DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 6TH Street, Boulder, Colorado 80302 (303) 441-3750	DATE FILED: June 12, 2023 5:37 PM FILING ID: E876E179D53CB CASE NUMBER: 2018CV30349
Plaintiffs: BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, et al. v. **Defendants:** SUNCOR ENERGY (U.S.A.) INC., et al.	▲COURT USE ONLY▲ Case Number: 2018CV30349 Division: 2
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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)

Defendant Exxon Mobil Corporation ("ExxonMobil") respectfully submits this supplemental brief in further support of Defendants' pending motion to dismiss for failure to state a claim and ExxonMobil's motion to dismiss for lack of personal jurisdiction.[1] Recent caselaw confirms that (i) Plaintiffs cannot state a claim because their claims are governed by federal common law, which Congress has displaced, (ii) Plaintiffs fail to plead a viable state law cause of action, and (iii) personal jurisdiction cannot be exercised against ExxonMobil consistent with due process. This supplemental brief begins with the merits arguments, which apply to both ExxonMobil and the Suncor Defendants, and concludes with a discussion of personal jurisdiction.

I. Defendants' Motion to Dismiss for Failure to State a Claim.

A. Plaintiffs' Claims Are Governed by Federal Common Law.

City of New York v. *Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), remains the only case-dispositive decision addressing the merits of Plaintiffs' claims. In *City of New York*, the Second Circuit affirmed the dismissal of a climate change-related tort action—materially identical to this case—brought by the City of New York against certain energy producers, including ExxonMobil. The Second Circuit framed the question before it as "whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions"—precisely the question at issue here—and held unequivocally that "the answer is 'no.'" *City of New York*, 993 F.3d at 85. "Global warming," the court explained, "presents a

[1] Defendants are ExxonMobil and Suncor Energy (U.S.A.) Inc., Suncor Energy Sales Inc., Suncor Energy Inc. (the "Suncor Defendants"). By filing this brief, ExxonMobil does not waive its personal jurisdiction defenses, having moved to dismiss Plaintiffs' amended complaint on that basis. This brief focuses principally on legal developments since briefing on the motion to dismiss was submitted. Lack of discussion here of any argument contained in that briefing is not intended as a waiver or abandonment of that argument. Defendants incorporate all of their prior arguments by reference.

uniquely international problem of national concern" and is "not-well suited to the application of state law." *Id.* at 85-86. Adhering to Supreme Court precedent spanning nearly a century, the Second Circuit held that federal common law must instead govern claims seeking redress for injuries allegedly sustained due to interstate emissions. *Id.* at 91-92 (collecting cases).[2]

The Second Circuit went on to hold that the Clean Air Act "speaks directly" to the regulation of interstate greenhouse gas emissions, and thus displaces federal common law with respect to claims related to those emissions. *See City of New York*, 993 F.3d at 95-96; *see also Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410 (2011) ("*AEP*"). The City of New York, therefore, could not state plausible claims for relief.

The logic and holding of *City of New York* apply with equal force here. Plaintiffs seek relief for injuries allegedly caused by worldwide greenhouse-gas emissions. Federal common law thus necessarily and exclusively governs Plaintiffs' claims. And under federal common law, Plaintiffs' claims fail because the Clean Air Act has displaced any remedy for interstate emissions previously available under federal common law. *See AEP* at 421, 424.

Several federal courts of appeals have recently held that actions seeking redress for climate-related injuries are not removable to federal court on the ground that federal common law governs such claims.[3] Although Plaintiffs may attempt to misconstrue these decisions as supporting denial

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[2] *See also City of New York* v. *BP P.L.C.*, 325 F. Supp. 3d 466, 471-72 (S.D.N.Y. 2018), *aff'd sub nom. City of New York*, 993 F.3d 81 (2d Cir. 2021); *City of Oakland* v. *BP P.L.C.*, 325 F. Supp. 3d 1017, 1021 (N.D. Cal. 2018), *vacated and remanded sub nom. City of Oakland* v. *BP PLC*, 960 F.3d 570 (9th Cir. 2020).

