DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 6TH Street, Boulder, Colorado 80302 (303) 441-3750	DATE FILED: March 5, 2020 4:42 PM FILING ID: 6EED5539242C1 CASE NUMBER: 2018CV30349 **▲COURT USE ONLY▲**
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REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM PURSUANT TO COLO. R. CIV. P. 12(b)(5)	

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I. Introduction

Plaintiffs' opposition ignores prevailing case law dismissing nearly identical claims and confirms that they seek an unprecedented expansion of the traditional bounds of Colorado tort law to hold select energy companies liable for the purported present and future local impacts of a complex, inherently global phenomenon.[1] Unable to justify such an expansion with any existing law, the opposition now seeks to repurpose the Amended Complaint ("Complaint" or "AC") to target Defendants' alleged promotion of fossil fuels, rather than production and emissions by third parties. But the effort is futile. Not only does federal law displace, preempt, and invalidate Plaintiffs' claims irrespective of how they are characterized, Plaintiffs' promotion theory conflicts with the state law claims they purportedly assert. Whether based on emissions, production, or promotion, the result is the same: Plaintiffs do not, and cannot, cite a single climate-change-based tort action that has survived a motion to dismiss, nor offer any reason why this case is different.[2]

II. Argument

A. Plaintiffs' Claims Should Be Dismissed under Federal Common Law

Plaintiffs attempt to avoid dismissal of their claims by ignoring current prevailing case law barring nearly identical climate-change actions on multiple federal law grounds, including that federal common law displaces the operation of any state law Plaintiffs may attempt to rely on to assert tort claims for climate change. *See City of New York* v. *BP p.l.c.*, 325 F. Supp. 3d 466, 471

[1] By filing this reply brief, Defendants do not waive their personal jurisdiction defenses. *See* Colo. R. Civ. P. 12(b); Defs.' Mot. Dismiss Lack Personal Jurisdiction (Dec. 9, 2019).

[2] Because Plaintiffs *cannot* state plausible claims for relief, their unsupported request for leave to amend should be denied as futile. *See Liscio* v. *Pinson*, 83 P.3d 1149, 1153-54 (Colo. App. 2003).

(S.D.N.Y. 2018), *appeal pending*; *City of Oakland* v. *BP p.l.c.*, 325 F. Supp. 3d 1017, 1024-25 (N.D. Cal. 2018), *appeal pending*.

Rather than engage with current case law, Plaintiffs attempt to move the goalposts by claiming that this case is not "an attempt to control emitters and emissions," Br. 6, but their shift in strategy cannot be squared with their own allegations. Throughout their Complaint, Plaintiffs reference "unchecked" levels of fossil fuel production, sale, and use, AC ¶¶ 7, 16, 323, 330, 346, 376, 379, and refer to "emissions" more than 80 times, *see, e.g.*, *id.* ¶ 7. And the very first sentence of Plaintiffs' brief makes clear that their claims focus squarely on the purportedly excessive levels of fossil fuels Defendants have *produced* and *sold*. Br. 1; *see also* Br. 2, 3, 4, 23, 27, 28, 29, 30. Adjudication of their claims as pleaded ultimately will require a determination of what level of production and sale of fossil fuels around the world by Defendants would have been reasonable or appropriate, and whether, or to what degree, those activities should have been "checked." These questions come within federal common law, *see* Defs.' Br. 7-9, and Plaintiffs' arguments to the contrary are meritless.

First, Plaintiffs do not dispute that federal courts have recognized a "federal common law of interstate [pollution]," applied this law to climate-change-related tort claims, and held that the Clean Air Act ("CAA") displaces such claims. *See Am. Elec. Power Co.* v. *Connecticut* ("*AEP*"), 564 U.S. 410, 418-22 (2011); *Native Village of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849, 853-55 (9th Cir. 2012); *New York*, 325 F. Supp. 3d at 471; *Oakland*, 325 F. Supp. 3d at 1024-25. Instead, Plaintiffs attempt to distinguish *AEP* and *Kivalina* by arguing that federal common law applies only to suits brought by one State to abate pollution emanating from another, Br. 6, while ignoring that *New York* and *Oakland*, *supra*, are to the contrary. Moreover, the absence of a State

plaintiff was no impediment to the application of federal common law in *Kivalina*. Indeed, courts have repeatedly applied federal common law in suits in which neither a State nor the federal government was a party. *See, e.g.*, *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 511 (1988); *Helfrich* v. *Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1095-1104 (10th Cir. 2015). Plaintiffs offer no rationale for treating claims by municipalities against private companies concerning out-of-state pollution differently than claims by States.[3] The sovereign prerogatives demanding application of federal common law are particularly strong here, where three local governments seek damages allegedly resulting from international activities and the alleged consequences of those activities. *See Tex. Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981). The inherently global, undifferentiated nature of Plaintiffs' claims makes them "inappropriate for state law to control," *id.* at 641, and also distinguishes them from alleged individual or localized harms resulting from tobacco or opioid use.

