DISTRICT COURT, BOULDER COUNTY, STATE OF COLORADO
Boulder County Combined Court
1777 Sixth Street
Boulder, CO 80302

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CASE NUMBER: 2018CV30349

Plaintiffs:
BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY et al.,

v.

Defendants:
SUNCOR ENERGY (U.S.A.) INC., et al.

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Division: 2

PLAINTIFFS' REPLY TO DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM PURSUANT TO COLO. R. CIV. P. 12(b)(5) AND EXXON MOBIL CORPORATION'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION PURSUANT TO COLO. R. CIV. P. 12(b)(2)

INTRODUCTION

Three recent federal courts of appeals decisions, including the Tenth Circuit's *in this case*, eviscerate Defendants' position that federal common law preempts these claims. Having nothing new to add, Defendants deflect, merely rehashing the very argument that the new cases refute.

Defendants' new statute of limitations case does not question the Colorado law that shows these claims are timely. Nor does Colorado law bar public nuisance claims for the production, deceptive promotion or sale of products; Defendants still provide no basis for creating new rules that would exclude these claims. And Plaintiffs plead their CCPA claims with sufficient particularity.

Finally, none of Exxon's personal jurisdiction cases remotely undermine Plaintiffs' showing that the Supreme Court has foreclosed Exxon's argument.

ARGUMENT

I. Recent decisions thoroughly discredit Defendants' federal common law argument.

Defendants' arguments only reinforce Plaintiffs' prior showing that federal common law does not preempt Plaintiffs' claims. Defendants concede 1) that they do not seek to create new federal common law, but rely on the federal common law of interstate air pollution, Defs.' Supp. Br. 3; and 2) that the Clean Air Act (CAA) displaced the federal common law they invoke, which "'no longer exists.'" *Id.* (quoting *Bd. Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.,* 25 F.4th 1238, 1260 (10th Cir. 2022)). As noted previously, the federal common law of interstate pollution would not have applied when it existed; it only applied where a state sued to enjoin an out-of-state polluter. Pls.' Supp. Br. 5. And federal common law that no longer exists cannot preempt. *Id.* 4-5.[1] Indeed, Defendants concede, as the Tenth Circuit found, that because federal common law is

[1] *See Rhode Island v. Shell Oil Prods. Co., L.L.C.*, 35 F.4th 44, 55-56 (1st Cir. 2022); *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 204, 206-07 (4th Cir. 2022); *Boulder*, 25 F.4th at 1260-61. Defendants' claim that *Baltimore* and *Rhode Island* held only that the defendants failed to meet the test for creating *new* federal common law, Defs.' Supp. Br. 3, is obviously wrong.

statutorily displaced, the question is whether *the CAA* preempts these claims. Defs.' Supp. Br. 4 (citing 25 F.4th at 1261). That precludes any federal common law preemption argument.

Nor does the CAA preempt these claims. Pls.' Supp. Br. 7-8. In cases involving traditional local concerns – like the threats to public safety here – "[p]reemption requires a 'clear and manifest purpose' from Congress." *Baltimore*, 31 F.4th at 206 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 316-17 (1981)). Nothing in the CAA evinces such intent; indeed two savings clauses preserve state law. Pls.' Opp'n to Defs.' 12(b)(5) Mot. 10-12. Defendants' brief does not argue otherwise. Thus, Defendants, like *City of New York v. Chevron Corp.*, 993 F.3d 81, 98-100 (2d Cir. 2021), upon which they rely, cannot identify *any* body of federal law, statutory or common law, that preempts.