[3] *See Rhode Island* v. *Shell Oil Prods. Co.*, 35 F.4th 44, 54 (1st Cir. 2022), *cert. denied*, No. 22-524, 2023 WL 3046229 (Apr. 24, 2023); *City of Hoboken* v. *Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022); *Mayor & City Council of Baltimore* v. *BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022), *cert. denied*, No. 22-361, 2023 WL 3046224 (Apr. 24, 2023); *Minnesota* v. *Am. Petroleum Inst.*, 63 F.4th 703, 709-12 (8th Cir. 2023); *County of San Mateo* v. *Chevron Corp.*, 32 F.4th 733, 746-48 (9th Cir.

of Defendants' motion to dismiss, none contravenes the basic premise that Plaintiffs' claims are governed by federal common law and must be dismissed. *See* 12(b)(5) Motion ("Mot.") at 7-12. *Hoboken, Minnesota* and *San Mateo* turned solely on the application of the well-pleaded complaint rule, which holds that federal jurisdiction exists only when a federal question appears on the face of plaintiff's complaint. *See Hoboken*, 45 F.4th at 707-09; *Minnesota*, 63 F.4th at 709-12; *San Mateo*, 32 F.4th at 746-48. That jurisdictional rule is irrelevant to the merits. The *Rhode Island* and *Baltimore* courts held that climate claims did not arise under federal common law because defendants failed to demonstrate the requisite "significant conflict between a federal interest and state law's application." *Baltimore*, 31 F.4th at 202 (internal quotation marks omitted); *see Rhode Island*, 35 F.4th at 54. But here, Defendants need not satisfy the test for "creat[ing]" *new* federal common law, *Baltimore*, 31 F.4th at 202, because the U.S. Supreme Court has already held, in "a mostly unbroken string of cases" dating back "over a century," that federal common law governs "disputes involving interstate air or water pollution." *City of New York*, 993 F.3d at 91.

In this case, the Tenth Circuit correctly recognized that the Clean Air Act—the federal statute responsible for setting nationwide emissions standards for air pollutants like greenhouse gases—displaces federal common law claims alleging pollution-based harms. *Boulder*, 25 F.4th at 1261; *see also AEP*, 564 U.S. at 424. The court of appeals went on to hold that federal jurisdiction was not present because, after statutory displacement by the Clean Air Act, otherwise-applicable federal common law "no longer exists." *Boulder*, 25 F.4th at 1260 (emphasis omitted).

2022), *cert. denied*, No. 22-495, 2023 WL 3046226 (Apr. 24, 2023); *Bd. of Cnty. Comm'rs of Boulder Cnty.* v. *Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022), *cert. denied*, No. 21-1550, 2023 WL 3046222 (Apr. 24, 2023).

Based on that conclusion, the court indicated that the only analytical question remaining after statutory displacement is "whether the federal act that displaced the federal common law preempted the state-law claims." *Id.* at 1261. The Tenth Circuit had no occasion to elaborate on the appropriate preemption analysis, given that it was addressing the question of jurisdiction. But as the Second Circuit recognized in *City of New York*, because federal common law exists only in areas where "state law cannot be used" in the first instance, "state law does not suddenly become presumptively competent to address issues" in such an area after statutory displacement. 993 F.3d at 98. The question after statutory displacement is whether the Clean Air Act specifically preserves the particular type of state law claim at issue. *See id.* And the Clean Air Act simply cannot be read to authorize a suit for injuries allegedly caused by interstate emissions. *See* Mot. 7-12, 14-16; *City of New York*, 993 F.3d at 100 (holding that the Clean Air Act "does not authorize" state law claims based on "emissions emanating simultaneously from all 50 states and the nations of the world.").[4] Plaintiffs have identified no provision in the Clean Air Act that could be interpreted to authorize such suits.[5]

[4] A Hawai`i trial court, in a decision it subsequently certified for interlocutory appeal, declined to hold that federal common law governed claims for injuries purportedly sustained due to climate change. *See City & Cnty. of Honolulu* v. *Sunoco LP*, No. 1CCV-20-380-JPC, Dkt. 618 (Haw. Cir. Ct. Mar. 29, 2022). That decision was erroneous and the two other trial courts to have ruled on dispositive motions in similar cases have held that federal common law governs. *See also City of New York*, 325 F. Supp. 3d at 471-72; *City of Oakland*, 325 F. Supp. 3d at 1021. More, plaintiffs there premised their claims exclusively on allegedly deceptive *promotion*—not production—of energy products and expressly *disavowed* that their claims relied on emissions. *Id.* at 3.

