). Furthermore, the corporation must designate an

agent in Colorado for service of process. C.R.S. § 7-90-701. Once the corporation is authorized to conduct business in Colorado, it enjoys "the same rights and privileges as, but no greater rights or privileges than, and ... is subject to the same duties, restrictions, penalties, and liabilities imposed upon, a functionally equivalent domestic entity." C.R.S. § 7-90-805(2).

By their plain terms, these statutes do not explicitly require foreign entities to consent to personal jurisdiction as a condition of registering to do business here. Indeed, the statutes do not mention general jurisdiction and, instead, only require a corporation to file a statement of foreign authority and maintain a state registered agent. C.R.S. § 7-90-801(1). Thus, unlike in *Mallory*, neither C.R.S. § 7-90-801 nor § 7-90-805 expressly informs foreign entities that by registering to do business in Colorado, or by designating a Colorado registered agent, they are consenting to the personal jurisdiction of Colorado courts. Furthermore, neither statute could have alerted ExxonMobil that its compliance could be construed as consent to general personal jurisdiction to Colorado courts. *See Pennsylvania Fire*, 243 U.S. at 95.

Second, as set forth in *Lumen*, the Local Governments' reliance on *Packaging Store* and *Budde* for implied consent to general personal jurisdiction is unavailing.

Packaging Store does not support implied consent to general personal jurisdiction by merely having a registered agent in the state of Colorado. In *Packaging Store*, the parties entered into a contract in which the defendant contractually agreed to appoint an agent for service of process in Colorado and to litigate claims in Colorado arising under the parties' contract. 917 P.2d at 363. The Court held "a nonresident's contractual consent to the jurisdiction of Colorado courts will be enforced if the terms of the consent are clear, and such consent can confer jurisdiction even if the minimal contacts test is not met." *Id*. (citations omitted).

The Local Governments assert that *Packaging Store* relied upon precedents where consent was predicated on registration statutes. Response to Supplemental Authority Notice, p. 1 (October 3, 2023). However, the precedent relied upon is unpersuasive for several reasons. First, some of the cases cited by *Packaging Store* held that the business-registration statutes at issue created implied consent based on legislative intent. *See generally Sondergard v. Miles, Inc*., 985 F.2d 1389, 1393 (8th Cir.1993), *cert. denied*, 510 U.S. 814 (1993); *Werner v. Wal–Mart Stores, Inc.*, 861 P.2d 270, 273 (N.M. App. 1993). Second, other cases relied on in *Packaging Store* held state courts can obtain personal jurisdiction over nonresident defendants when they consent to it. *See generally Holloway v. Wright & Morrissey, Inc*., 739 F.2d 695, 697 (1st Cir.1984); *Rykoff–Sexton v. American Appraisal*, 469 N.W.2d 88, 90 (Minn.1991); *Green Mountain College v. Levine*, 139 A.2d 822, 825 (Vt. 1958). Accordingly, many of the cases relied on in *Packaging Store* follow the *Mallory* analysis. Lastly, none of the cases relied upon in *Packaging Store* are based on Colorado law, nor decided in the Tenth Circuit.

In short, absent a contractual agreement, *Packaging Store* does not support the Local Governments' implied consent to general personal jurisdiction argument.

The Local Governments' reliance on *Budde* is also unavailing. In *Budde,* the Tenth Circuit held that under Colorado law, a foreign corporation's registration to do business in Colorado constituted consent to general personal jurisdiction. However, as noted in *Lumen,* C.R.S. § 7-9-119 was repealed. As set forth above, Colorado's current business-registration statutes do not provide that a foreign business entity consents to personal jurisdiction by registering to do business in the state and appointing an agent.

In conclusion, the Court concludes that ExxonMobil did not consent to general jurisdiction in Colorado courts by registering as a foreign corporation.

2. Specific Jurisdiction

Due process permits courts to exercise specific jurisdiction over non-resident defendants when there is a substantial connection between the forum and the specific claims asserted. *Magill*, 379 P.3d at 1039. To exercise jurisdiction over a non-resident defendant, a plaintiff must also show that jurisdiction is appropriate under the state's long-arm statute. Colorado's long-arm statute is set forth at C.R.S. § 13-1-124.[3]

a. Long-Arm Statute

As set forth above, the Colorado Supreme Court has held on numerous occasions that C.R.S. § 13-1-124 "extends the jurisdiction of Colorado courts to the maximum limit permitted by the due process clauses of the United States and Colorado Constitutions," and that the jurisdictional analysis under federal and state law is the same. *Goettman v. North Fork Valley Restaurant*, 176 P.3d 60, 66 (Colo. 2007). When it filed its C.R.C.P. 12(b)(2) Motion to Dismiss on December 9, 2019, ExxonMobil acknowledged that satisfying due process requirements would also satisfy the requirements of Colorado's long-arm statute. Motion to Dismiss, p. 5, (December 19, 2019).

After the U.S. Supreme Court announced its decision in *Ford Motor Company v. Montana Eighth Judicial District Court*, 592 U.S. 351 (2021), however, ExxonMobil contended that the limitations imposed by Colorado's long-arm statute may be more stringent than those imposed by the Due Process Clause, at least as the Clause was recently interpreted by the U.S. Supreme Court. In particular, ExxonMobil asserts that the long-arm statute confers jurisdiction over any cause of action "arising from" the transaction of any business within the state or the commission of a

[3] C.R.S. § 13-1-124 provides in relevant part that "[e]ngaging in any act enumerated in this section by any person, whether or not a resident of the state of Colorado, either in person or by an agent, submits such person . . . to the jurisdiction of the courts of this state concerning any cause of action arising from: (a) the transaction of any business within this state; (b) the commission of a tortious act within this state; . . ."

tortious act within the state, and therefore independently requires a causal connection for specific jurisdiction. ExxonMobil's Supplemental Briefing, pp. 6-7 (May 3, 2021); *see Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014) (the term "arising out of" calls for examination of the causal connection or nexus between the conditions and obligations of employment and the employee's injury).

The Local Governments disagree, maintaining that the Colorado Supreme Court has repeatedly held that the jurisdictional analysis is the same for both the long-arm statute and constitutional due process. Local Governments' Supplemental Briefing, pp. 6-7 (May 17, 2021). Moreover, even if the long-arm statute imposes a distinct requirement, the inquiry looks at the "totality of conduct" by the defendant. *Parocha v. Parocha*, 418 P.3d 523, 527 (Colo. 2018). The legislative purpose of the long-arm statute "was the expansion of our court's jurisdiction within constitutional limitations in order to provide a local forum for Colorado residents who suffer damages in Colorado as a result of tortious acts of non-residents." *Vandermee v. District Court*, 433 P.2d 335, 337 (Colo. 1967). Even if the long-arm statute imposes heightened requirements, the Local Governments maintain that the requirements of the long-arm statute have been satisfied.

Critically, the Colorado Supreme Court has held, on multiple occasions, that Colorado's long-arm statute "extends the jurisdiction of Colorado courts to the maximum limit permitted by the due process clauses of the United States and Colorado Constitutions," and therefore, the jurisdictional analysis under federal and state law is the same. *Goettman*, 176 P.3d at 66; *Foundation for Knowledge in Development v. Interactive Design Consultants, LLC*, 234 P.3d 673, 677-78 (Colo. 2010); *Magill*, 379 P.3d at 1037; *Keefe*, 40 P.3d at 1270; *Cf. Parocha*, 418 P.3d at 527 (because compliance with the long-arm statute "is a threshold matter that is not necessarily subsumed in a due process analysis, we consider each in turn."). Therefore, based on this

precedent, it is unnecessary for the Court to separately assess whether it has jurisdiction over ExxonMobil under the long-arm statute. If exercising jurisdiction comports with the Due Process Clause, the requirements of the long-arm statute will necessarily have been satisfied in accordance with Colorado law.

Moreover, even if the jurisdictional limitations imposed by the long-arm statute and the Due Process Clause are no longer coterminous, the Local Governments have made a sufficient showing that the long-arm statute's requirements have been satisfied (see analysis in section A(2)(b), below). ExxonMobil has been transacting business in Colorado for decades, including by placing its products within the stream of commerce. The Amended Complaint has alleged that the company's intentional torts outside Colorado have had harmful effects in Colorado. Additionally, the Local Governments have alleged that ExxonMobil's misrepresentations were received by consumers in Colorado. The Local Governments have therefore met their burden to show that the claims arise from ExxonMobil's transaction of business within the state and/or the commission of alleged tortious acts within the state, sufficient to satisfy the requirements of the long-arm statute.

b. Due Process Clause – Specific Jurisdiction

The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant. *International Shoe Co.*, 326 U.S. at 316. In the seminal *International Shoe* opinion, the U.S. Supreme Court held that a trial court's authority depends on the defendant having such contacts with the forum state such that maintenance of the suit is reasonable and does not offend traditional notions of fair play and substantial justice. *Id.* at 316-17.

Specific personal jurisdiction exists where a defendant has sufficient "minimum contacts" with the forum state, looking first to whether the defendant purposefully availed itself of the forum through activities in or affecting the forum and second whether there is sufficient nexus such that the plaintiff's claims "arise out of or relate to the defendant's contacts." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 475 (1985); *Keefe*, 40 P.3d at 1271. The contacts must show that the defendant deliberately "reached out beyond" its home, by for example, exploiting a market in the forum state or entering a contractual relationship centered there. *Walden v. Fiore*, 571 U.S. 277, 285 (2014). Additionally, defendants must have "fair warning" or "knowledge that a particular activity may subject [it] to the jurisdiction of a foreign sovereign." *Ford Motor Company*, 592 U.S. at 360 (citations omitted).

i. Purposeful Availment

In its Rule 12(b)(2) Motion to Dismiss, filed in December 2019, ExxonMobil acknowledged that the first part of the minimum contacts test – purposeful availment, was satisfied. Based on the allegations in the Amended Complaint, it is undisputed that the purposeful availment requirement has been satisfied.

ii. Substantial Nexus

In support of its Rule 12(b)(2) Motion, ExxonMobil argued that the second requirement for specific jurisdiction – sufficient nexus – requires a showing of "but for" causation, which it contended, was not met here. In 2021, however, the U.S. Supreme Court explicitly rejected this causation standard. *Ford Motor Company*, 592 U.S. at 361. The "but for" requirement had been viewed as arising from *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 U.S. 255, 262 (2017). *Ford Motor* put that notion to rest, concluding that strict causation is not required so

long as there is a meaningful relationship between the alleged forum contacts and the plaintiff's claims. 592 U.S. at 361-62.[4]

Eschewing the but-for causation test espoused by ExxonMobil in its core briefing, the U.S. Supreme Court held that a sufficient nexus exists where there are either related activities or an occurrence in the forum. *Id.* at 360. The *Ford Motor* Court emphasized the importance of a global company's extensive forum contacts in showing nexus and reasonableness. In particular, the Court noted that Ford had advertised its cars and engaged with franchises to sell cars, parts, and maintenance services in Montana. *Id.* at 355-56, 365. Even though Ford did not sell the particular vehicle that injured plaintiffs in Montana, a unanimous Supreme Court held that Ford's extensive contacts with the forum state satisfied the nexus and reasonableness prong for specific jurisdiction. *Id.* at 364-65.

Here, if anything, ExxonMobil's contacts with Colorado are more extensive than Ford's contacts with Montana. ExxonMobil has advertised its products in Colorado. AC, ¶¶ 107, 412-29. The company has engaged with Colorado franchises to sell its products in Colorado. AC, ¶¶ 74-80, 112-19. Further, ExxonMobil has produced, sold, and transported fossil fuels in Colorado. AC, ¶¶ 107-08, 110, 121-22. These actions amply demonstrate that ExxonMobil has "reached out beyond its home" and has had extensive contacts with Colorado.

Ford Motor also foreclosed ExxonMobil's argument that it conducts so much business globally that it cannot be sued in a local jurisdiction that does not have general jurisdiction over the company. The U.S. Supreme Court noted that Ford was a global company that markets, sells,

[4] In its initial briefing, ExxonMobil relied heavily on several decisions that had applied the "but-for" causation test to claims brought against fossil fuel companies in climate change litigation, including *City of Oakland v. BP P.L.C*, 2018 WL 3609055, at *3 (N.D. CA 2018). This U.S. District Court decision was vacated by the Ninth Circuit in *City of Oakland v. BP, P.L.C.*, 969 F.3d 895 (9th Cir. 2020), and the determination that plaintiffs failed to adequately plead "but for" causation conflicts with *Ford Motor*.

and services its products across the United States and overseas, and to enhance its brand and increase its sales, the company engages in wide-ranging promotional activities, including television, print, online, and direct-mail advertisements. *Id.* at 355. "No matter where you live, you've seen them." *Id.* Despite this global presence, Ford could be haled into court in Montana for contacts that related to plaintiffs' harm. The same can be said for ExxonMobil here. AC, ¶¶ 74-80, 107-22, 412-29. ExxonMobil's "too big to be sued in Colorado" argument therefore fails.

Ford Motor also establishes that ExxonMobil's extensive forum contacts relate to the harms alleged in the Amended Complaint, as ExxonMobil's sales and marketing contacts are of the same type recognized as sufficient in *Ford Motor*. 592 U.S. at 355-56, 365. The Amended Complaint alleges that "activities" such as the company's sales and advertisements have contributed to "occurrences" such as fires, droughts, and beetle infestations. AC, ¶¶ 222-23, 415-16. According to the Amended Complaint, ExxonMobil's extensive activities therefore have a relationship or connection with the harms facing the Local Governments' communities. *Ford Motor,* 592 U.S. at 376 (Gorsuch, J., concurring). *See also Archangel*, 123 P.3d at 1194 (for specific jurisdiction, the actions of the defendant giving rise to the litigation created a substantial connection with the forum state); *Etchieson v. Central Purchasing, LLC*, 232 P.3d 301, 308 (Colo. App. 2010) (finding specific jurisdiction reasonable when company had extensive forum contacts).