Plaintiffs also contend that the federal common law of transboundary pollution does not govern claims for damages against sellers of fossil fuels, and is limited to cases where States seek injunctions against emitters. Br. 7. The court in *Kivalina* held unequivocally that "the type of remedy asserted is not relevant" to the analysis of whether claims are displaced or preempted by

[3] Contrary to Plaintiffs' assertion, *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), does not foreclose application of federal common law to "municipal claims against private companies for damages." Pls.' Br. 6-7. In that case, the Court expressly did not decide whether a private plaintiff, much less a local government, could bring a cause of action for damages under federal common law. 453 U.S. at 21. Indeed, none of the cases Plaintiffs rely on involve nuisance claims brought by public entities against out-of-state sources of air pollution. For example, *Jackson* v. *Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985), involved product liability claims for asbestos-related personal injuries—*not* claims based on transboundary pollution, as to which the court recognized federal common law applies and state law, including the interest of "ensuring compensation for injur[ies]," must yield. *Id.* at 1324-25.

federal common law. 696 F.3d at 857; *accord New York*, 325 F. Supp. 3d at 473; *see California* v. *BP p.l.c.*, 2018 WL 1064293, at *3 (N.D. Cal. Feb. 27, 2018), *appeal pending*.[4]

What is more, that Plaintiffs seek damages rather than an injunction does not mean their claims would not amount to regulation of fossil fuel production and sale. "[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959). Plaintiffs' cases also do not support their argument that their claims do not seek to regulate emitters' out-of-state activity. For example, in *City of New York* v. *Bob Moates' Sport Shop, Inc.*, 253 F.R.D. 237, 242-43 (E.D.N.Y. 2008), the court did not find that a tort remedy imposed on upstream gun sellers would not regulate out-of-state transactions, only that such regulation did not violate the Second Amendment.

Second, Plaintiffs theorize without legal basis that this Court would need to create "new preemptive federal common law" to dismiss their claims under federal law. But this is no issue of preemption. The Supreme Court has already determined that interstate pollution "is a matter of federal, not state, law" which "should be resolved by reference to federal common law." *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 488 (1987); *see also AEP*, 564 U.S. at 421. And that principle has already been applied by two federal district courts to this context. *New York*, 325 F. Supp. 3d at 471; *Oakland*, 325 F. Supp. 3d at 1024-25. Because Plaintiffs' claims fall squarely within existing federal common law, *see New York*, 325 F. Supp. 3d at 471; *Oakland*, 325 F. Supp. 3d at 1024-25, creating new federal common law is unnecessary.

[4] Plaintiffs rely on ExxonMobil's arguments against application of federal common law in *Kivalina*, Br. 8, but neglect to mention that the Ninth Circuit did not adopt ExxonMobil's position. *See Kivalina*, 696 F.3d at 855.

Plaintiffs also argue that Defendants do not identify any "uniquely federal" interest in this dispute.[5] However, Defendants' motion described those interests at great length. *See* Br. 1-2, 7-19. Plaintiffs' claims clearly implicate these uniquely federal interests.[6] *See New York*, 325 F. Supp. 3d at 471.

Third, Plaintiffs assert that displaced federal common law *cannot* preempt their state law claims because when Congress has displaced federal common law, state law "becomes an available option." Br. 10. That does not make sense. Where, as here, "uniquely federal interests" warrant application of federal common law, it is "*inappropriate for state law to control*."[7] *Tex. Indus.*, 451 U.S. at 640-41 (emphasis added); *see New York*, 325 F. Supp. 3d at 474-75. That Congress has so comprehensively addressed the subject so as to leave no room for even *federal* common-law remedies cannot mean that *state* common-law remedies suddenly become viable. *AEP* merely left "open for consideration" the narrow question whether the CAA preempted state-law nuisance

[5] *Rodriguez* v. *FDIC*, 2020 WL 889191 (S. Ct. Feb. 25, 2020), is not to the contrary. There, the Court declined to apply federal common law to a dispute clearly lacking in "uniquely federal interests"—the allocation of a tax refund among corporate group-filers. *See id.* at *3. In contrast, the "uniquely federal interests" at issue in adjudicating transboundary pollution suits concerning climate change are indisputable. *See AEP*, 564 U.S. at 418-22.

[6] *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980), does not stand for the proposition that national security policy is not a uniquely federal interest implicating federal common law. The court simply declined to fashion a federal common law rule governing product liability claims because the federal government had not expressed a clear policy on how to balance veterans' welfare with the military's supply needs. *See id.* at 994-95. Here, the Supreme Court and Ninth Circuit have made clear that the CAA is an expression of federal policy as it pertains to Plaintiffs' climate-change claims. *See AEP*, 564 U.S. at 427; *Kivalina*, 696 F.3d at 856-57.

[7] Plaintiffs make no effort to defend their claims under federal common law, instead asserting in a footnote that they "do not plead a federal common law claim at all." Br. 10 n.5. But that misses the point: Plaintiffs' transboundary emissions claims, even if purportedly brought under state law, must be "resolved by reference to federal common law." *Ouellette*, 479 U.S. at 488.

claims based on "the law of each State where the defendants operate powerplants." 564 U.S. at 429. Here, Plaintiffs challenge global conduct.[8] Federal common law displaces their claims.