Instead, Defendants seek to transform statutory preemption's presumption *against* preemption into one *favoring* it. Thus, they repeat their argument under *City of New York* that state law claims only exist if the CAA "specifically preserves" them. Defs.' Supp. Br. 4. But the Supreme Court has held the opposite: the availability of state suits "depends, *inter alia*, on the preemptive effect of the [Clean Air] Act." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 429 (2011). Similarly, in *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987), where the plaintiff sought to enjoin an out-of-state polluter, the Court conducted an ordinary conflict preemption analysis under the analogous Clean Water Act, *id.* at 491-97; it did not ask whether the statute specifically preserves such claims. The Supreme Court has clearly rejected *City of New York*'s incorrect understanding of preemption. Regardless, even if that approach were valid, 42 U.S.C. § 7604(e) expressly preserves state claims.[2]

II. Plaintiffs' claims are timely.

Nothing in *In Re Xarelto (Rovaroxaban) Prod. Liab Litig*, No. 2:19-cv-13139, 2021 WL 66453, at *1 (E.D. La. Jan. 7, 2021), disagrees that Defendants must show Plaintiffs knew or should have

[2] Defendants' suggestion that the CAA does not permit state claims for interstate emissions is at odds with Section 7604(e)'s broad text, and *Ouellette*, which allowed such claims, based in part on an indistinguishable savings clause. *See* 479 U.S. at 497-500.

known of its damages and their legal cause, and that this is typically a jury question. Pls.' Opp'n to Defs.' 12(b)(5) Mot. 20-21. For example, that Plaintiffs plead a *scientific* consensus, Am. Compl. ¶ 436, does not mean *it* knew of its injuries. *Xarelto* supports Plaintiffs, noting that claims do not accrue until the injury and its cause are apparent. 2021 WL 66453, at *1. Nor does *Xarelto* address the type of continuing torts or injuries here. Liability for a continuing nuisance exists even if the activity has ceased. *Hoery v. United States*, 64 P.3d 214, 218 (Colo. 2003). Under Defendants' theory, injuries that manifested within the limitations period were time-barred before they even occurred. And some of the damages Plaintiffs seek are to mitigate inevitable impacts that *still* have not occurred. Since at least some harms accrued during the limitations periods, new harms continue to accrue, and the factual record is undeveloped, the Court cannot grant Defendants' motion on the pleadings.

III. Plaintiffs state claims for public and private nuisance.

Plaintiffs allege both public and private nuisance claims, yet Defendants only argue against Plaintiffs' public nuisance claims, mostly with out-of-state law. Plaintiffs' claims are not novel; ordinary tort standards – negligence, recklessness, and intent – apply to nuisance claims in Colorado including to Plaintiffs' claim based on Defendants' conduct here. *See Hoery,* 64 P.3d at 218. The only additional requirement for public nuisance is an unreasonable interference with public rights. Pls.' Opp'n to Defs.' 12(b)(5) Mot. 25. Plaintiffs have plausibly alleged interference with public rights.

A. Colorado law does not bar claims for public nuisances created by products.

In Colorado, a nuisance includes "indirect or physical conditions created by defendant that cause harm," *Hoery*, 64 P.3d at 218, and there is no blanket exception for public nuisances involving products. Defendants misstate their only Colorado case, which held that defendant's sale and marketing of e-cigarettes was not a public nuisance because it did not interfere with a *public* right – not that Colorado law forecloses nuisance liability for promoting or selling products. *State v. Juul*

Labs, No. 20CV32283, 2020 WL 825733, at *3, 5 (Colo. Dist. Ct. Dec. 14, 2020).

Many courts have recognized public nuisance claims for the production, promotion, or sale of products,[3] and some specifically reject Defendants' cases.[4] *Hunter*, which overturned Plaintiffs' cited but not "leading" case, was concerned that liability would allow plaintiffs to convert products liability actions into public nuisance claims. 499 P.3d at 729-30; *accord Lead Indus. Ass'n,* 951 A.2d at 456. That concern is not applicable here. Defendants did not simply sell their products; they produced, promoted, and sold fossil fuels at levels they knew would cause harm, while deceiving the public about the dangers to promote sales. *See, e.g. MTBE*, 725 F.3d at 121; *ConAgra*, 17 Cal. App. 5th at 83-84. And unlike in *JUUL*, *Hunter*, and *Lead Indus.,* this case involves rights common to "the general public." *JUUL*, 2020 WL 825733 at *4; *see also Purdue Pharma L.P.*, 2022 R.I. Super. LEXIS 14 at *73-75.[5] These injuries are addressed by public nuisance claims, *not* products liability.