To be sure, *Ford Motor* clarified that there are "real limits" to specific jurisdiction. 592 U.S. at 362. For instance, where there is no connection between the forum and the plaintiff, or where the defendant's forum contacts are "isolated and sporadic," jurisdiction over the defendant is unreasonable. *Id.* at 366, n.4. Here, however, the Local Governments are Colorado communities, and as set forth above, according to the Amended Complaint, ExxonMobil's contacts are far more than isolated or sporadic – they are extensive.

iii. Reasonableness and Fair Notice

In its briefing, ExxonMobil contends that it could not anticipate that in producing and selling fossil fuels it could be sued for harms in Colorado. Supplemental Briefing, p. 4 (October 24, 2023). In *Ford Motor*, the U.S. Supreme Court rejected a similar argument advanced by Ford. Ford argued that it was surprised at being brought into court in the forum where the injuries occurred because some of the conduct also occurred outside Montana. 592 U.S. at 366-67. The U.S. Supreme Court held that only an activity or an occurrence in the forum state is required, and because Ford was regularly marketing its products in the forum, it had "clear notice" that it would be subject to jurisdiction. *Id.* at 368.

Here, ExxonMobil has "done business in Colorado since at least the 1930s." AC, ¶ 105. There is no dispute that the company purposefully availed itself of the Colorado market. Further, according to the Amended Complaint, ExxonMobil knew that the production and sale of fossil fuels was altering the climate and causing damages like those allegedly suffered by the Local Governments. *Id*. at ¶¶ 344-45, 353, 356-62. *Ford Motor* clarified that the fact that a multi-national company sold a product in other states does not impair the plaintiffs' ability to sue in the forum where they were injured. 592 U.S. at 360. The federalism concerns animating the Due Process Clause do not require the Colorado Local Governments to pursue ExxonMobil in New Jersey or Texas state courts. Rather, *Ford Motor* and due process jurisprudence establishes that the Local Governments may bring their claims in the forum in which they reside and in which harm has occurred. Colorado has an interest in providing a convenient forum and remedying local harms relating to alleged misconduct.

iv. *City and County of Honolulu*

City and County of Honolulu v. Sunoco LP, 537 P.3d 1173 (Haw. 2023), *cert. petition docketed*, No. 23-947 (U.S. Mar. 1, 2024), bolsters the conclusion that ExxonMobil is subject to specific jurisdiction in Colorado for the claims alleged in the Amended Complaint. Similar to this case, in *City and County of Honolulu*, the local governments brought suit against a number of oil and gas producers alleging several tort claims under state law: public nuisance, private nuisance, strict liability failure to warn, negligent failure to warn, and trespass. In affirming the denial of the motions to dismiss, the Hawaii Supreme Court held that the defendants were subject to specific jurisdiction in Hawaii state court. *Id.* at 1189.

The Hawaii Supreme Court observed that specific jurisdiction over the defendant oil and gas companies was more apparent than Montana's exercise of specific jurisdiction over Ford. *Id.* at 1191. In particular, the Court held that the defendants, which had sold and marketed fossil fuel products in Hawaii, had availed themselves of Hawaii's markets and laws and were therefore subject to specific jurisdiction for both in-state and out-of-state tortious acts that arose out of or related to those contacts. *Id*. Citing *Ford Motor*, the Hawaii Supreme Court determined that the plaintiffs did not need to allege that their injuries were caused by defendants' fossil fuels being burned in the forum state; rather, specific jurisdiction for climate change injuries attached for both in-state and out-of-state tortious conduct when those claims arise out of, or relate, to "Defendants sale and promotion of oil and gas" in the forum state. *Id*. Additionally, when the three prongs of the minimum contacts test are met, the defendant has fair warning it could be subject to specific jurisdiction, and the exercise of specific jurisdiction comports with due process. *Id.* at 1193. Lastly, the Court concluded that it was reasonable for Hawaii trial courts to exercise specific jurisdiction over the defendants, and that the exercise of jurisdiction did not conflict with interstate

federalism principles because Hawaii had a "significant interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Id.* at 1194 (internal quotation marks omitted).

While not binding on this court, the Hawaii Supreme Court's analysis of specific jurisdiction in a similar action is persuasive authority.

For the foregoing reasons, the Court concludes that the Local Governments have met their burden to show that specific jurisdiction over ExxonMobil is present here. The Local Governments have established a strong relationship between ExxonMobil, this forum, and the litigation. *See City and County of Honolulu*, 537 P.3d at 1194. Indeed, this relationship and ExxonMobil's contacts with Colorado are more extensive and stronger than Ford's contacts with Montana in *Ford Motor*.

B. Suncor Canada's Motion to Dismiss for Lack of Personal Jurisdiction

Suncor Canada has moved to dismiss the claims against it for lack of personal jurisdiction under C.R.C.P. 12(b)(2). This entity does not own the oil and gas refinery in Commerce City. The Court indisputably has personal jurisdiction over Suncor Energy, which owns and operates the Commerce City refinery (AC, ¶ 57) and Suncor Sales, which operates 47 retail gas stations in Colorado (AC, ¶ 58). Suncor Canada is the parent entity, and maintains that it has no substantial connection to Colorado to support the exercise of personal jurisdiction. The Local Governments counter that the Court has general jurisdiction over Suncor Canada and specific jurisdiction by virtue of Suncor Canada's activities and through its subsidiaries' contacts with and activities in Colorado.

Courts may decide a Rule 12(b)(2) motion either by holding a hearing or based solely on documentary evidence and the allegations in the complaint. *Foundation for Knowledge*, 234 P.3d

at 677. In the absence of a hearing,[5] the Local Governments have the burden to establish a prima facie case of personal jurisdiction. *Archangel*, 123 P.3d at 1192. The Local Governments may make a prima facie showing by raising "a reasonable inference that the court has jurisdiction over the defendant." *Foundation for Knowledge*, 234 P.3d at 677. This "light burden" is intended to "screen out cases in which personal jurisdiction is obviously lacking." *Id.* Unlike a motion to dismiss under C.R.C.P. 12(b)(5), the allegations in the complaint must be accepted as true only to the extent they are not contradicted by the defendant's competent evidence. *Id.; Archangel,* 123 P.3d at 1192. When plaintiffs submit competent rebuttal evidence, the parties' competent evidence presents conflicting facts, and discrepancies are to be resolved in plaintiff's favor. *Id.*

1. General Jurisdiction

Suncor Canada is a Canadian corporation with its principal place of business and corporate headquarters in Calgary, Alberta. AC, ¶¶ 47, 89. Unlike ExxonMobil, this entity is not registered to do business in Colorado. Suncor Canada has no offices in Colorado, has no operations in Colorado, has not produced or refined any fossil fuels in Colorado, and has not marketed or sold any fossil fuels to customers in Colorado. Motion to Dismiss for Lack of Personal Jurisdiction, Exhibit A, ¶¶ 5-6, 8, 11, 15-16 (December 19, 2019).

The Local Governments' conclusory allegation that Suncor Canada is "at home" in Colorado and therefore subject to general jurisdiction is not supported by specific factual allegations or any evidence in the record. Because Suncor Canada's place of incorporation and

[5] Neither party requested an evidentiary hearing. Plaintiffs' Response, p. 6 (filed March 19, 2020); June 2, 2023 Minute Order (Plaintiffs' Motion for Conditional Discovery, filed December 30, 2019, is moot because the Court did not hold an evidentiary hearing. In support of its Rule 12(b)(2) Motion to Dismiss, Suncor produced the Affidavit of Greg Freidin as Exhibit A. In Response, the Local Governments attached the Declaration of Naomi Glassman-Majara and 26 exhibits (Exhibits A-Z). In Reply, the Energy Companies attached the Declaration of Nancy Thonen, with Exhibits 1-18, and the Declaration of Patricia O'Reilly, with Exhibits 1-2.

principal place of business are both located in Canada, under federal and Colorado case law, Suncor Canada is not "at home" in Colorado for jurisdictional purposes. *Daimler*, 571 U.S. at 137; *Magill*, 379 P.3d at 1037. Because general jurisdiction subjects the entity to all lawsuits in the jurisdiction of every nature, "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." *Magill*, 379 P.3d at 1037 (*quoting Daimler*, 571 U.S. at 137). As the place of incorporation and principal place of business are easily ascertainable, "a corporation may reasonably anticipate being haled into court in either place." *Magill*, 379 P.3d at 1037; *Daimler*, 571 U.S. at 137.

General jurisdiction may be exercised over a corporation outside its principal place of business or its place of incorporation only in an "exceptional case." *Magill*, 379 P.3d at 1039, *Daimler*, 571 U.S. at 139, n.19. More specifically, an entity that conducts continuous and systematic activities of a general business nature in the forum may be subject to general jurisdiction in the forum. *Giduck v. Niblett*, 408 P.3d 856, 863 (Colo. App. 2014). These activities must be extensive and deep to meet the high bar set for exceptional circumstances. *See Daimler*, 571 U.S. at 123 (having a regional office and other facilities, being the largest supplier of luxury vehicles, and having 2.4% of worldwide sales attributable to California does not constitute continuous and systematic activities); *Magill*, 379 P.3d at 1038 (Ford's contacts with Colorado did not meet the continuous and systematic test where Ford had a registered agent in Colorado, Ford conducted aggressive marketing, Ford sold cars through 30 franchised Colorado dealerships, Ford maintained several offices and businesses in the state, Ford trained and certified mechanics to work with Colorado consumers, and Ford had actively litigated cases in Colorado). Here, the Local Governments have not alleged any set of exceptional facts supporting general jurisdiction in Colorado, and the record does not contain any. *See* Motion to Dismiss for Lack of Personal

Jurisdiction, Exhibit A, ¶¶ 7-16 (December 19, 2019) (Suncor Canada does not have any direct contacts with Colorado).

In Response, the Local Governments seek to distinguish *Daimler* and *Magill* and argue that unlike the defendants in those cases, Suncor Canada's U.S.-based contacts are primarily with Colorado. AC, ¶ 90. The Local Governments therefore reason that there is only one U.S. state where Suncor Canada could be considered essentially at home and subject to suit – Colorado. Response, pp. 22-23 (March 19, 2020). However, the alleged fact that Suncor Canada has more connection to Colorado than any other U.S. state is not relevant in determining whether Suncor Canada is essentially at home in Colorado. The Local Governments have not cited to legal authority establishing that a foreign business entity must have general jurisdiction with the U.S. state for which it has the most connection.

The Court therefore concludes that Suncor Canada is not "at home" in Colorado, and therefore, general jurisdiction over this foreign corporation does not exist.

2. Specific Jurisdiction

The legal standards for assessing specific personal jurisdiction set forth above in section (A)(2) apply here.

First, for specific jurisdiction to apply, the defendant must purposefully avail itself of the privilege of conducting business in the forum state. *Keefe*, 40 P.3d at 1271; *Burger King*, 471 U.S. at 472; *Archangel*, 123 P.3d at 1198-1200. In *Archangel*, the Colorado Supreme Court held that a Russian company that was not authorized to do business in Colorado, had no registered agent in Colorado, had no property interests in Colorado, had no financial transactions in Colorado, and had no assets in Colorado did not purposefully avail itself of the privilege of doing business in

Colorado. *Id.* at 1196-98. The 70 communications with plaintiff, a Colorado resident, were deemed fortuitous and insufficient to trigger purposeful availment. *Id.* at 1197.

Here, like in *Archangel*, Suncor Canada is a corporation organized under a foreign nation's laws with its principal place of business located outside the United States. Motion, Exhibit A, ¶¶ 5-6 (December 19, 2019). Suncor Canada is not authorized to do business in Colorado, has no registered agent in Colorado, and has no facilities in Colorado. *Id.* at ¶¶ 8, 10-11, 13, 15. Its operations, including its employees and sales, are outside Colorado. *Id.* at ¶¶ 12, 14-16. The Court therefore concludes that the Local Governments have not established a prima facie case that Suncor Canada has availed itself of the privilege of doing business in Colorado.

Second, there is not a substantial nexus between the Local Governments' claims and Suncor Canada's activities in Colorado. As set forth above, in *Ford Motor*, the U.S. Supreme Court held that a sufficient nexus exists where there is a meaningful relationship between the alleged forum contacts and a plaintiff's claims. 592 U.S. at 359. This prong of the specific jurisdiction test requires that "the actions of the defendant giving rise to the litigation must have created a 'substantial connection' with the forum state." *Archangel*, 123 P.3d at 1194.

Here, the Local Governments have not pled facts alleging a substantial connection between their claims and Suncor Canada's Colorado-related contacts. The allegations specific to Suncor Canada relate to its history and general background. AC, ¶¶ 47-51. The Amended Complaint does not allege that Suncor Canada itself took any actions in Colorado to purposefully direct harm at Colorado residents. Indeed, as set forth above in section (B)(1), there are no allegations or competent evidence in the record that Suncor Canada conducts any operations or business in Colorado.

In support of specific jurisdiction, the Local Governments contend that Suncor Canada's actions in contributing to global climate change satisfy the requirements of specific jurisdiction in Colorado. AC, ¶¶ 7-9, 15-17, 123-38. Unlike the allegations against ExxonMobil and Suncor Energy and Suncor Sales, however, the Amended Complaint does not identify any Colorado business activity conducted by Suncor Canada itself. In short, there is no alleged substantial connection between Suncor Canada and Colorado sufficient for specific personal jurisdiction to attach to Suncor Canada.

In Response, the Local Governments place extensive reliance on *Calder v. Jones*, 465 U.S. 783 (1984) for the proposition that Suncor Canada is subject to jurisdiction for the in-state effects of its tortious out-of-state acts. Response, pp. 9-10 (March 19, 2020). In *Calder*, the U.S. Supreme Court held that California had specific jurisdiction over two out-of-state defendants where the writing and editing of an allegedly libelous article was expressly aimed at California. *Id*. at 786-87. Based on the facts of the case, the Court concluded that California was the focal point for both the story and the harm suffered. *Id.* at 789-91. Here, for *Calder* to apply, the conduct at issue must have been expressly aimed at Colorado in particular. Instead, while harm is alleged to Colorado, there are no allegations that Suncor Canada expressly aimed the harm at Colorado. *See* AC, ¶¶ 134, 137.

Likewise, the fact that the Local Governments are located in Colorado and suffer injuries from global climate change (AC, ¶ 89) is in and of itself insufficient to confer specific jurisdiction over Suncor Canada. *See Walden v. Fiore*, 571 U.S. 277, 291 (2014) (the mere fact that defendant's conduct affected plaintiffs with connections with the forum state, in and of itself, does not authorize specific jurisdiction). This injury-based theory of personal jurisdiction would

conceivably confer jurisdiction on every court to exercise limitless jurisdiction over every entity and individual generating emissions in the world.