[5] Likewise, Plaintiffs identify no federal statute or Constitutional provision permitting claims premised on *foreign* emissions; any such claims "would not only risk jeopardizing our nation's foreign policy goals but would also seem to circumvent Congress's own expectations and carefully balanced scheme of international cooperation on a topic of global concern." *City of New York*, 993 F.3d at 103.

B. Plaintiffs Fail to State Plausible Claims for Relief Even Under State Law.

Recent cases confirm that dismissal is proper even if state law governs Plaintiffs' claims.

Statute of Limitations: Plaintiffs' claims are time-barred, as the two- to four-year limitations periods had long passed by the time of suit. *See* Mot. 22-23. Under Plaintiffs' theory of the case, there has been widespread consensus on the existence and causes of climate change for decades, rendering Plaintiffs on notice of any allegedly tortious conduct. *Id.* Likewise, the Colorado Consumer Protection Act ("CCPA") claim is time-barred because any alleged misrepresentations began decades ago. *Id.*; Am. Compl. ¶ 324. And Plaintiffs allege that they have been addressing climate change—the source of their purported injuries—since at least as early as 2002. *See* Am. Compl. ¶¶ 20-29, 35-45, 199-204, 213-220, 230-231. Even if there was some "uncertainty" as to the "full extent" of Plaintiffs' alleged injuries, their claims still expired long ago. *See In re Xarelto (Rivaroxaban) Prod. Liab. Litig.*, 2021 WL 66453, at *1 (E.D. La. Jan. 7, 2021) (applying Colorado law).

Nuisance: It remains true that no Colorado court has ever recognized a nuisance claim based on the production, promotion, or sale of a lawful consumer product. Conversely, in *State* v. *Juul Labs, Inc.*, 2020 WL 8257333, at *3 (Colo. Dist. Ct. Dec. 14, 2020), a Colorado district court recently rejected nuisance claims against an e-cigarette manufacturer purportedly analogous to Plaintiffs' framing of their claims here. There, plaintiffs alleged that the manufacturer engaged in "an intentional campaign" of misleading advertisements that resulted in widespread nicotine addiction. The court held there is no actionable "public right" to be free from the advertisement or sale of a lawful product. *Id.* In so doing, the court joined a chorus of others recognizing that public nuisance claims are distinct from product liability claims, which are "designed specifically

to hold manufacturers liable for harmful products." *State* v. *Lead Indus. Ass'n*, 951 A.2d 428, 456 (R.I. 2008); *see, e.g.*, *State ex rel. Jennings* v. *Monsanto Co.*, 2022 WL 2663220 (Del. Super. Ct. July 11, 2022) (holding that public nuisance claims cannot arise from the sale or manufacture of lawful products), *appeal filed*, No. 279, 2022 (Del. 2022). Notably, Plaintiffs' leading case on this issue—*State ex rel. Hunter* v. *Purdue Pharma L.P.*, 2019 Okla. Dist. LEXIS 3486, at *42 (Okla. Dist. Ct. Aug. 26, 2019)—has been reversed by the Oklahoma Supreme Court. *See State ex rel. Hunter* v. *Johnson & Johnson*, 499 P.3d 719, 731 (Okla. Nov. 8, 2021).[6]

Courts also have continued to affirm that nuisance liability requires that a defendant have control over the instrumentality causing the alleged nuisance at the time the damage occurs. *See In re Paraquat Prods. Liab. Litig.*, 2022 WL 451898, at *11 (S.D. Ill. Feb. 14, 2022); *Johnson & Johnson*, 499 P.3d at 727-28. Here, however, Plaintiffs allege damages resulting from the use and combustion of fossil fuels by *third parties*, not by Defendants. Am. Compl. ¶¶ 128, 445.

CCPA: Recent decisions confirm that CCPA claims premised on false representations must satisfy Rule 9(b), *Faulhaber* v. *Petzl Am., Inc.*, 2023 WL 1993612, at *5-6 (D. Colo. Feb. 14, 2023), which requires that a claimant specify with particularity the "time, place and contents" of allegedly false representations, *Lynn* v. *Brown*, 803 F. App'x 156, 161 (10th Cir. 2020). Here, Plaintiffs premise their claims on deceptive promotion but identify only five public statements by ExxonMobil—amounting to only three of the 544 paragraphs in the complaint, Am. Compl.