B. Colorado law does not require defendants to control the instrumentality.

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[3] *See, e.g. In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 725 F.3d 65, 121 (2d Cir. 2013); *In re National Prescription Opiate Litigation*, No. 1:17-md-2804, 2021 U.S. Dist. LEXIS 205164 at *93-94 (N.D. Ohio Oct. 25, 2021); *State v. Purdue Pharma, LP*, No. 217-2017-CV-00402, 2018 N.H. Super. LEXIS 24 at *37-38 (Sept. 18, 2018); *City of Boston v. Purdue Pharma, LP*, No. 1884CV02860, 2020 Mass. Super. LEXIS 2 at *23 (Suffolk Cty. Super. Ct. Jan. 3, 2020).

[4] *See e.g. State v. Purdue Pharma L.P.*, No. PC-2018-4555, 2022 R.I. Super. LEXIS 14 at *73-75 (Super. Ct. Providence Feb. 18, 2022) (Rhode Island court distinguishing *State v. Lead Indus. Ass'n,* 951 A.2d 428 (R.I. 2008)); *Blackfeet Tribe of the Blackfeet Indian Reservation v. AmerisourceBergen Drug Corp. (In re Nat'l Prescription Opiate Litig.)*, No. 1:18-op-45749, 2019 U.S. Dist. LEXIS 101659 at *100-04 (N.D. Ohio Apr. 1, 2019) (adopted in relevant part, 2019 U.S. Dist. LEXIS 101657 *97-100 (June 13, 2019))(rejecting *Lead Indus. Ass'n*); *People v. ConAgra Grocery Products Co.*, 17 Cal. App. 5th 51, 164 (6th Dist. Ct. App. 2017) (same); *In re Nat'l Prescription Opiate Litig.*, 589 F.Supp. 3d 790, 815-16 (N.D. Ohio 2022) (rejecting *Hunter v. Johnson & Johnson*, 499 P.3d 719, 729-30 (Okla. Nov. 8, 2021)); *Parris v. 3M Co.*, 4:21-cv-40-TWT, 2022 U.S. Dist. LEXIS 113185 *6-7 (N.D. Ga. June 27, 2022) (same). Defendants' other case, *State ex rel. Jennings v. Monsanto*, applied Delaware law, 2022 Del. Super. LEXIS 289 (New Castle Cty. Super. Ct. Jul. 11, 2022), but "numerous" courts "have upheld the exact same public nuisance claims against Monsanto." *People ex rel. Raoul v. Monsanto Co.*, No. 22 C 5339, 2023 U.S. Dist. LEXIS 788852 at *7-8 (N.D. Ill. May 5, 2023).

[5] Plaintiff alleges injury to the rights to: use public property and the environment, *e.g.* Am. Compl. ¶¶ 145-46, 156-58, 236, 238, 106, 163, 169-72, 227-28, 232, 243-46, 318-19, 258-60, 263, 278, 280-81, 447; public health and safety, *e.g.* ¶¶ 145-46, 153, 167, 187-92, 194-96, 227-28, 232, 236, 238, 243-45, 256-60, 298-300, 306-08, 311, 315, 318-19; and travel and commerce, *e.g.* ¶¶ 236, 238, 243-246, 447.

Defendants cite out-of-state cases to claim that a defendant must control the instrumentality of the nuisance at the time of injury, but Colorado has no such requirement. Pls.' Opp'n to Defs.' 12(b)(5) Mot. 26-27. *In re Paraquat Prod. Liab. Litig.,* No. 3:21-MD-3004-NJR 451898 (S.D. Ill. Feb. 14, 2022) does not cite Colorado law. A defendant can cause a nuisance even if the activity that created it has ceased. *Hoery*, 64 P.3d at 218. Colorado follows Restatement (Second) of Torts § 821B.[6] "Courts interpreting this section generally reject attempts to impose a control requirement, instead focusing on whether the defendant created or participated in the creation of the nuisance." *Raoul*, 2023 U.S. Dist. LEXIS 78852 at *7.[7] Defendants provide no reason to deviate from that approach.[8]