In their Response, the Local Governments also rely on a stream of commerce argument, contending that Suncor Canada delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in Colorado, and is therefore subject to specific jurisdiction for the fossil fuels that were sold and burned in Colorado. Response, p. 9 (March 19, 2019). The stream of commerce theory of jurisdiction arose in the products liability context, *Avocent Huntsville Corp. v. Aten International Co., Ltd.*, 552 F.3d 1324, 1331 (Fed. Cir. 2008), and courts have been "reluctant to extend the stream of commerce principle outside the context of products liability cases." *Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 472 (5th Cir. 2006). Critically, Colorado courts have not applied this theory outside the products liability context. In the absence of precedential authority applying the theory outside the products liability context, the Court declines the invitation to apply it here.

The Local Governments also contend that Suncor Canada participated in a conspiracy, and the forum-related acts of the co-conspirators may be imputed to Suncor Canada for jurisdictional purposes. Response, p. 14 (March 19, 2020). As acknowledged by the Local Governments, however, Colorado has not recognized a conspiracy theory of personal jurisdiction. *See First Horizon Merchant Services v. Wellspring Capital Management, LLC*, 166 P.3d 166, 178 (Colo. App. 2007) (some courts outside of Colorado have recognized this theory).

The Court therefore concludes that the Local Governments have not made a prima facie showing that Court has specific personal jurisdiction over Suncor Canada, itself.

3. Jurisdiction Through Subsidiary Companies as Agents

In support of their personal jurisdiction argument, the Local Governments primarily contend that the Court has personal jurisdiction over Suncor Canada based on the Colorado contacts of six subsidiary companies.[6] Plaintiffs allege that these subsidiaries are agents of Suncor Canada and that Suncor Canada is a "single enterprise." AC, ¶¶ 50-51. Further, the Local Governments allege that Suncor Canada "directs the operations of its subsidiaries through a common design." *Id*. at ¶¶ 52, 90. In particular, the Local Governments allege that through its subsidiaries, Suncor Canada promotes fossil fuel use in Colorado, sells fossil fuels in Colorado, operates a petroleum refinery in Colorado, and operates pipeline systems that transport crude oil to a refinery in Colorado. *Id*. at ¶ 91. They also allege that through the subsidiaries, Suncor Canada emitted GHGs through transportation, production, and refinery activities. *Id*. at ¶ 92. While this argument holds superficial appeal, as set forth below, Colorado law does not support this personal jurisdiction through subsidiary theory.

In 2016, the Colorado Supreme Court issued a pair of decisions addressing whether a court may impute the contacts of subsidiary companies to a parent entity. *Griffith v. SSC Pueblo Belmont Operating Co.*, 381 P.3d 308, 310 (Colo. 2016); *Meeks v. SSC Colorado Springs Colonial Columns Operating Co.*, 380 P.3d 126, 128 (Colo. 2016). Under the *Griffith* test, to impute the contacts to the parent to establish jurisdiction, the corporate veil of the subsidiary must be pierced. Under the veil piercing test, a plaintiff must show (1) the entity is merely the alter ego of the member, (2) the corporate form is used to perpetuate a wrong, and (3) disregarding the legal entity would achieve an equitable result. 381 P.3d at 313. Unless the corporate veil is pierced, the trial court is to "treat

[6] The six subsidiary companies are Defendant Suncor Energy (U.S.A.) Inc., Defendant Suncor Energy Sales, Inc., Suncor Energy (U.S.A.) Pipeline Company, Suncor Energy (U.S.A.) Marketing, Inc., Petro-Canada Resources (U.S.A.), Inc., and Suncor Energy Services, Inc. AC, ¶¶ 94-104.

each entity separately and analyze only the contacts that each parent company has with the state when performing the personal jurisdiction analysis." *Id.* at 311. Parental control of subsidiary entities or even operating as a single enterprise is insufficient to justify the imputation of a subsidiary's forum contacts to the parent.

In *Griffith*, the trial court found that the parent entities and their in-state affiliates operated as one business, that the non-resident affiliates "collectively controlled the operations, planning management, and budget" of the in-state resident affiliate, and the non-resident entities financially benefited from the resident company. *Id.* at 314. The Colorado Supreme Court held that these findings were inadequate to impute the in-state subsidiary's contacts to the parent. *Id.* In *Meeks*, the Court clarified that trial courts must apply the *Griffith* veil piercing test "to determine whether nonresident parent companies may be haled into court in Colorado based on the actions of their resident subsidiaries." 380 P.3d at 128.

The authorities relied on by the Local Governments in support of the agency through subsidiary argument predated *Griffith* and *Meeks*. *See, e.g., Goettman v. North Fork Valley Restaurant*, 176 P.3d 60, 67 (Colo. 2007); *SGI Air Holdings II, LLC v. Novartis International AG*, 239 F.Supp.2d 1161, 1166 (D. Colo. 2003); *Horizon Merchant Services v. Wellspring Capital Management, LLC*, 166 P.3d 166, 177-78 (Colo. App. 2007).

Here, the Amended Complaint does not allege that the corporate veil of the Suncor entities should be pierced, nor does it contain factual allegations supporting veil piercing. Instead, the Local Governments generally allege that the subsidiaries are agents within a single enterprise, such as Suncor Canada exercising control of its corporate family. AC, ¶¶ 50-51. More detailed allegations include an allegation that a 2017 Suncor Canada annual report used the words "we" and "Suncor" to refer to Suncor Canada and its affiliates, that Suncor Canada announced plans for

maintenance of two refineries run by affiliates, that Suncor Canada controls and directs fossil fuel activities across its corporate family, that Suncor Canada prepares consolidated financial statements that include its subsidiaries, that the 2017 annual report referred to the Commerce City refinery as "our" refinery, that Suncor Canada backs the business of its subsidiaries, and that members of the corporate family cannot refuse to participate in fossil-fuel commerce. *Id*., ¶¶ 50-53, 56, 60; *see also* Response, Exhibits A-Z (webpages and articles referencing "Suncor Energy"). These agency-based allegations and information are irrelevant to the veil piercing test pronounced by *Griffith* and *Meeks*. At the very least, they are insufficient to meet the high bar imposed by the alter ego test.

Additionally, the Amended Complaint does not contain factual allegations to meet the 3-part veil piercing test. First, the Amended Complaint does not contain allegations or facts that could establish that Suncor Canada and its subsidiaries are alter egos. *See In re Phillips*, 139 P.3d 639, 644 (Colo. 2006) (courts should examine 11 alter-ego factors to pierce the corporate veil of a parent company). Second, the Amended Complaint does not allege that the subsidiary entities' corporate structure is merely a fiction used to perpetuate a fraud or defeat a rightful claim. Third, the Amended Complaint does not contain allegations that disregarding the corporate structure would achieve an equitable result.

The Court therefore concludes that the Local Governments have not made a prima facie showing that the Court has specific jurisdiction over Suncor Canada by virtue of the actions of its subsidiaries and affiliate companies.

4. Fair Play and Substantial Justice

Lastly, to establish personal jurisdiction over Suncor Canada, assuming that Suncor Canada has any minimum contacts with Colorado, the Court would also need to consider whether

exercising personal jurisdiction would offend traditional notions of fair play and substantial justice.[7] *Archangel*, 123 P.3d at 1194-95. Factors to consider are the burden on the defendant, the forum state's interest in resolving the controversy, and the plaintiff's interest in attaining effective and convenient relief. *Id.* at 1195. Where, as here, a defendant's minimum contacts with Colorado are weak, the less a defendant needs to show unreasonableness. *Id.*

First, in assessing burden, courts are to consider the unique burdens on business entities defending against litigation in a foreign country. *Asahi Metal Industries Co. v. Superior Court of California*, 480 U.S. 102, 114-15 (1987); *Benton v. Cameco Corp.*, 375 F.3d 1070, 1078-79 (10th Cir. 2004). That said, the Court notes that Suncor Canada has extensive resources and has been ably represented in this litigation by experienced local counsel. Second, this ruling does not affect the claims against Defendants Suncor Energy or Suncor Sales. Given the presence of these Defendants and their Colorado assets, Colorado appears to have minimal interest in adding a third Suncor entity, particularly one that has no operations, property, or personnel in Colorado. Third, subject to a ruling on the C.R.C.P. 12(b)(5) Motion, the Local Governments may pursue their claims in this litigation against Suncor Energy and Suncor Sales.

The Court therefore concludes that, on balance, exercising specific personal jurisdiction over Suncor Canada would offend traditional notions of fair play and substantial justice.

Suncor Canada's Motion to Dismiss under C.R.C.P. 12(b)(2) is therefore granted. There are no issues of disputed jurisdictional fact, and the Local Governments have not made a prima facie case that the Court has either general or specific personal jurisdiction over Suncor Canada. Based on the Amended Complaint's allegations and evidence attached to the Response, there is no reasonable inference that the Court has personal jurisdiction over Suncor Canada.

[7] Based on the analysis above, it is unnecessary to address this prong, but the Court does so for the sake of completeness for review purposes.

C. THE ENERGY COMPANIES' MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM UNDER C.R.C.P. 12(b)(5)

The Energy Companies initially contend that the Local Governments' claims are preempted by federal law. First, they maintain that the claims are governed by federal common law, and not state common law, and should therefore be dismissed. Second, the Energy Companies assert that if not displaced by federal common law, the claims are preempted by the federal Clean Air Act and other federal statutes. Third, the Motion to Dismiss contends that the claims are precluded based on five other federal law theories.

Next, if the claims are not preempted by federal law, the Energy Companies maintain that they are not viable claims under state law, because (1) the Local Governments lack standing; (2) the claims are barred by the applicable statutes of limitations, and (3) the Local Governments cannot plausibly allege causation. Then, if the claims survive, the Energy Companies argue that each claim should be dismissed for failure to state a claim under Colorado law.

Each of these arguments is addressed in turn.

1. Federal Preemption – Framing the Issues in this Litigation

As a threshold matter, before delving into the federal preemption claims, the Court must determine and clarify the claims made by, and the relief sought, by the Local Governments. The Energy Companies frame the issue as the Local Governments' "attempt to use this state's tort law to control the worldwide activity of companies that play a crucial role in virtually every sector of the global economy." Motion to Dismiss for Failure to State a Claim, p. 1 (December 19, 2019). They further posit that the claims "raise federal statutory, regulatory, and constitutional concerns; threaten to upset bedrock federal-state divisions of responsibility; and have profound implications for the global economy, international relations, and America's national security." *Id.* The Energy Companies characterize the Local Governments' claims as asking the court "to disregard well-

established boundaries of tort law, hold select Defendants liable for the actions of billions of third parties, and adjudicate whether Plaintiffs' alleged harms outweigh the massive and undeniable social utility of fossil fuels – not just in Colorado, but around the world." Motion to Dismiss for Failure to State a Claim, pp. 2-3 (December 19, 2019).

Conversely, the Local Governments frame the issue as seeking compensation for harms caused in their jurisdictions. They represent that they are not asking the Court to weigh the costs and benefits of fossil fuels nor revisit federal government decisions. Response, p. 1 (February 6, 2020). Rather, the Local Governments allege that the Energy Companies have altered the climate by producing, selling, and promoting fossil fuels at levels they knew would bring catastrophic harm to Colorado. They further allege that the Energy Companies accelerated the pace and exacerbated the harm by concealing and misrepresenting the dangers of unchecked fossil fuel consumption to increase their sales. The consequences of these actions have led to an altered climate with concomitant costs in the Local Governments' jurisdictions. AC, ¶¶ 222-23, 243-48, 250-92, 300-17. Therefore, at issue in the motion to dismiss for failure to state a claim is whether, under established Colorado law, a jury can consider whether the Energy Companies bear any liability for the Local Governments' damages.

Resolution of this framing issue is important as it significantly impacts the federal preemption analysis, and to a lesser extent, the analysis pertaining to the viability of the state law claims.

Critically, the U.S. District Court of Colorado and the Tenth Circuit have both weighed in on this issue – in this very case. As the Local Governments aptly put it in their Response, the Energy Companies are arguing against a case the Local Governments did not plead. Through this action, the Local Governments are not attempting to litigate a policy solution to global climate

change, limit fossil fuel use or production, or control greenhouse gas emissions. *See Board of County Commissioners v. Suncor Energy (U.S.A.), Inc.*, 405 F.Supp.3d 947, 955 (D. Colo. 2019) (the Local Governments "do not ask the Court to stop or regulate Defendants' emissions of fossil fuels"). The Local Governments are not asking this Court to weigh the costs and benefits of fossil fuels nor revisit policy decisions made by the federal government for purposes of controlling or regulating emissions.

In remanding this action back to state court, the U.S. District Court of Colorado observed that the Local Governments "do not allege that any federal regulation or decision is unlawful," nor do they ask "the Court to consider whether the government's decisions to permit fossil fuel use and sale are appropriate," nor do they "challenge or seek to impose federal emissions regulations, and do not seek to impose liability on emitters." *Id.* at 969-71. The U.S. District Court therefore concluded that the Energy Companies did not present "an accurate characterization of the Plaintiffs' claims." *Id.* at 971.

On remand from the United States Supreme Court, the Tenth Circuit held that none of the six grounds asserted by the Energy Companies supported federal removal jurisdiction, and affirmed the district court's order remanding this action to state court. *Board of County Commissioners of Boulder County v. Suncor Energy (USA), Inc.*, 25 F.4th 1238, 1275 (10th Cir. 2022). Like the U.S. District Court, the Tenth Circuit characterized this lawsuit as "about damages related to climate change." *Id.* at 1247. According to the Tenth Circuit, the Local Governments "do not ask the court 'to stop or regulate' fossil-fuel production or emissions 'in Colorado or elsewhere.'" *Id.* at 1248. They instead request that the Energy Companies "help remediate the harm caused by their intentional, reckless and negligent conduct, specifically by paying their share of the costs [the Local Governments] have incurred and will incur because of

[the Energy Companies'] contribution to alteration of the climate." *Id.* (internal citations omitted).