[6] In their opening submission, Plaintiffs claim that the Oklahoma Supreme Court's reversal of *Hunter*—on which Plaintiffs relied heavily in their opposition to Defendants' motion to dismiss—does not change its nuisance analysis. To the contrary, the *Hunter* decision eviscerates Plaintiffs' nuisance arguments. The Oklahoma Supreme Court held unequivocally that a plaintiff cannot state viable public nuisance claims based on the manufacturing, marketing, and selling of a lawful product. 499 P.3d at 723-31. That is precisely what Plaintiffs seek to do here.

¶¶ 409, 419, 421—and utterly fail to plead them with the requisite specificity, let alone plead that any were made in or directed to Colorado. For the statements Plaintiffs do identify, they fail to allege the date on which the representations were made or the intended or actual audience, and only allege where one of them was made or published. *See* Mot. 28-29. That is not enough. *See, e.g.*, *Faulhaber*, 2023 WL 1993612, at *5-6 (it is insufficient to allege that defendant "made a statement at some point in 2012"); *Clark* v. *Hyatt Hotels Corp.*, 2021 WL 8129700, at *4 (D. Colo. Dec. 13, 2021). Nor do Plaintiffs allege any omissions with particularity, a standard that requires pleading "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." *Id.* at *4.

The CCPA claim also fails because there is no allegation that any public statements induced residents of Boulder County, the City of Boulder, or elsewhere, to purchase or use products that they otherwise would not have. There are no allegations that anyone in Colorado or elsewhere even viewed any of Defendants' public statements. *See Connell Solera, LLC* v. *Lubrizol Adv. Mats., Inc.*, 2023 WL 2187481, at *23 (D. Colo. Feb. 23, 2023). This is fatal.[7]

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

Colorado state courts may only exercise specific personal jurisdiction over an out-of-state defendant subject to certain due-process constraints, including that the claims must arise out of or relate to a defendant's forum contacts. After briefing on the motions to dismiss was completed,

[7] On the law of trespass, Colorado courts have continued to refuse to expand trespass beyond its traditional bounds to encompass the novel claims asserted here. *See 4455 Jason St, LLC* v. *McKesson Corp.*, 2021 WL 130655, at *3 (D. Colo. Jan. 14, 2021) (declining to expand trespass law to cover claims that a prior owner contaminated the land owned by a subsequent owner).

the Supreme Court decided *Ford Motor Co.* v. *Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), which clarified the scope of the "arises out of or relates to" constraint and confirmed that the exercise of personal jurisdiction here would violate due process. Plaintiffs in *Ford Motor* alleged injuries resulting from a Ford vehicle malfunctioning in the forum States, even though Ford manufactured and originally sold the particular vehicles that injured plaintiffs elsewhere. *Id.* at 1022-23. The Supreme Court held that specific jurisdiction was present under those facts. The Court interpreted the "arise out of or relate to" requirement of specific personal jurisdiction as encompassing two components: a plaintiff's injuries must either "arise out of" a defendant's forum contacts—*i.e.*, the contacts must cause the injury—or a plaintiff's claims must otherwise sufficiently "relate to" those contacts. *Id.* at 1026. Although the "relate to" component does not expressly require causation, the Court emphasized that it incorporates "real limits" on the exercise of personal jurisdiction and "does not mean anything goes." *Id.*

The Court concluded that Ford's contacts with the forum States were sufficiently "related to" plaintiffs' injuries because Ford "had systematically served a market in [the forum States] for the very vehicles that plaintiffs allege malfunctioned and injured them in those States." *Id.* at 1028. And Ford "urge[d] [forum residents] to buy its vehicles"—including the models that allegedly malfunctioned in the forum—"[b]y every means imaginable," citing Ford's extensive network of dealerships and advertising efforts. *Id.* at 1028. These contacts supported jurisdiction over Ford because it "ha[d] 'clear notice' that it will be subject to jurisdiction in the State's courts when [its] product malfunctions there." *Id.* at 1030-31.