IV. Plaintiffs have pled sufficient facts to establish their CCPA claim.

Defendants' assertion that Plaintiffs have not pled misrepresentations and omissions with particularity is wrong. Plaintiffs need only state the main facts regarding the fraud. *Schaden v. DIA Brewing Co., LLC,* 2021 CO 4M, ¶ 58, 478 P.3d 1264, 1275, *as modified on denial of reh'g* (Feb. 1, 2021) (courts must account for the simplicity and flexibility the rules contemplate and "be sensitive to the risk that application of the requirement of particularity, prior to discovery" may permit defrauders to conceal fraud's details). Plaintiffs plead the time periods of Defendants' knowledge, omissions, and misrepresentations, *see, e.g.* Am. Compl. ¶¶ 323-24, 328-32, 342, 347-49, 355, 363-69, 371, 377, 407-09, 414-16, 494, including the dates of specific public statements, *e.g.* ¶¶ 409, 419, 421; that

[6] *Juul* held: "§ 821B is a sensible, historically well-grounded, and widely adopted approach" to defining public rights in public nuisance cases. 2020 WL 825733 *4.

[7] *See also e.g. ConAgra*, 17 Cal. App. 5th at 164 (rejecting control requirement). Regardless, courts have found sellers liable for their control over their own marketing or distribution. *E.g. In re National Prescription Opiate Litigation,* 452 F.Supp.3d 745, 774 (N.D. Ohio 2020); *State v. Purdue Pharma L.P.*, No. PC-2018-4555, 2019 R.I. Super. LEXIS 95, at *29-30 (Super. Ct. Providence Aug. 16, 2019).

[8] Regarding trespass, Defendants cite *4455 Jason St., LLC v. McKesson Corp.*, No. 20-CV-02533-NYW, 2021 U.S. Dist. LEXIS 7293, at *6-7 (D. Colo. Jan. 14, 2021), Def's Supp. Br. 7 n.6, but the claim was against a former owner who polluted property while owning it; *4455 Jason St.* is irrelevant.

Defendants' statements reached consumers (including in Colorado), *e.g.* ¶¶ 415-16, 491, 496, 498, reduced knowledge and concern about fossil fuel use, *e.g.* ¶¶ 410 & n.26, 436-42, had the goal to increase that use, *e.g.* ¶¶ 491-92, and contributed to unchecked sales that caused Plaintiffs' injuries, *e.g.* ¶ 499. And heightened pleading standards do *not* apply to "material omissions." *Faulhaber v. Petzl Am., Inc.*, No. 1:22-cv00102-CNS-SKC, 2023 U.S. Dist. LEXIS 24973, at *15, 18 (D. Colo. Feb. 14, 2023).[9] If more is required, Plaintiffs respectfully request leave to amend. *Deason v. Lewis*, 706 P.2d 1283, 1286 (Colo. App. 1985) (where amendment can possibly state claim, leave is freely granted).

Defendants' argument that Plaintiffs must allege that statements induced San Miguel County residents to purchase products, is new and should not be considered. Regardless, it is meritless.[10]

V. None of Exxon's cases suggests Plaintiffs cannot litigate Colorado injuries here.

Exxon does not deny its decades-long, case-relevant conduct in Colorado; that its out-of-state acts contributed to harms here; that it knew its in- and out-of-state acts would do so; or that Plaintiffs' CCPA claim arises out of only its Colorado acts. There is clearly a sufficient nexus between Plaintiffs' claims and Colorado injuries, Exxon's conduct, and Colorado. Exxon repeats its prior attempt to spin *Ford* in its favor, but the Supreme Court rejected Exxon's position. *See* Pls.' Suppl. Resp. Br. Regarding *Ford Motor Co. v. Montana Eighth Judicial District Court* ("Pls.' *Ford* Br.").