In addressing similar climate-change related litigation, courts from other jurisdictions have likewise concluded that the litigation is not aimed at controlling fossil fuel emissions or amending federal energy policy, but rather the claims concern defendants' "fossil fuel products and extravagant misinformation campaign that contributed to its injuries." *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 217 (4th Cir. 2022); *see also City and County of Honolulu,* 537 P.3d at 1187 (plaintiffs are not seeking to set regulatory standards for how, whether, or how much fossil fuels defendants produce or sell). In *City & County of Honolulu*, the Hawaii Supreme Court framed the plaintiffs' complaint as seeking to "challenge the promotion and sale of fossil-fuel productions without warning and abetted by a sophisticated disinformation campaign." *Id.* at 1187 (citing *Baltimore*, 31 F.4th at 233). In short, the Hawaii Supreme Court determined the complaint concerned torts committed in Hawaii that caused alleged injuries in Hawaii. *Id.*

The Court notes that at least one other decision, *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021), rejected the conclusion that the lawsuit was about production, sales, and misleading marketing; instead characterizing the complaint as "artful pleading," and determining that the claims were really about regulating emissions. As the Local Governments point out, this framing appears to be at odds with U.S. Supreme Court precedent. In *Virginia Uranium v. Warren*, 587 U.S. 761, 772-73 (2019) (Gorsuch, J.), in a 3-Justice plurality opinion, the Court rejected the parallel argument that Virginia's mining ban was really a means of regulating radiation, regardless of whether the regulation had the purpose of addressing nuclear hazards.

Here, as in *City and County of Honolulu*, a major focus of the litigation is the claim that the Energy Companies' actions have tortiously caused harm to local communities and the Energy Companies have misled the public about the dangers of fossil fuels. The lawsuit is not seeking injunctive relief, or asking the Court to regulate or limit fossil fuel emissions. Instead, the Local Governments seek damages under Colorado tort law for harms and costs caused by the Energy Companies' alleged tortious actions.

2. Federal Common Law

As part of their federal preemption argument, the Energy Companies argue that the Local Governments' claims are based on federal common law. Next, applying federal common law, the Energy Companies maintain that the claims must be dismissed because they are displaced by federal legislation. Additionally, even if the claims were not displaced by legislation, the Energy Companies assert that the Amended Complaint fails to assert a plausible claim under federal common law.

The Local Governments counter that their claims are not properly based on federal common law. Therefore, there is no displacement.

There is no federal general common law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). However, there remain limited areas of "specialized federal common law." *American Electrical Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011). Federal common law applies where the subject matter of the claims implicates "uniquely federal interests." *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 640 (1981). The United State Supreme Court has held that federal common law applies to cases addressing "air and water in their ambient or interstate aspects." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972); *American Electrical Power*, 564 U.S. at 421 ("Environmental protection is undoubtedly an area within national

legislative power").[8] In *American Electrical Power*, plaintiffs brought claims against several electric utilities, contending that GHG emissions created a substantial and unreasonable interference with public rights in violation of federal and state tort law. *Id.* at 418. The U.S. Supreme Court held that the plaintiffs' claims were governed by federal common law, but were displaced by the Clean Air Act ("CAA"), and therefore failed to state a claim. *Id.*

The Court concludes the Energy Companies' federal common law preemption argument fails for no less than five independent reasons.

First, "the federal common law of nuisance that formerly governed transboundary pollution suits no longer exists due to Congress's displacement of that law through the CAA." *Suncor*, 25 F.4th at 1260; *American Electrical Power*, 564 U.S. at 421; *City and County of Honolulu*, 537 P.3d at 1195. *American Electrical Power*, relied on by the Energy Companies, "extinguished federal common law public nuisance damage action[s], along with the federal common law public nuisance abatement actions." *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012) (*Kivalina II*); *Suncor*, 25 F.4th at 1259 (in *American Electrical Power*, the CAA displaced the federal common law of air pollution). Several federal appellate courts have recently confirmed in climate change litigation that the federal common law which once governed interstate pollution damage and abatement actions was displaced. *See Rhode Island v. Shell Oil Production Co.*, 35 F.4th 44, 55 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 1796 (2023) (the Clean Water Act and the CAA have statutorily displaced any federal common law that previously existed, and therefore the court could not rule that any federal common law controlled the state's claims); *Baltimore*, 31 F.4th at 204 (federal common law did not control the city's state law claims because "federal

[8] Federal common law is disfavored because "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." *American Electrical Power*, 564 U.S. at 423-24.

common law in this area cease[d] to exist due to statutory displacement, Baltimore [did] not invoke[] the federal statute displacing federal common law, and . . . the CAA does not completely preempt Baltimore's claims); *City and County of Honolulu*, 537 P.3d at 1196 ("Because the CAA displaced federal common law, we cannot accept Defendants' argument that the federal common law governs here").[9]

In short, numerous courts have held that the federal common law that once governed interstate pollution damages and abatement suits was displaced by the CAA.

Despite this displacement, the Energy Companies argue that federal common law survives with enough force to preempt state common law claims involving interstate air pollution. As the Hawaii Supreme Court characterized it in *City and County of Honolulu*, this argument amounts to an argument that federal common law is both dead and alive – "dead in that the CAA has displaced it, but alive in that it still operates with enough force to preempt Plaintiffs' state law claims." *Id.* at 1198. Under this two-step approach, plaintiffs would be left without a remedy. Federal common law would preempt state common law, and the CAA would then displace federal common law. There is, however, no federal statutory cause of action under the CAA for these claims. *See* 42 U.S.C. § 7401, *et seq*. Without a federal statutory remedy, federal common law remedy, or state law remedy, plaintiffs are left without legal recourse.

In *City and County of Honolulu*, the Hawaii Supreme Court declined to follow this two-step approach "because it engages in backwards reasoning." 537 P.3d at 1199. This Court likewise declines the Energy Companies' invitation to go down this road to nowhere. Federal common law

[9] The position advanced by the Energy Companies also conflicts with the position ExxonMobil advocated for in *Kivalina II*, wherein ExxonMobil argued against application of federal common law in global climate change litigation – stating that even if "global climate change is predominately a matter of federal concern" it "has nothing to do with whether private damages claims raise uniquely federal interests of the type that justify applying federal common law." Response, Exhibit A, p. 57, n.23 (February 6, 2020).

pertaining to transboundary air pollution has been displaced by the CAA. The issue therefore becomes whether the state law claims advanced by the Local Governments are preempted by the CAA. *See Suncor,* 5 F.4th at 1261.

Second, as set forth above, the Local Governments' claims do not seek to regulate emissions. The federal common law relied on by the Energy Companies formerly governed transboundary pollution and damages suits, which are distinguishable from the claims brought by the Local Governments in this litigation. The claims governed by federal common law in the air pollution context were brought against polluting entities which sought to enjoin further pollution. *See, e.g., Milwaukee,* 406 U.S. at 93. This area of specialized federal common law governed "suits brought by one State to abate pollution emanating from another State." *American Electrical Power,* 564 U.S. at 421. Federal common law applied to such actions because states have conflicting interests in applying their state's law where one state seeks to enjoin conduct authorized in another state. *Milwaukee,* 406 U.S. at 104-07.

Here, the Local Governments' claims do not seek to regulate or enjoin GHG emissions. Moreover, the plaintiffs are local governments within Colorado, and this is not a suit brought by a state to abate pollution emanating from another state. Therefore, the former federal common law pertaining to transboundary pollution, even if it still existed, would not preempt the Local Governments' claims here.

This conclusion is in accord with a host of other courts that have considered this argument. *See, e.g., City and County of Honolulu*, 537 P.3d at 1200; *Rhode Island,* 35 F.4th at 55-56; *Suncor*, 425 F.4th at 1260, n.5; *Baltimore,* 31 F.4th at 204, 217; *City of Oakland,* 969 F.3d at 906 (state law claims for public nuisance did not raise a substantial federal question).

Third, even if federal common law was not displaced by the CAA, there is no basis for recognizing new federal common law to apply to the Local Governments' state law claims for damages.[10] First, displacement of state law is primarily a decision for Congress, rather than courts creating common law. *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1325 (5th Cir. 1985). Second, this litigation does not involve adverse states, which could necessitate federal common law as an alternative to having one state's law apply to the disadvantage of the other. Third, the Local Governments are not attempting to regulate the conduct of out-of-state pollution sources. *Suncor*, 25 F.4th at 971.

Fourth, the Energy Companies have not shown a uniquely federal interest to justify the invocation of federal common law. A uniquely federal interest must relate to an articulated congressional policy or directly implicate the authority and duties of the United States as sovereign. *Rhode Island*, 35 F.4th at 54; *Baltimore*, 31 F.4th at 200-01; *Jackson*, 750 F.2d at 1325. The Energy Companies have not shown how this case directly implicates these federal concerns. In the briefing, the Energy Companies tout abstract federal interests such as national energy and security policy. However, they do not specify concrete interests or identify how they are implicated by the state law damages claims brought in this case. *Wallis v. Pan Am Petroleum Corp.*, 384 U.S. 63, 71 (1966). Unlike in *International Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987), in which there was a detailed federal permitting scheme that would have been disrupted if an affected state law applied to discharges, there is no comprehensive federal scheme governing the Energy Companies' sales of fossil fuels or marketing activities.

[10] From the Supplemental Briefing filed June 12, 2023, it appears that the Energy Companies now concede that they are not seeking to create new federal common law, as they rely on the federal common law pertaining to interstate air pollution.

Fifth, and relatedly, the Energy Companies have not shown a significant conflict between federal interests and Colorado law. To invoke federal common law, "state law must pose a threat to an identifiable federal policy." *In re Agent Orange Products Liability Litigation*, 635 F.2d 987, 995 (2d Cir. 1980). Here, the Energy Companies have not identified a federal policy pertaining to their liability for damages, let alone how state law conflicts with any such federal interest. *Baltimore*, 31 F.4th at 200-04 (holding that the defendants' argument failed to establish either a uniquely federal interest in compensating local communities for climate injuries and redressing defendants' misleading promotional activities, or a significant conflict between any such federal interests and the application of state law to the conduct at issue).

In the supplemental briefing, the Energy Companies rely heavily on the Second Circuit's ruling in *City of New York*, 993 F.3d 81 (2d Cir. 2021). In supplemental briefing, they posited that *City of New York* "remains the only case-dispositive decision addressing the merits of Plaintiffs' claims." Supplemental Brief, p. 1 (June 12, 2023). *City of New York* affirmed the dismissal of a climate change-related tort action brought by the City of New York against certain energy companies, including ExxonMobil. *Id.* at 85. The Second Circuit agreed with the energy companies that federal common law preempted the state tort claims, and further, that the CAA displaced federal common law with respect to those claims. *Id.* at 91-92, 95-96.

The Local Governments contend that *City of New York*, which is not binding on this Court, was wrongly decided and distinguishable. In the Supplemental Briefing, the Local Governments cite a host of appellate decisions that disagree with the *City of New York's* analysis on the applicability of federal common law and CAA preemption.

Indeed, *City of New York's* holdings that federal common law governs claims seeking damages for injuries sustained due to interstate GHG emissions and that the CAA displaces federal

common law with respect to those emissions conflicts with several other appellate courts that have considered these issues. *See, e.g.*, *Rhode Island*, 35 F.4th at 54; *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 708 (3d. Cir. 2022); *Baltimore*, 31 F.4th at 204; *Minnesota v. American Petroleum Institute*, 63 F.4th 703, 709-12 (8th Cir. 2023); *County of San Mateo v. Chevron Corp.*, 32 F.4th 733, 746-48 (9th Cir. 2022); *Suncor*, 25 F.4th at 1261; *City of Oakland*, 969 F.3d at 906-09; *City and County of Honolulu*, 537 P.3d at 1201. This Court joins the vast majority of courts who have considered this issue, concluding the reasoning and analysis in these cases is considerably more persuasive than the Second Circuit's *City of New York* analysis. In particular, *City of New York* relied on U.S. Supreme Court precedent governing interstate air or water pollution, which as noted above, is distinguishable from the claims advanced by the Local Governments in this litigation.

The motion to dismiss based on federal common law preemption principles is therefore denied.

3. Whether the Clean Air Act Preempts the Claims

Federal common law does not displace or preempt the Local Governments' claims. Because the CAA displaced federal common law, the analysis now turns to whether the CAA preempts the state tort claims brought in this action. For the reasons set forth below, the Court concludes that the Local Governments' claims are not preempted by the CAA.

The doctrine of preemption is rooted in the U.S. Constitution's Supremacy Clause. U.S. Const. art. VI, cl. 2; *see also City and County of Honolulu*, 537 P.3d at 1203. There are two general types of preemption – complete preemption and ordinary preemption. *City of Hoboken*, 45 F.4th at 707; *City and County of Honolulu*, 537 P.3d at 1203. Complete preemption applies in the context of federal removal jurisdiction. *Id.* Thus, ordinary preemption applies here. There is a presumption that state laws are not preempted. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

The parties offer competing federal preemption legal frameworks. The Energy Companies assert that the displacement of federal common law shifts the burden to the party contesting preemption, and the test is whether the CAA specifically preserves the particular type of state law claim at issue. *See City of New York*, 993 F.3d at 98. Because the CAA does not authorize a suit for injuries caused by interstate GHG emissions, the CAA does not preserve the state law claims here, and thereby preempts the claims. *Id.* at 100.

The Local Governments counter that ordinary preemption applies. Under this test, there is a presumption against the preemption of state laws and claims. *City and County of Honolulu*, 537 P.3d at 1203 (citing *Wyeth*, 555 U.S. at 565). When determining whether a statute is preempted, courts primarily evaluate whether Congress intended to preempt state law. *Id.* at 1203.

The Court concludes that ordinary preemption principles apply here, placing the burden on the Energy Companies to show the state law claims have been preempted. As set forth above, U.S. Supreme Court precedent provides that there is a presumption against federal preemption of state law claims. The U.S. Supreme Court has held that the availability of state suits "depends, *inter alia*, on the preemptive effect of the [Clean Air] Act." *American Electrical Power*, 564 U.S. at 429; *see also Ouellette*, 479 U.S. at 492 (Court applied an ordinary conflict preemption analysis under the CWA). Indeed, in considering the removal issue in this litigation, the Tenth Circuit relied on *American Electrical Power* and *Kivalina II*, and determined that "we look to the federal act that displaced the federal common law to determine whether the state claims are preempted." *Suncor*, 25 F.4th at 1261.

In general, there are three types of ordinary, or substantive, preemption: (1) express preemption, where Congress has expressly preempted local law; (2) field preemption, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation

and leaves no room for state law; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of a federal objective. *City and County of Honolulu*, 537 P.3d at 1203 (citations omitted); *Ouellette*, 479 U.S. at 491-92; *see also Middleton v. Hartman*, 45 P.3d 721, 731 (Colo. 2002) (state law tort claims are preempted where Congress has occupied the field through legislation or when they conflict with federal law).