Following *Ford Motor*, courts applying the "relatedness" component of specific jurisdiction have demanded a "close connection" between defendant's forum contacts and the

alleged injuries, *Yamashita* v. *LG Chem, Ltd.*, 62 F.4th 496, 506 (9th Cir. 2023) (collecting cases), such that the defendant "ha[s] 'fair warning' that [its] activities may subject it to another state's jurisdiction," *Johnson* v. *TheHuffingtonPost.com, Inc.*, 21 F.4th 314, 318 (5th Cir. 2021). "[G]iving 'relate to' too broad a scope," courts have warned, would risk "collaps[ing] the core distinction between general and specific personal jurisdiction." *Bernhardt* v. *Islamic Republic of Iran*, 47 F.4th 856, 866 (D.C. Cir. 2022); *see Vapotherm, Inc.* v. *Santiago*, 38 F.4th 252, 261 (1st Cir. 2022). In *Johnson*, for example, the Fifth Circuit refused to exercise personal jurisdiction over an online website that allegedly defamed a Texas resident because the website's sales and advertisements to Texans (and every other visitor) was "unrelated" to the allegedly libelous story. 21 F.4th at 325. And in *Yamashita*, the Ninth Circuit found jurisdiction lacking where the exploding battery at issue was a different product from the one defendant sold or shipped into the forum. *See* 62 F.4th at 506-07.

Applying these principles, ExxonMobil is not subject to personal jurisdiction here. A "close connection" is lacking, and ExxonMobil did not have fair warning that its alleged activities *in Colorado* could subject it to liability for alleged injuries from the cumulative *worldwide* use and emissions of fossil fuel products. *See Ford Motor*, 141 S. Ct. at 1025; *Yamashita*, 62 F.4th at 506. Billions around the world—including Plaintiffs—contribute to greenhouse gas emissions. *See* Am. Compl. ¶¶ 7, 10, 67. And there is "no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time." *Native Village of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 865, 880 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). Given the lack of any adequate nexus between ExxonMobil's alleged Colorado contacts and the claimed impacts of climate

change in Colorado, ExxonMobil could not have reasonably anticipated—let alone had "clear notice"—that producing, promoting, or selling its products in Colorado would subject it to suit here for injuries allegedly caused by the countless individuals and entities that sold and consumed fossil fuel products around the world. *See City of New York*, 993 F.3d at 91, 93.

To exercise specific jurisdiction would also violate core principles of interstate federalism. *See Ford Motor*, 141 S. Ct. at 1030. Asserting jurisdiction over a nonresident such as ExxonMobil for the alleged local effects of global climate change would necessarily regulate conduct far beyond the State's borders. *See City of New York*, 993 F.3d at 92. Under that reasoning, all jurisdictions affected by climate change would presumably have similar powers, likely resulting in conflicting legal regimes on defendants. But no state has a more "significant interest" in global climate change than any other, *see Ford Motor Co.*, 141 S. Ct. at 1030, and such an expansion of local power would interfere with defendants' home jurisdictions' power over their citizens, *see Johnson*, 21 F.4th at 318. Exercising jurisdiction over ExxonMobil's activities outside Colorado would thus violate the "territorial limitations on the power of the respective States." [8] *Bristol-Myers Squibb Co.* v. *Super. Ct. of California*, 137 S. Ct. 1773, 1780 (2017).

III. Conclusion

For the reasons stated above and in Defendants' and ExxonMobil's motion to dismiss briefing, the Amended Complaint should be dismissed with prejudice.

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[8] Exercising personal jurisdiction would also violate Colorado's long-arm statute, which must be satisfied as "a threshold matter," *Parocha* v. *Parocha*, 418 P 3d 523, 527 (Colo. 2018); Colo. Rev. Stat. § 13-1-124. The statute does not include a "relate[s] to" component and permits jurisdiction only if Plaintiffs' injuries "aris[e] from"—as in, are caused by—ExxonMobil's activities in Colorado. *See Ford Motor*, 141 S. Ct. at 1026; *City of Brighton* v. *Rodriguez*, 318 P.3d 496, 502 (Colo. 2014); *U.S. Indus./Fed. Sheet Metal, Inc.* v. *Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Labor*, 455 U.S. 608, 615 (1982). They do not. *See* 12(b)(2) Mot. 10-13.

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Respectfully submitted,

Below-signed counsel certifies that he is a member in good standing of the bar of this Court.

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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 **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 CCES and served on all counsel of record.

s/ Paul D. Bryant
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