Exxon asserts that it did not have fair warning that it would need to answer for out-of-state acts, Defs.' Supp. Br. 9, but those acts connect it to Colorado *because* they caused and contributed to injuries here. Pls.' *Ford* Br. 4-6. Exxon's claim that there is no way to connect its out-of-state

[9] *Clark v. Hyatt Hotels Corp.* is inapposite. There, plaintiff did not allege defendants omitted information in, or knew of carbon monoxide exposure at the time of, an advertisement or sale, unlike here. No. 1:20-CV-01236-RM-SKC, 2021 WL 8129700, at *5 (D. Colo. Dec. 13, 2021), adopted, 2022 WL 884282 (D. Colo. Mar. 25, 2022).

[10] Section 6–1–105(1)(e) reaches representations with the capacity to deceive, even if they did not. *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 144, 147-48 (Colo. 2003). *Connell Solera, LLC v. Lubrizol Advanced Materials, Inc.*, No. 21-CV-00336-NYW-SKC, 2023 U.S. Dist. LEXIS 30375, at *74-76 (D. Colo. Feb. 23, 2023), does not hold otherwise, it applied *Rhino Linings*.

activities to specific Colorado injuries ignores the laws of physics: Exxon contributed to the climate crisis that has caused harm in Colorado. Pls.' Supp. Br. 1-2.[11]

Exxon's arguments about jurisdiction limits, federalism, and fair notice are irrelevant, given that it concedes purposeful availment and its overwhelming, relevant conduct in Colorado. Pls.' *Ford* Br. 1. Plaintiffs do not collapse general and specific jurisdiction, Defs.' Supp. Br. 9; Exxon seeks to bar specific jurisdiction. *See* Pls.' Supp. Br. 9. The fact that Exxon acted in many places and knowingly caused harm everywhere does not exempt it from ordinary jurisdictional rules.

Exxon claims that "no state" has the most significant interest in global climate change, and thus no state can litigate climate change's local impacts. Defs.' Supp. Br. 10. The question is not Colorado's interest in *climate change*, but in *these Colorado injuries*. And multiple fora with sufficient interests can exercise jurisdiction, not just the one with the "greatest interest." Regardless, Colorado has the greatest interest in litigating these Colorado harms. And again, this case does not challenge any sister or foreign states' regulatory decisions. Pls.' Supp. Br. 8.

Exxon's cases requiring a "close connection" between the contacts and the suit, Defs.' Supp. Br. 8-9, do not suggest a "close connection" is absent here, where it conceded purposeful availment, engaged in claim-relevant forum conduct, and knowingly caused serious harm to this State.[12]

CONCLUSION

For the reasons stated here and in Plaintiffs' prior briefing, the motions should be denied.

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[11] The inquiry is fact specific. A court in another climate case could find that a small out-of-state emitter that did not do business in Colorado or knowingly cause substantial harm here, has not purposefully connected itself to this state, but that says nothing of the allegations here.

[12] *See Yamashita v. LG Chem., Ltd.*, 62 F.4th 496 (9th Cir. 2023) (battery causing harm was not marketed in or directed at forum; only forum conduct was unrelated to the injury); *Johnson v. HuffingtonPost.com, Inc.*, 21 F.4th 314 (5th Cir. 2021) (internet libel case, where issue was purposeful direction not nexus); *Bernhardt v. Islamic Rep. of Iran*, 47 F.4th 856 (D.C. Cir. 2022) (terrorism case where nothing connected defendant's sanction evasion and attacks abroad); *Vapotherm, Inc. v. Santiago*, 38 F.4th 252, 255-56 (1st Cir. 2022) (only forum connection was plaintiff's headquarters; wrongful conduct occurred outside state and there were no forum effects beyond plaintiff's injury).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of June, 2023, a true and correct copy of the foregoing **PLAINTIFFS' REPLY TO DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM PURSUANT TO COLO. R. CIV. P. 12(b)(5) AND EXXON MOBIL CORPORATION'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION PURSUANT TO COLO. R. CIV. P. 12(b)(2)** was electronically filed with the court through CCE and served on the following counsel of record through CCE:

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