The Energy Companies assert that the Local Governments' claims are preempted under the latter two theories. Motion to Dismiss for Failure to State a Claim, pp. 14-15 (December 9, 2019). The Court disagrees, concluding that the claims are not preempted under any preemption theory.

First, to be clear, express preemption does not apply. Federal law expressly preempts state law only where the federal statute contains an express preemption clause barring state law claims in certain areas. *City and County of Honolulu*, 537 P.3d at 1203 (citing *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015)). The CAA does not contain express language preempting state common law tort claims, and the Energy Companies do not contend that it does. Indeed, the CAA does just the opposite by preserving "any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." 42 U.S.C. § 7604(e).

Second, field preemption does not apply. Field preemption applies where (1) the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement the regulation, or (2) the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *City and County of Honolulu*, 537 P.3d at 1204; *see also In re MacAnally*, 20 P.3d 1197, 1201 (Colo. App. 2007) (field preemption occurs where a federal law "so thoroughly occupies a legislative field as

to make reasonable the inference that Congress left no room for the states to supplement it.") Even complementary state regulation is impermissible when Congress occupies an entire field. *Id.*; *Arizona v. United States*, 567 U.S. 387, 401 (2012).

The Energy Companies maintain that Congress's delegation to the EPA of broad authority over "whether and how to regulate carbon-dioxide emissions" reflects a clear occupation of this legislative area. Motion to Dismiss for Failure to State a Claim, p. 16 (December 9, 2019).

Under the legal standards for field preemption, the CAA does not completely occupy the field of GHG emissions. *City and County of Honolulu*, 537 P.3d at 1204; *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 694 (6th Cir. 2015) (the CAA does not bar state common law claims against in-state emitters because "environmental regulation is a field that the states have traditionally occupied"). Most critically, under the CAA, each state retains regulatory power through state implementation plans. 42 U.S.C. § 7410(a)(1). Further, the CAA expressly provides for a state's right to adopt or enforce a standard or limitation regarding emissions unless the state policy would be less stringent than the CAA. 42 U.S.C. § 7416. In general, the CAA preserves state regulatory and common law authority in this area. 42 U.S.C. §§ 7401(a)(3), 7604(e). The CAA therefore does not reflect a "congressional decision to foreclose any state regulation in the area." *City and County of Honolulu*, 537 P.3d at 1204 (quoting *Arizona*, 567 U.S. at 401)*; see also Ouellette*, 479 U.S. at 492 (the savings clause in the CWA defeats field preemption).

Moreover, the CAA provides the EPA with authority to regulate emission sources. 42 U.S.C. § 7411. The CAA does not directly regulate the Energy Companies' upstream levels of enterprise-wide fossil fuel production, sale and promotion. *See Baltimore*, 31 F.4th at 215 (the EPA "regulates air pollution from stationary sources, emission standards for moving sources, noise pollution, acid rain, and stratospheric ozone protection."). As set forth above, the Local

Governments' claims do not seek to regulate emissions. Therefore, field preemption would not preclude their claims even if Congress intended to occupy the field relating to GHG emissions.

Third, the Court concludes that conflict preemption does not apply. In general, conflict preemption exists when state law "stands as an obstacle to accomplishing the purposes and objectives of federal law." *In re Drexler & Bruce*, 315 P.3d 179, 182 (Colo. App. 2013). Conflict preemption consists of (1) obstacle preemption and (2) impossibility preemption. *City and County of Honolulu*, 537 P.3d at 1204. Obstacle preemption applies when state law claims "stand[] as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Id.* (quoting *Arizona*, 567 U.S. at 399). Impossibility preemption is a "demanding defense" that applies when state law claims directly conflict with federal law or penalize behavior that federal law requires. *Id.* (quoting *Wyeth*, 555 U.S. at 573).

On this front, the Energy Companies argue that obstacle preemption applies by contending that adjudication of the state law claims would "interfere with the careful balance struck by Congress" through numerous statutes and regulations related to fossil fuel production, emissions, and environmental protection. Motion to Dismiss for Failure to State a Claim, p. 15 (December 19, 2019) (citing *Arizona*, 567 U.S. at 406). They posit that the approach taken by the Local Governments amounts to an "avalanche of litigation based on overlapping application of every state's common law" which will present a significant obstacle to federal regulation of air pollution and Congress's objective of increasing fossil fuel extraction. *Id.*

The Court first concludes that the claims advanced here are not an obstacle to the CAA's regulation of air pollution emissions. Congress has stated that the overarching goal of the CAA is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." 42 U.S.C. § 7401(b)(1). The Energy Companies have not shown how the state law

claims at issue here, which seek damages and not an injunction, interfere with the CAA's regulation of air pollution, and in particular, source emissions.

Second, in support of the obstacle preemption theory, the Energy Companies cite several federal laws relating to federal lands and leasing and assert there is a preemptive federal interest in promoting domestic oil production. Motion to Dismiss for Failure to State a Claim, pp. 10-11 (December 19, 2019). The Local Governments do not, however, seek to enjoin or restrain domestic oil production. Additionally, broadly invoking a federal interest "should never be enough to win preemption of a state law." *Virginia Uranium*, 587 U.S. at 767 (plurality opinion). A federal interest in promoting domestic oil production does not prohibit states or localities from seeking to remedy harm arising from domestic oil production activities. *See* 42 U.S.C. §§ 13401, 15927(b)(2)-(3) (oil production should not compromise the environment or harm local communities).

The Energy Companies' preemption argument conflicts with several recent appellate decisions. As set forth above, the claims in this case address conduct different from what the CAA regulates – this case is not about regulating emissions. *Suncor*, 25 F.4th at 1264. In *City of Oakland*, the Ninth Circuit held that "Congress intended [the CAA] to preserve state-law causes of action pursuant to a saving clause." 969 F.3d at 907-08. In short, the CAA preserves state tort claims. *Suncor*, 25 F.4th at 1263; *Baltimore*, 31 F.4th at 216-17. Significantly, the CAA contains two savings clauses which expressly preserve state law. 42 U.S.C. § 7604(e); § 7416. *See City of Oakland*, 969 F.3d at 907-08 (the savings clause in § 7416 '"makes clear that states retain the right to 'adopt or enforce' common law standards that apply to emissions' and preserves '[s]tate common law standards . . . against preemption.'" (quoting *Merrick*, 805 F.3d at 690-91).

Moreover, it is notable that the CAA does not provide a remedy to the Local Governments for the claims brought herein. *See Suncor*, 25 F.4th at 1267 (the fact that "state common law might provide redress for harm caused by certain private actors, and thereby created remedies unavailable to a plaintiff through the federal legislative or regulatory process, is entirely unremarkable"). As set forth above, under the Energy Companies' theory, federal common law is displaced by the CAA, which in turn preempts the state law claims. The absence of a remedy in the CAA for the Local Governments to seek redress for the harms and injuries alleged in the Amended Complaint would leave them entirely without a remedy. This result further supports the conclusion that the CAA does not preempt the state law claims advanced in this litigation.

In support of their preemption theory, the Energy Companies rely heavily on *City of New York.*[11] The overarching question in preemption analyses is whether Congress intended to preempt state law. *City and County of Honolulu*, 537 P.3d at 1203 (citations omitted). *City of New York* does not expressly hold that Congress intended the CAA to preempt state tort law. The *City of New York's* determination that even where a federal statute does not directly preempt state law, it can do so indirectly by displacing federal common law, conflicts with U.S. Supreme Court precedent. *See American Electrical Power*, 564 U.S. at 429 ("[i]n light of our holding that the Clean Air Act displaces federal common law, the availability . . . of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act.").

[11] The Court also notes the Energy Companies' reliance on the Delaware Superior Court's decision in *Delaware v. BP America Inc., et al.*, 2024 WL 98888 (Del. Super. Ct. Jan. 9, 2024), interlocutory review denied May 8, 2024, 2024 WL 2044799, submitted as supplemental authority on January 18, 2024 (Exhibit A). In *Delaware*, the Superior Court held that the CAA preempts state law to the extent a state attempts to regulate air pollution originating in other states. With regard to federal preemption, this authority is not persuasive for the same reasons that the *City of New York* is not compelling.

The Energy Companies also place reliance on *Ouellette*, which held that in a suit by Vermont landowners against a New York paper mill, plaintiffs' Vermont state law claims were preempted by the CWA. 479 U.S. at 498. In reaching this conclusion under a conflict preemption analysis, the U.S. Supreme Court held that application of Vermont law would circumvent the CWA's extensive permitting system, and Vermont law was therefore preempted due to the conflict with federal statutory law. *Id*. at 494. In so holding, however, the Court observed that application of New York law would not be preempted. *Id.* As noted above, the claims advanced in this litigation are not an obstacle to or in conflict with the CAA's regulation of air pollution emissions. *Ouellette's* conflict preemption analysis is therefore distinguishable.

The Energy Companies also seek to distinguish several of the cases relied on by the Local Governments because they addressed preemption in the context of federal removal. This argument fails for three reasons. First, *City and County of Honolulu* holds that, outside of the removal context, the CAA did not preempt state law claims similar to those made here. Second, although the appellate courts addressing preemption in the removal context applied the well pleaded complaint rule, these cases still provide guidance in assessing whether the CAA preempts the Local Governments' state law claims brought in this litigation.[12] Third, U.S. Supreme Court preemption precedent arising from other contexts supports application of the ordinary preemption principles applied above.

4. Whether Other Federal Doctrines Preempt the Claims

The Energy Companies contend that the claims at issue violate a handful of other federal doctrines: federal foreign affairs power, separation of powers, the Commerce Clause, due process, and free speech. Each is addressed in turn.

[12] *See, e.g., Suncor* 45 F.4th at 1261; *Baltimore*, 31 F.4th at 215; *City of Hoboken*, 45 F.4th at 707.

a. Foreign Affairs Power

State law claims "must give way if they impair the effective exercise of the Nation's foreign policy." *American Insurance Association v. Garamendi*, 539 U.S. 396, 419 (2003). In *Garamendi*, the U.S. Supreme Court invalidated a California law encouraging Holocaust reparations by European insurance carriers because of the likelihood it would "conflict with express foreign policy of the National Government." *Id.* at 420.

The Energy Companies claim that in seeking damages for their lawful worldwide fossil fuel production activities, the Local Governments are asking the Court to interfere with the federal government's ability to negotiate and implement comprehensive international agreements related to climate change, infringe upon foreign-policy decisions, and undercut the President's diplomatic discretion. Motion to Dismiss, pp. 16-17 (December 19, 2019).

This argument fails for several reasons. First, the Court is unaware of any cases holding that the foreign affairs power preempts state tort law claims for injuries incurred in the state. Second, foreign policy lacking the force of a specific law cannot preempt, even when state law has serious foreign policy implications. *Medellin v. Texas*, 552 U.S. 491, 523-32 (2008). Third, and perhaps most critically, the Energy Companies have not shown how the state law claims here, which seek monetary damages for domestic harms, compromise the President's ability to pursue foreign policy. Nor do they show how the claims conflict with international obligations.

b. Separation of Powers

The Energy Companies next maintain that adjudicating the Local Governments' claims would violate separation of powers and federalism principles. They suggest that a state court judgment on the legality of the Energy Companies' extraction and production of fossil fuels is beyond the role of the courts. Further, courts should refrain "from reviewing controversies

concerning policy choices and value determinations." *Busse v. City of Golden*, 73 P.3d 660, 664 (Colo. 2003) (citations omitted). They further urge that decisions pertaining to appropriate and reasonable fossil fuel production and emission levels are to be resolved by the legislative or executive branches. *Moss v. Board of County Commissioners*, 411 P.3d 918, 921 (Colo. App. 2015) (addressing whether bows are firearms).

The Local Governments counter that this argument essentially invokes the federal political question doctrine, which the Colorado Supreme Court has rejected. *Lobato v. People*, 218 P.3d 358, 370 (Colo. 2009). Further, even if it applies, they maintain that the argument does not satisfy the factors set forth in *Baker v. Carr*, 369 U.S. 186, 222 (1962). They also note that federal courts of appeal have universally rejected the theory's applicability to climate change tort cases. *See Connecticut v. American Electrical Power Co.*, 582 F.3d 309, 321-22 (2d Cir. 2009); *rev'd on other grounds*; *Comer v. Murphy Oil USA*, 585 F.3d 855, 869-79 (5th Cir. 2009), *vacated* 598 F.3d 208 (5th Cir. 2010) (vacated upon agreement to hear *en banc*, but quorum lost).

The Local Governments overstate the *Lobato* holding. In *Lobato*, the Colorado Supreme Court held that the political question doctrine did not preclude judicial review of the statute in that case. 218 P.3d at 374. The separation of powers and political question doctrines may therefore be considered. However, the Court concludes that adjudication of the claims here does not violate either separation of powers or political question principles. These claims are to be resolved in accordance with Colorado common law (tort claims) and statutory law (CCPA claim). Adjudication involves more than policy determinations reserved for the legislative and executive branches. Rather, it requires the jury to evaluate and weigh the evidence and apply Colorado law, through jury instructions, in deciding the claims. To the extent the public nuisance claim requires a balancing of the social utility of the action with the harm caused by the action, this balancing is

performed in any public nuisance action, and tort law provides the standards for the jury to apply. *See Cook v. Rockwell International Corp.*, 580 F.Supp.2d 1071, 1141-42 (D. Colo. Dec. 7, 2006); Restatement (Second) of Torts § 821B, cmt. (i) (in public nuisance suit for damages, court's task is to decide whether it is unreasonable to engage in the conduct without paying for the harm done).

c. Commerce Clause

The Energy Companies next urge that the claims violate the extraterritoriality doctrine of the Commerce Clause. The U.S. Constitution's dormant Commerce Clause invalidates state laws that have the "'practical effect' of regulating commerce occurring wholly outside that State's border," or "control[ling] conduct beyond the boundaries of the State." *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). A "[s]tate may not impos[e] economic sanctions on violators of its laws with the intent of changing tortfeasors' lawful conduct in other States." *BMW of North America v. Gore*, 517 U.S. 559, 572 (1996). Although state legislation is not at issue here, the Energy Companies assert that common law environmental tort claims are tantamount to state regulation, as they can cause a defendant to "change its methods of doing business and contributing pollution to avoid the threat of ongoing liability." *Ouellette*, 479 U.S. at 495. Here, the Energy Companies suggest that adjudication of the claims in this litigation could have the practical effect of controlling the Energy Companies' conduct beyond the boundaries of Colorado, and the undifferentiated nature of GHG emissions would result in Colorado tort law being used to impose policy choices on neighboring states. Motion to Dismiss, pp. 18-19 (December 19, 2019).

The Court concludes that the claims are not precluded by the dormant Commerce Clause. Extraterritoriality is the "most dormant" dormant Commerce Clause doctrine, and *Healy* and its progeny are limited to statutes "tying the price of . . . in-state products to out-of-state prices." *Energy & Environmental Legal Institute v. Epel*, 793 F.3d 1169, 1172, 1174-75 (10th Cir. 2015)

(quoting *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644, 669 (2003)). This *Healy* line of cases involve discrimination against out-of-state products. This action involves neither state legislation nor price discrimination. Likewise, *BMW* is distinguishable. It did not include a Commerce Clause challenge, rather, it addressed whether disproportionate punitive damages may be used to punish out-of-state conduct. In contrast, this case involves a request for compensatory damages for conduct causing in-state injuries.

Moreover, the U.S. Supreme Court recently rejected a general "extraterritoriality" doctrine under the dormant Commerce Clause. In *National Pork Producers v. Ross*, 598 U.S. 356 (2023), the Court clarified that *Healy* does not support an extraterritoriality doctrine, and observed that "[i]n our interconnected national marketplace, many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior." *Id.* at 374.

d. Due Process Clause

Next, the Energy Companies contend that the Local Governments' claims violate the Due Process Clause of the U.S. Constitution in two ways. First, due process precludes states from "punish[ing] a defendant for conduct that may have been lawful where it occurred." *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408, 421 (2003). The Energy Companies' exploration and production activities are lawful in all states and nations, and thus they assert that the Local Governments may not seek to punish them for lawful conduct. Second, due process prohibits states from imposing disproportionate and retroactive liability for lawful conduct. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 549 (1998). Here, the Amended Complaint seeks past and future damages, trebled, relating to conduct dating back more than 100 years. AC, ¶¶ 532-35.

Like the Commerce Clause argument, the case law relied on by the Energy Companies (*State Farm* & *BMW*) regarding lawful conduct addresses punitive damages, rather than liability.

With regards to retroactivity, the Local Governments plausibly contend that this type of argument has been rejected in analogous lead paint, asbestos, and tobacco cases. Liability may still attach for prior conduct that, while not criminal, is tortious. *People v. ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d 499, 599 (Cal. App. 2017) (lead paint), *cert. denied*, 139 S. Ct. 377 (2018); *Air & Liquid Systems Corp. v. DeVries*, 586 U.S. 446, 457 (2019) (asbestos); *Bullock v. Philip Morris USA, Inc.*, 131 Cal. Rptr. 3d 382, 395-96 (Cal. App. 2011) (tobacco). Here, the Local Governments have alleged that the Energy Companies sold, marketed, and misrepresented the dangers of fossil fuels while knowing they would cause catastrophic climate change. This action does not seek to impose criminal sanctions on conduct that was lawful when it occurred. Rather, the Local Governments seek compensatory damages for conduct they contend was tortious at the time it occurred. The issue of whether liability will attach, and if so, how far back, go to the merits of the action.

The claims therefore do not violate the Due Process Clause.

e. First Amendment

Lastly on the federal doctrine front, the Energy Companies seek dismissal of the claims because they seek to punish the Energy Companies for protected speech. For instance, the Amended Complaint alleges that ExxonMobil ran advertisements "claim[ing] that climate science was unsettled," "criticiz[ing] the unrealistic and economically damaging Kyoto process," and "emphasiz[ing] scientific uncertainties about the human role in climate change." AC, ¶ 421. The Energy Companies maintain that punishing these alleged advertisements would violate the First Amendment, which protects the essential "free flow of commercial information." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995).

Additionally, the Energy Companies urge that the claims are barred by the Noerr-Pennington doctrine, which immunizes various forms of administrative and judicial petitioning activity from legal liability in later litigation. *General Steel Domestic Sales, LLC v. Bacheller*, 291 P.3d 1, 7 (Colo. 2012). On this issue, the Energy Companies assert that the Amended Complaint's reference to industry groups refers to lobbying organizations, which they suggest are immunized by the Noerr-Pennington doctrine. The Motion also notes that some of the Amended Complaint's allegations go to communications regarding the International Panel on Climate Change ("IPCC"), whose principal audience was policymakers. Motion to Dismiss, p. 21 (December 19, 2019).

As an initial matter, the First Amendment argument pertains only to the CCPA claim, as the other claims do not involve speech. With regard to the CCPA claim, as pointed out by the Local Governments, the Energy Companies' First Amendment argument would eviscerate the CCPA by rendering it unconstitutional as applied to commercial speech. The First Amendment "accords a lesser protection to commercial speech." *Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980). To be protected, the commercial speech "must concern lawful activity and not be misleading." *Id.* at 566. Here, the Local Governments allege that the speech in question was misleading. Therefore, the CCPA claim is not prohibited by the First Amendment.

Likewise, the claim is not barred by the Noerr-Pennington doctrine. Petitioning activity is not protected by this doctrine if the activity involved "fraud, or some other legally cognizable harm associated with a false statement." *United States v. Alvarez*, 567 U.S. 709, 718-19 (2012); *see also United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009) (Noerr-Pennington "does not protect deliberately false or misleading statements."). Here, the Amended Complaint

alleges that the statements were falsely made. Additionally, the doctrine does not apply if the subject activity "was not genuinely intended to influence government action." *Philip Morris,* 566 F.3d at 1123. Here, the allegations of misleading speech are far broader than speech aimed at policymakers, and the allegations disclaimed relief based on petitioning activities. AC, ¶ 542.

The claims therefore do not violate the First Amendment.

5. Whether the Claims are Viable Under State Law

a. Standing

Standing is a threshold issue that must be resolved before a decision on the merits. *Hickenlooper v. Freedom from Religion Foundation, Inc.*, 338 P.3d 1002, 1006 (Colo. 2014). Colorado plaintiffs benefit from relatively broad individual standing. *Ainscough v. Owens,* 90 P.3d 851, 856 (Colo. 2004) (Colorado's test "has traditionally been relatively easy to satisfy"). A plaintiff's injury may be intangible, such as the deprivation of civil liberties. *Id.* To establish standing, a plaintiff must show both that (1) plaintiff suffered an injury in fact, and (2) that the injury was to a legally protected interest. *Reeves-Toney v. School District No. 1 in the City and County of Denver*, 442 P.3d 81, 86 (Colo. 2019); *Wimberly v. Ettenberg*, 570 P.2d 535, 537-39 (Colo. 1977). Present or threatened economic harm is a sufficient injury in fact. *City of Northglenn v. Board of County Commissioners*, 411 P.3d 1139, 1143 (Colo. App. 2016).

The Energy Companies first assert that the Local Governments lack standing because they do not and cannot allege that the Defendants' fossil fuel activities are directly responsible for their alleged injuries. Rather, the Amended Complaint includes allegations that the Energy Companies made it possible for billions of consumers to consume fossil fuels, which caused the alleged injuries. AC, ¶¶ 10, 128, 322. In competitor standing cases, a defendant having "merely encourage[d] or permit[ted] a third party to engage in conduct that affects a plaintiff's legally

protected interest" does not create an injury in fact. *1405 Hotel, LLC v. Colorado Economic Development Commission*, 370 P.3d 309, 318 (Colo. App. 2015).

This argument is similar to the Energy Companies' causation argument (Section 5(c) below). In general, causation is an issue of fact. More particularly, whether an injury resulted from a defendant's actions is a merits question, "reserved for the trier of fact." *Wimberly*, 570 P.2d at 539. Here, the Local Governments have alleged that the Energy Companies knew consumers would use the fossil fuels they produced, and that this would substantially contribute to global climate change and concomitant harm, including to the Local Governments. AC, ¶¶ 327-30, 337-75. Generally, a third party's act "is not a superseding cause immunizing the defendant from liability, if it is reasonably foreseeable." *Ekberg v. Greene*, 588 P.2d 375, 376 (Colo. 1978). The Local Governments have therefore sufficiently alleged that the Energy Companies' activities are responsible for their damages.

Second, the Motion to Dismiss argues that the nature and extent of the claimed damages will not be known until a remote time in the future, and such factual allegations are insufficient to support the standing claim. *Olson v. City of Golden*, 53 P.3d 747, 752 (Colo. App. 2002). In particular, the Amended Complaint alleges that damages are "expected," "projected," "anticipated," or "predicted" to manifest at some point in the future. AC, ¶¶ 161-63, 165-66, 172-73, 178-79, 244, 255, 288, 311.

The Energy Companies' speculative injury argument is similarly unavailing. The Amended Complaint includes allegations that the Local Governments have already incurred damages due to an altered climate and are presently "expending considerable taxpayer dollars" to protect residents from climate impacts. *Id*. at ¶¶ 221-320, 454. The fact that some of the alleged damages may arise in the future does not defeat standing for alleged injuries that have occurred in

the past and are presently occurring. *Cf. Olson*, 53 P.3d at 752 (it would not be known until a remote time whether there would be an injury at all). Indeed, Colorado courts have also permitted claims for threatened injury, such as loss of future sales, if the claims are not speculative. *Syfrett v. Pullen*, 209 P.3d 1167, 1170 (Colo. App. 2008); *Colorado Manufactured Housing Association v. Pueblo County*, 857 P.2d 507, 511 (Colo. App. 1993).

In short, the Local Governments have adequately alleged an injury in fact to a legally protected interest, and therefore have standing.

b. Statute of Limitations

The Energy Companies contend that all of the claims are time-barred because, from the face of the Amended Complaint, the Local Governments were on notice of the claims more than four years before they were filed. *See* C.R.S. §§ 13-80-102(1) (the statute of limitations for trespass and nuisance claims is 2 years); § 13-80-101(1)(a) (the statute of limitations for unjust enrichment claims is 3 years); § 6-1-115 (the statute of limitations for CCPA claims is 3 years after the date on which the false, misleading, or deceptive act or practice occurred or the date on which the last in a series of such acts or practices occurred or within 3 years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice, and may be extended for one year if certain elements are proven); *Sterenbuch v. Goss*, 266 P.3d 428, 436 (Colo. App. 2011) (the statute of limitations for civil conspiracy claims is in the 2-4 year range because they share the statute of limitations of the underlying tort).

In particular, the Amended Complaint includes allegations that by "the late 1980s, the reality of climate change was increasingly identified in public settings," and a "scientific consensus around the existence and causes of climate change" had emerged by the 1990s. AC, ¶¶ 417, 436.

The allegations regarding misrepresentations date to the 1990s and were made publicly. *Id.*, ¶¶ 324, 416, 419-21. The Amended Complaint also includes allegations that there have been local impacts dating back to the 1990s and early 2000s, and that the Local Governments have undertaken efforts to combat these effects. *Id.*, ¶¶ 32, 206, 214, 226, 229, 259, 268, 314. Based on these allegations, the Energy Companies reason that the Local Governments were aware of their claims before 2014, and that the claims are therefore all time barred.

The Local Governments counter that the Energy Companies do not show that the Local Governments knew, or should have known, "all material facts essential to show the elements" of their claims before this action was initiated in 2018. *Miller v. Armstrong World Industries, Inc.*, 817 P.2d 111, 113 (Colo. 1991). Further, the accrual of a claim is typically "a question of fact for the jury." *Keller Cattle Co. v. Allison*, 55 P.3d 257, 261 (Colo. App. 2018). The issue of when the Local Governments knew of the Energy Companies alleged tortious acts and knew of the injuries the altered climate was causing in their jurisdictions is therefore a matter of proof. As an alternative response, the Local Governments maintain that their claims are timely because the torts are continuing torts. AC, ¶¶ 379, 406, 446, 467, 505, 515, 525. The Colorado Supreme Court has held that where pollution was both still present and migrating onto a plaintiff's property, it was a continuing trespass and nuisance even "where the cause of the contamination has ceased." *Hoery v. United States*, 64 P.3d 214, 221-22 (Colo. 2003). Because the tortious conduct has not ceased, the nuisance and trespass claims have not yet accrued.

The Court first concludes that the nuisance and trespass claims, and by extension the civil conspiracy claim, are subject to the continuing tort doctrine, and therefore not barred by the statute of limitations. The Amended Complaint alleges that the Energy Companies' actions have caused injuries that occurred in the past, are occurring in the present, and will occur in the future. AC, ¶¶

379, 406, 446, 467, 505, 515, 525. Further, the alleged tortious activity, along with an ongoing increase in GHG emissions, is continuing to occur. *Id.*, ¶¶ 380-406. The nuisance and trespass claims are therefore not barred by C.R.S. § 13-80-102(1). Additionally, although the Amended Complaint alleges that there was a scientific consensus in the 1990s, the issue of when the Local Governments knew or should have known all material facts supporting their claims, or when the claims accrued even in the absence of the continuing tort doctrine, is an issue of fact which precludes dismissal when the Court accepts the factual allegations as true and makes all reasonable inferences in the Local Governments' favor.

The continuing tort doctrine does not, however, apply to the CCPA claim, as there is no allegation that the conduct (concealment and misrepresentations) is continuing. Rather, the Amended Complaint includes allegations that the Energy Companies concealed the known risks and, separately, jointly, and in coordination with others, "directed, participated in and benefitted from efforts to misleadingly cast doubt about the causes and consequences of climate change, including: (1) making affirmative and misleading statements suggesting that continued and unabated fossil fuel use was safe (in spite of internal knowledge to the contrary); and (2) attacking climate science and scientists who tried to report truthfully about the dangers of climate change." AC, ¶ 408.

The Amended Complaint identifies several alleged specific misleading and deceptive communications to the public. AC, ¶¶ 409 (1996 statement by Exxon CEO); 419 (1997 Mobil advertisement in New York Times); 421 (2000, 2001, and 2004 Exxon advertisements); 424 (Global Climate Coalitions' marketing efforts in 1990s and early 2000s); 430 (SEPP scientists intending to create doubt in public mind in 1990s); 432 (1998 sham SEPP petition). These specific communications pre-date 2014.

The issue is therefore whether the Energy Companies have established as a matter of law that these claims accrued before 2014. C.R.S. § 6-1-115 (more than four years before the action was filed). Here, the specific communications identified above all occurred before 2014. Under the CCPA statutory limitation, however, the claims are still timely if the Amended Complaint was filed within "three years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice." *Id.*

The Amended Complaint provides insufficient factual allegations on this issue. While it includes the allegation that a large number of Colorado consumers, including in the Local Governments' communities, "were and continue to be directly affected by Defendants' deceptive trade practices." (AC, ¶ 496), there is insufficient factual content for the Court to determine when the cause of action accrued. As noted below, the CCPA allegations lack the particularity required by C.R.C.P. 9(b). In short, the Local Governments have not sufficiently alleged sufficient factual allegations for the Court to conclude or infer when the CCPA claim accrued.

The motion to dismiss the common law tort claims is therefore denied, and the motion to dismiss the CCPA claim as time-barred by C.R.S. § 6-1-115 is granted.

c. Causation

To prevail on the majority of their claims, the Local Governments must prove both causation-in-fact and legal causation. *Reigel v. SavaSeniorCare, LLC*, 292 P.3d 977, 985 (Colo. App. 2011). Causation is "a question of fact that is properly decided by a fact finder." *Id.* at 985-86; *Brown v. Silvern*, 45 P.3d 749, 751 (Colo. App. 2001). In *Reigel*, within the context of causation requirements for negligence claims, the Colorado Court of Appeals affirmed that causation is a question of fact for the jury unless the facts are undisputed and reasonable minds could draw but one inference from them. *Id.* at 985-86. The Court held that to establish causation

under Colorado law, a plaintiff must show either that (1) but for the defendant's alleged negligence, the claimed injury would not have occurred, or (2) the defendant's alleged negligence was a necessary component of a causal set that would have caused the injury. *Id.* at 987. The Court confirmed that though "the court has spoken in terms of the defendant's negligence being a 'substantial factor' where other potential causes may be at play, the court has not retreated from the requirement that the defendant's conduct be a cause without which the injury would not have occurred." *Id.*

The Energy Companies maintain that as to causation-in-fact, the Local Governments do not, and cannot, allege that the claimed injuries would not have occurred "but for" the Energy Companies' activities. *Smith v. State Compensation Insurance Fund*, 749 P.2d 462, 464 (Colo. App. 1987). The Amended Complaint alleges that the Energy Companies supplied only a fraction of global oil demand. AC, ¶¶ 61, 81 n.7, 397. They contend that it is simply not plausible to state which emissions caused the alleged climate change injuries alleged here. Thus, the Energy Companies posit that the Local Governments cannot plausibly allege that the climate change consequences at issue here would not have happened "but for" the Energy Companies' activities.

As to legal causation, the Energy Companies urge that the Local Governments cannot plausibly allege that the damages were a "reasonably foreseeable" consequence of the Energy Companies' conduct. *Boulders at Escalante, LLC v. Otten, Johnson, Robinson, Neff & Ragonetti, P.C.*, 412 P.3d 751, 762 (Colo. App. 2015). Because the alleged damages have arisen due to fossil fuel production and consumption around the planet over many decades, the Energy Companies suggest that the causal chain is too attenuated for the companies to be deemed legally responsible for the alleged harms to the Local Governments' communities. *Id.* at 766.

The Court concludes that the Local Governments have plausibly alleged causation. For purposes of the Motion to Dismiss, the factual allegations must be accepted as true, with all reasonable inferences being drawn in Plaintiffs' favor. As noted above, causation is typically an issue of fact to be determined by the factfinder. Here, the Local Governments have pled that the Energy Companies are two of the largest sources of GHG emissions globally and historically, responsible for "billions of tons." AC, ¶¶ 15, 62, 82 n.8, 383, 399. When viewed in the light most favorable to the non-moving party, these allegations are sufficient to plausibly allege causation-in-fact.

Moreover, under the Energy Companies' causation-in-fact theory, no one is legally responsible for harm caused by multiple actors. This position is contrary to Colorado law, including model Jury Instructions governing causation, which recognize that more than one person may be responsible for causing damages, and it is not a complete defense that another person may have contributed to the damages. CJI-Civ. 9:19; *see also* C.R.S. § 13-21-111.5 (allocation of fault in tort cases).

The Energy Companies also rely on the U.S. District Court's decision in *Kivalina*. This reliance is misplaced, as the decision was not affirmed on those grounds, *Kivalina II*, 696 F.3d 849, and its analysis on this issue is contrary to U.S. Supreme Court precedent. *American Electrical Power*, 582 F.3d at 347 (defendants' argument that "many others contribute to global warming in a variety of ways . . . does not defeat the causation requirement"); *see also Amigos Bravos v. United States BLM*, 816 F.Supp.2d 1118, 1135 (D. N.M. 2011) (plaintiffs need not trace their injuries directly to defendants' emissions, but rather must show a "meaningful contribution").

Further, according to the Restatement of Torts, where defendants "contribute[] to a nuisance to a relatively slight extent" such "that [their] contribution taken by itself would not be

an unreasonable one," they may be liable if "the contributions of all is a substantial interference, which becomes an unreasonable one." Restatement (Second) of Torts § 840E cmt. b. In the context of opioid litigation, where a manufacturer was responsible for "less than one percent" of the market, a U.S. District Court concluded it is "for the jury to decide" whether the defendants were liable, denying summary judgment. *In re National Prescription Opiate Litigation*, 2019 WL 4178617, at *4 (N.D. Ohio Sept. 4, 2019). Similarly, it is unnecessary for the Local Governments to prove that the Energy Companies' particular GHG emissions caused the specific injuries alleged here. Rather, in a multiple contributor tort case, there is no need to tie specific injuries to the actions of defendants. *See Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1219 (Cal. 1997) (causation shown where defendant "was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or defendant inhaled or ingested"). Further, the Local Governments have adequately alleged causation-in-fact relating to the Energy Companies alleged promotional acts. AC, ¶¶ 323-24, 407-43; *see also ConAgra*, 227 Cal. Rptr. 3d at 548 ("promotions were a substantial factor in leading to the [unchecked] use of [fossil fuel].")

The Local Governments have thus plausibly pled causation-in-fact.

The Amended Complaint has also plausibly pled legal, or proximate causation. The touchstone of proximate causation is foreseeability. *Boulders at Escalante*, 412 P.3d at 762. The Local Governments have alleged the Energy Companies knew for decades that their fossil fuels, when used as intended as promoted, were substantially certain to significantly contribute to climate change. AC, ¶¶ 363-69. Further, the Amended Complaint includes allegations that the Energy Companies knew decades ago that time lags would mask "much more significant effects in the future." *Id.* at ¶¶ 347, 360-61. In short, they allege that the Energy Companies foresaw the climate

crisis and yet promoted their product and misrepresented the dangers. These allegations are sufficient to plausibly plead proximate causation.

d. Claims for Public and Private Nuisance

A public nuisance is "the doing or failure to do something that injuriously affects the safety, health, or morals of the public or works some substantial annoyance, inconvenience, or injury to the public." *State, Department of Health v. The Mill*, 887 P.2d 993, 1002 (Colo. 1994). Under Colorado common law, land uses that cause pollution constitute a nuisance. *Id.* (citation omitted).

A private nuisance is a "substantial invasion of a plaintiff's interest in the use and enjoyment" of property. *Public Service Co. v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001). To prove a private nuisance claim, a plaintiff must establish that (1) the defendant's conduct unreasonably interfered with the use and enjoyment of the plaintiff's property, (2) the interference was so substantial that it would have been offensive or caused inconvenience or annoyance to a reasonable person in the community, and (3) the interference was either negligent or intentional. *Id.*

To prevail on either the public or private nuisance claims, the Local Governments will be required to prove that the Energy Companies' conduct was unreasonable. *Saint John's Church in Wilderness v. Scott*, 194 P.3d 475, 479 (Colo. App. 2008); Restatement (Second) of Torts §§ 826-32. To do so, they must show that the gravity of the harm outweighs the utility of the actor's conduct, or that the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible. Restatement (Second) of Torts § 826.

The Energy Companies advance three arguments in support of dismissal of the nuisance claims. First, they contend that any allegation that the Energy Companies' conduct was

unreasonable is facially implausible. The Energy Companies note the obvious benefits of fossil fuels and the industrial and economic progress spurred by fossil fuels.

In Response, the Local Governments argue they are not required to show that that costs of fossil fuel consumption outweigh its benefits. Rather, they must show that it is unreasonable for the Energy Companies to knowingly cause harm to the local communities without compensation. Restatement (Second) of Torts §§ 821B cmt. i, 826, 829A. The Local Governments have alleged that the Energy Companies' actions have caused serious harm to public health and property, while they have earned hundreds of billions of dollars in profits by contributing to the harm. AC, ¶¶ 15, 69, 84. Additionally, they have alleged that the Energy Companies benefited from concealing the dangers of fossil fuel consumption from the public. *Id.* at ¶¶ 5, 323, 407-08, 412-16, 443. There are no plausible social benefits associated with this particular conduct. Restatement (Second) of Torts § 829(b), cmt. d; *People v. ConAgra Grocery Products Co.*, 17 Cal.App.5th 31, 84 (Cal. App. 2017) (nuisance liability applies for promotion of "lead paint for interior use with knowledge of the hazard that such use would create"). Like causation, reasonableness is typically an issue of fact to be left to the determination of the trier of fact. *Van Wyk*, 27 P.3d at 391; Restatement (Second) of Torts § 826, cmt. b.

The Court concludes that when the factual allegations of the Amended Complaint are accepted as true, in the light most favorable to the Local Governments, the Amended Complaint has plausibly alleged causes of action for both private and public nuisance. Under the nuisance principles set forth in the Restatement, if interference with property is found, the fact finder must determine whether it is reasonable for the Energy Companies to cause harm in the local communities without compensating the communities for the harms caused. Restatement (Second) of Torts §§ 821B cmt. i, 826, 829A. In determining the utility of conduct that causes the intentional

invasion, the fact finder may consider the impracticability of preventing or avoiding the invasion. *Id.* at § 828. Additionally, in a public nuisance action for damages, although a general activity may have great utility it may still be unreasonable to inflict the harm without compensating for it. *Id.* at § 821B cmt. i. Based on the extensive factual allegations noted above, the Amended Complaint plausibly states claims for both private and public nuisance.

Second, the Energy Companies argue that a defendant's conduct cannot constitute a public nuisance when it has been sanctioned by statute. Restatement (Second) of Torts § 821B cmt. f. They cite several Colorado statutes which authorize or encourage fossil fuel development and use. Motion to Dismiss, p. 26 (December 19, 2019).

The Local Governments respond that the "authorized by statute" defense does not apply in this context, however. They posit that Colorado courts have limited this rule to enjoining public nuisances permitted by zoning regulations. *Green v. Castle Concrete Co.*, 509 P.2d 588, 590 (Colo. 1973). Nor does the defense limit damages claims. *Hobbs v. Smith*, 493 P.2d 1352, 1354 (Colo. 1972). Moreover, even if it did apply, the conduct at issue in this litigation was not all authorized by Colorado statute. Restatement (Second) of Torts § 821B, cmt. f. *See* C.R.S. §§ 8-20-204, 232.5, 233 (statutes prohibiting and regulating certain practices in motor fuels sales).

In the Reply, filed March 5, 2020, the Energy Companies rely on case law from the late 19th century and early 20th century to show that the authorized by statute defense applies outside the zoning injunction context. *See, e.g., Ft. Lyon Canal Co. v. Bennett*, 156 P. 604, 609 (Colo. 1916); *Platte & Denver Ditch Co. v. Anderson*, 6 P. 515, 520-21 (Colo. 1885).

The Court concludes that, assuming without deciding that the "authorized by statute" defense applies to nuisance actions for damages outside the zoning context, the defense does not defeat the nuisance claims under Rule 12(b)(5) standards. In particular, there is no showing that

the statutes cited by the Energy Companies authorize sales that jeopardize the climate or sanction deceptive marketing practices.

Relatedly, in supplemental briefing, the Energy Companies argue that no Colorado court has yet recognized a public nuisance claim based on the production, promotion, or sale of a lawful consumer product. They note that in *State v. Juul Labs, Inc.*, 2020 WL 8257333, at *3 (Colo. Dist. Ct. Dec. 14, 2020), a state Colorado District Court rejected a public nuisance claim against an e-cigarette manufacturer. In *Juul Labs*, the plaintiffs alleged that the manufacturer engaged in an intentional campaign of misleading advertisements that resulted in nicotine addiction. The Court determined that the sale and marketing of e-cigarettes was not a public nuisance because it did not interfere with a public right. *Id.* at *3, 5. The Court then distinguished public nuisance claims from product liability claims. *Id.*

Juul Labs, which is not binding appellate authority, did not hold that Colorado law categorically forecloses nuisance liability for promoting or selling lawful products. The Denver District Court expressed concern about conflating public nuisance and products liability law. The Colorado Supreme Court has held that a nuisance may include "indirect or physical conditions created by defendants that cause harm." *Hoery*, 64 P.3d at 218. No Colorado appellate decision establishes an exception for public nuisances involving lawful products. Additionally, the Amended Complaint alleges that the Energy Companies did more than sell lawful products – it alleges that they sold fossil fuels at levels they knew would cause significant harm and misrepresented the dangers to boost sales. Lastly, unlike *Juul Labs* and other case law relied on by the Energy Companies, this action involves rights common to the public.

Additionally, the Energy Companies assert that the Local Governments' leading case on this issue, *State ex rel. Hunter v. Purdue Pharma L.P.*, 2019 WL 4019929 (Okla. Dist. Ct. August

26, 2019) was reversed by the Oklahoma Supreme Court. *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 731 (Okla. 2021). In *Hunter*, the Oklahoma Supreme Court held that a plaintiff did not state a viable public nuisance claim based on the manufacturing, marketing, and selling of a lawful product. *Id.* at 723-31.

Hunter interprets Oklahoma nuisance law and is not binding on this Court. Further, like other authorities, *Hunter* expressed concern that permitting the nuisance claim in the products liability context would allow plaintiffs to convert products liability actions into public nuisance claims. 499 P.3d at 729-30. That concern is not present here. Moreover, there does not appear to be unanimity among cases from other jurisdictions on this issue, as other out-of-state authorities have permitted public nuisance claims pertaining to the production, promotion, and sale of lawful products. *See, e.g.*, *MTBE Litigation*, 725 F.3d 65, 121 (2d Cir. 2013); *In re National Prescription Opiate Litigation*, 2021 WL 4952468, at *5-7 (N.D. Ohio Oct. 25, 2021); *State v. Purdue Pharma, LP*, 2018 WL 4566129, at *13-14 (D. N.H., Sept. 18, 2018).

Third, the Energy Companies cite case law from other jurisdictions in which courts have required the defendant to have "control over the instrumentality causing the alleged nuisance at the time the damage occurs." *State v. Lead Industrial Association, Inc.*, 951 A.2d 428, 449 (R.I. 2008); *Tioga Public School District No. 115 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993); *In re Paraquat Products Liability Litigation*, 2022 WL 451898, at *11 (S.D. Ill, Feb. 14, 2022). The Amended Complaint alleges that fossil fuel combustion is responsible for the majority of emissions that have caused GHG concentrations to reach hazardous levels, thus implicitly acknowledging it is use of fossil fuels by third parties that has caused the alleged damage. AC, ¶¶ 128, 445.

Colorado has yet to impose a "control over the instrumentality" element in nuisance cases. Moreover, such an element appears inconsistent with Colorado law and the Restatement. *See Hoery,* 64 P.3d at 218 ("a nuisance can include indirect or physical conditions created by defendant that cause harm"); Restatement of Torts (Second) § 834 ("One is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on"); *see also MTBE,* 725 F.3d at 121-22, n.43 (liability for selling MTBE-laden gasoline even when it was spilled by independent third parties). In the absence of Colorado law imposing "control over the instrumentality" as an indispensable element of a public nuisance claim, the Energy Companies' motion to dismiss on this basis is denied.

The motion to dismiss the nuisance claims under C.R.C.P. 12(b)(5) is therefore denied.

e. Trespass Claim

In general, civil trespass is an uninvited physical intrusion upon real property. *Hoery,* 64 P.3d at 217. To be liable for trespass, a defendant must have intended to do the act that constitutes, or inevitably causes, the intrusion. *Antlovich v. Brown Group Retail, Inc.*, 183 P.3d 582, 603 (Colo. App. 2007). The act must be done with knowledge that it would to a substantial certainty result in the entry of the foreign matter, *Hoery*, 64 P.3d at 218, or in the usual course of events, would damage property of another. *Burt v. Beautiful Savior Lutheran Church,* 809 P.2d 1064, 1067 (Colo. App. 1990). A defendant is liable if the defendant sets "in motion a force which, in the usual course of events, will damage" the plaintiff's property. *Hoery,* 64 P.3d at 217.

The Energy Companies first contend that the Local Governments cannot plausibly allege that the Energy Companies intended to cause "flood waters, fire, hail, rain, snow, wind and invasive species" to enter Boulder County. AC, ¶ 474. Second, they assert that the Local Governments cannot allege that any intrusion was nonconsensual. Motion to Dismiss, p. 28,

(December 19, 2019) (citing *Jones v. Lehmkuhl*, 2013 WL 6728951, at *23 (D. Colo. 2013); *Wal-Mart Stores, Inc. v. UFCW Int'l Union*, 382 P.3d 1249, 1258 (Colo. App. 2016)). Despite a factual allegation that the Local Governments "did not give Defendants permission" for the alleged invasions, AC, ¶ 477, the Energy Companies characterize the Amended Complaint as acknowledging the Local Governments are also responsible for fossil fuel emissions (*Id.*, ¶¶ 10, 202, 208, 215), thus impliedly consenting to the conduct at issue here. Third, because an action for trespass is not viable if the entry is authorized by legislative enactment (Restatement of Torts (Second) § 211), based on the "authorized by statute" theory discussed above for nuisance claims, they argue the trespass claim should similarly be dismissed.

The Court concludes that the Amended Complaint plausibly states a claim for trespass. Contrary to the Energy Companies' suggestion, the Local Governments do not need to allege that Defendants intended to cause the particular hazards identified in the Amended Complaint. Rather, to succeed on the trespass claim, the Local Governments must show that the Energy Companies intended to perform the acts that caused the harmful intrusion, and that they knew the intrusion would likely result. *Hoery*, 64 P.3d at 217; *Burt*, 809 P.2d at 1067. The Amended Complaint alleges that the Energy Companies produced, promoted, and sold fossil fuels, and that they knew that unchecked fossil fuel use would cause harm wrought by climate change. These allegations adequately state a claim for trespass.

The Energy Companies' implied consent argument is unavailing. Under Colorado law, "consent" is an agreement, approval, or permission as to some act or purpose." *Corder v. Folds*, 292 P.3d 1177, 1180 (Colo. App. 2012). "Permission" is in turn defined as "conduct that justified the other in believing that the possessor of property is willing to have them enter." *Id.* (quoting Black's Law Dictionary). The Amended Complaint does not allege or concede that the Local

Governments, by using fossil fuels themselves, agreed, approved, or granted permission to the Energy Companies to put in motion a force that would cause harm in the Local Governments' communities.

Likewise, the "authorized by statute" argument fails for the reasons set forth in section (5)(d) above.

In a footnote in the supplemental briefing, the Energy Companies cite *4455 Jason St., LLC v. McKesson Corp.*, 2021 WL 130655, at *3 (D. Colo. Jan. 14, 2021) for declining to expand trespass law. *McKesson* is distinguishable. In *McKesson*, plaintiff property owners sued a former owner who polluted the same property.

The motion to dismiss the trespass claim under C.R.C.P. 12(b)(5) is therefore denied.

f. Colorado Consumer Protection Act Claim

The Local Governments allege that the Energy Companies engaged in deceptive practices in violation of the Colorado Consumer Protection Act ("CCPA") by falsely representing, or omitting, material information regarding climate change. In support of their Motion to Dismiss, the Energy Companies contend that as a threshold matter, because the CCPA claim sounds in fraud, the Amended Complaint must allege with particularity the statements that were false or misleading, the particulars as to why they contend the statements were fraudulent, when and where the statements were made, and identify those responsible. *Faulhaber v. Petzl America, Inc.*, 656 F.Supp.3d 1257, 1266-67 (D. Colo. Feb. 14, 2023) (under F.R.C.P. 9(b), a CCPA claimant must specify with particularity the "time, place and contents" of allegedly false representations, the identity of the party making the false representation, and the consequences thereof); *State Farm Mutual Automobile Insurance Co. v. Parrish*, 899 P.2d 285, 289 (Colo. App. 1994) (a complaint alleging fraud must specify the statements that the plaintiff claims were false or misleading,

provide particulars regarding the respect in which the statements were fraudulent, allege when and where the statements were made, and identify who made such statements); C.R.C.P. 9(b).[13] They further assert that the alleged misrepresentations each lack at least one of the required elements. AC, ¶¶ 407-35.

On this front, the Local Governments respond that they have pled the CCPA claims with sufficient particularity. First, Colorado state courts have not yet determined whether the heightened pleading requirements in C.R.C.P. 9(b) apply to claims under the CCPA. *State ex rel. Suthers v. Mandatory Poster Agency, Inc.*, 260 P.3d 9, 13 (Colo. App. 2009). Second, they have pled that the Energy Companies knew fossil fuel use alters the climate and concealed and misrepresented those dangers, which allegations constitute the main facts of fraud. AC, ¶¶ 408, 410, 415; *Heller v. Lexton-Ancira Real Estate Fund, Ltd.*, 809 P.2d 1016, 1022 (Colo. App. 1990).

The Court concludes that the heightened pleading requirements of C.R.C.P. 9(b) apply to the CCPA claim. Although the Court is unaware of any Colorado appellate authority determining that C.R.C.P. 9(b)'s requirements apply to CCPA claims, in *Faulhaber*, the U.S. District Court of Colorado concluded that the federal counterpart, F.R.C.P. 9(b), which is substantively identical to C.R.C.P. 9(b), applies to CCPA claims. Moreover, the CCPA claim advanced in this case sounds in fraud, as there are factual allegations that the Energy Companies engaged in deceptive marketing practices.

The Amended Complaint identifies several specific public statements made by ExxonMobil. AC, ¶¶ 409, 419, 421. However, these allegations do not contain all of the required elements required by Rule 9(b) and Colorado law pertaining to fraud claims. By way of example, ¶ 409 alleges that Exxon's CEO made a particular statement "in 1996." Additionally, ¶ 419 alleges

[13] C.R.C.P. 9(b) provides "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

that Mobil ran a particular advertisement "in 1997." And the Exxon advertisements referenced in ¶ 421 were issued in 2000, 2001, and 2004.

Although a plaintiff need not plead all of the evidence it might present to prove the claim, "the complaint must at least state the main facts or incidents which constitute the fraud so that the defendant is provided with sufficient information to frame a responsive pleading and defend against the claim." *Schaden v. DIA Brewing Co., LLC*, 478 P.3d 1264, 1275, *as modified on denial of rehearing* (Feb. 1, 2021) (citing *Parrish*, 899 P.2d at 289) (holding that the amended complaint contained very detailed factual allegations meeting Rule 9(b)'s requirements). For instance, the CCPA allegations, including those referenced above, do not specify the date on which the representations were made, the audience they were directed to, or where they were published. It is unclear which representations, if any, were directed to Colorado.

Likewise, the factual allegations pertaining to omissions do not disclose "the particular information that should have been disclosed, the reason the information should have been disclosed, the person who should have disclosed it, and the approximate time or circumstances in which the information should have been disclosed." *Faulhaber*, 656 F.Supp.3d at 1268. The factual content of the CCPA allegations does not meet the requisite pleading particularity threshold. Further, given the Energy Companies' statute of limitations defense, it is critical that the factual allegations are sufficiently detailed to permit the court to make a more definitive determination of whether the claims are time-barred.

The Energy Companies maintain that the Amended Complaint fails to allege a plausible CCPA claim for several other reasons. As the CCPA allegations do not meet Rule 9(b)'s heightened pleading standards, it is unnecessary to address these additional arguments.

Because *Faulhaber* was announced after the Amended Complaint was filed, the dismissal of the CCPA claim is without prejudice. *See Deason v. Lewis*, 706 P.2d 1283, 1286 (Colo. App. 1985) (where there is a possibility that the complaint can be amended to set forth a claim upon which relief may be granted, permission to amend should be freely granted). Any motion to further amend the Complaint shall be filed by August 8, 2024, unless otherwise extended by court order.

g. Civil Conspiracy

A civil conspiracy requires (1) two or more persons, (2) a goal, (3) a meeting of the minds, and (4) an unlawful overt act, and (5) resulting damages. *Nelson v. Elway*, 908 P.2d 102, 1006 (Colo. 1995). Additionally, civil conspiracy may lie where "only lawful acts were performed if the purpose or goal is unlawful." *Magin v. DVCO Fuel Systems, Inc.*, 981 P.2d 673, 675 (Colo. App. 1995).

The Energy Companies contend the civil conspiracy claim fails for three reasons: (1) the acts alleged to constitute the underlying wrong provide no cause of action, (2) Colorado courts require greater detail in pleading conspiracy claims, and (3) the Amended Complaint fails to allege an "unlawful act or unlawful means."

These arguments are unavailing. First, the Amended Complaint alleges a conspiracy between the Energy Companies and others, including API, to promote and sustain unchecked fossil fuel sales at levels they knew were sufficient to alter the climate, and failed to disclose material information concerning the activities to maintain and increase their profits. AC, ¶¶ 504-07, 515-17. As set forth above, the "underlying wrongs" required for civil conspiracy are alleged through the other claims for relief, which provide causes of action. *Double Oak Construction, LLC v. Cornerstone Development, Int'l, LLC*, 97 P.3d 140, 146 (Colo. App. 2003) (the acts alleged to constitute the underlying wrong must provide a cause of action). Second, the conspiracy claim is

not limited to fraud allegations, and C.R.C.P. 9(b)'s heightened pleading standard therefore does not apply. Moreover, the Amended Complaint includes factual allegations that the Energy Companies produced, promoted, and sold fossil fuels together (AC, ¶¶ 49, 51, 74-75, 91, 326); were part of associations for decades where information about fossil fuel use was shared (*Id.*, ¶¶ 71, 80, 335-42, 349); and created a specific plan to sow doubt in the public's mind (*Id.*, ¶¶ 4-8, 93, 412-14). Third, the Local Governments have alleged unlawful overt acts, in the form of alleging the Energy Companies made deliberately misleading statements to the public and consumers. (*Id.*, ¶¶ 506, 516).

The motion to dismiss the conspiracy claim is therefore denied.

h. Unjust Enrichment

The Motion to Dismiss did not include a separate section challenging the unjust enrichment claim. The Response notes that the Energy Companies made "no specific challenge to unjust enrichment." Response, p. 30 (February 6, 2020). In Reply, the Energy Companies cite to footnote 9 in the Motion to Dismiss, in which they contend the unjust enrichment claim fails for the same reason as the other claims, and because the Local Governments do not allege that purchasers of the products did not receive "a valuable product for which they bargained and which they intend to keep." (citing *Van Zanen v. Qwest Wireless, LLC*, 550 F.Supp.2d 1261, 1266-67 (D. Colo. 2007), *aff'd*, 522 F.3d 1127 (10th Cir. 2008)). Reply, p. 15 (March 5, 2020).

The Court declines to grant a motion to dismiss limited to a portion of a footnote in the Motion to Dismiss. Because the challenge was not made apparent until the Reply, the motion to dismiss the unjust enrichment claim is denied.

VI. CONCLUSION

For the foregoing reasons, the Court DENIES ExxonMobil's Motion to Dismiss for Lack of Jurisdiction, and GRANTS Suncor Canada's Motion to Dismiss for Lack of Jurisdiction. The Court DENIES the Energy Companies' Motion to Dismiss for Failure to State a Claim under C.R.C.P. 12(b)(5), with one exception - the motion to dismiss the CCPA claim is GRANTED. The CCPA claim is dismissed without prejudice, and the Local Governments are granted leave to amend the Complaint to more particularly plead this claim.

The public nuisance, private nuisance, trespass, conspiracy, and unjust enrichment claims may proceed against ExxonMobil, Suncor Energy and Suncor Sales.

SO ORDERED this 21st day of June, 2024.

BY THE COURT:

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Robert R. Gunning
District Court Judge