B. Federal Law Preempts Plaintiffs' Claims

Plaintiffs argue that their claims are not preempted by federal statute. As an initial matter, even if state law could govern their claims (and it cannot), those claims are preempted for the same reason that they are displaced if governed by federal common law: they would interfere with the carefully constructed federal legal and regulatory structure concerning fossil fuel production, emissions, and environmental protection.[9] *See* Defs.' Br. 9-15. As to whether Congress has "spoken directly" to emissions, production, or promotion through the CAA, Plaintiffs do not contest that courts have previously dismissed climate-change-based tort claims as displaced by the CAA. *See, e.g., AEP*, 564 U.S. at 424. As those courts have clearly held, Congress specifically "entrust[ed]" the EPA with the "complex balancing" of "competing interests" involved in determining greenhouse-gas emissions levels. *Id.* at 427. Because Congress selected an agency

[8] To be sure, the concurring judge in *Kivalina* did note that plaintiff's claims, which were displaced by federal common law, potentially could be re-filed in state court, but only to the extent they were not preempted by federal law. 696 F.3d at 858 (Pro, J.). However, the viability of the state law claims was neither presented to, nor addressed by, the majority.

[9] Plaintiffs assert that Defendants must overcome a "higher standard" to establish preemption in areas of "traditional state authority." Br. 11 & n.6. However, unlike the intrastate regulation of defective products, at issue in *Jackson*, the regulation of "transportation fuels produced in or imported into" a state at issue in *American Fuel & Petrochemical Manufacturers* v. *O'Keeffe*, 903 F.3d 903, 908 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2043 (2019), or the regulation of gasoline spills, *see In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 457 F. Supp. 2d 324, 329 (S.D.N.Y. 2006), *aff'd*, 725 F.3d 65 (2d Cir. 2013), the regulation of interstate and international emissions is a "matter of federal law," *Ouellette*, 479 U.S. at 492. It is enough that the CAA's delegation of broad authority to the EPA to regulate greenhouse-gas emissions reflects a clear occupation of the legislative area with which the adjudication of Plaintiffs' claims would necessarily interfere.

to perform this balancing and regulate emissions *sources*, state law cannot govern Plaintiffs' claims based on "excess greenhouse gas emissions." AC ¶ 15; *see* Defs.' Br. 9-10.

Plaintiffs' derivative theory of liability does not distinguish this case from *AEP* or *Kivalina*. They plainly seek to regulate both upstream activities (production and promotion) and downstream activities (emissions)—each of which falls within a federally occupied field. *See* Defs.' Br. 16. To the extent the CAA leaves any room for state regulatory authority as Plaintiffs contend, Br. 11, it is only to reduce *in-state* air pollution, not to regulate *nationwide*, let alone *worldwide*, emissions, *see North Carolina ex rel. Cooper* v. *TVA*, 615 F.3d 291, 302-04 (4th Cir. 2010).

As to fossil fuel production, the various statutes identified by Defendants that promote domestic oil production reflect far more than a "vague federal interest" in fossil fuel production. Pls.' Br. 13. For example, Congress has directed the Secretary of Energy specifically "to increase the recoverability of domestic oil resources," 42 U.S.C. § 13411(a), and has granted preferential tax treatment to particular energy expenditures, such as those "for the purpose of ascertaining . . . any deposit of ore or other mineral," I.R.C. § 617(a)(1). Plaintiffs' citation to statutes evidencing Congress's "intent that oil production should *not* compromise the environment or harm local communities," Br. 13, only underscores the point: Congress has authorized and encouraged fossil-fuel production *notwithstanding* its other actions to address perceived climate change risk.

C. Plaintiffs' Claims Should Be Dismissed under Numerous Federal Doctrines

Plaintiffs' opposition confirms that their claims violate several other federal doctrines.

Foreign Affairs: Because Plaintiffs' suit targets commercial activity that is actively supported by many foreign governments, it directly impacts foreign policy and affairs. *Oakland*, 325 F. Supp. 3d at 1025-26; *see New York*, 325 F. Supp. 3d at 476. It also would put domestic

producers at a competitive disadvantage vis-à-vis foreign producers. Plaintiffs also fail to explain why the decades of foreign energy policy Defendants cite, including that exercised through executive order and legislation, lacks "force of law" with preemptive effect.[10] *Delgadillo* v. *Astrue*, 601 F. Supp. 2d 1241, 1248 (D. Colo. 2007); *see, e.g.*, Exec. Order No. 12,287 (1981). Their attempt to distinguish tort claims from state regulation or legislation also is unavailing. "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *BMW of N. Am, Inc.* v. *Gore*, 517 U.S. 559, 572 n.17 (1996).

Separation of Powers: Plaintiffs fail to address Defendants' argument that their claims violate the separation of powers, and instead argue against the political question doctrine.[11] Br. 14; *see New York*, 325 F. Supp. 3d at 475-76; *Oakland*, 325 F. Supp. 3d at 1025-26. Regardless, Plaintiffs' claims cannot be adjudicated without balancing policy concerns that are squarely reserved for the federal political branches. *New York*, 325 F. Supp. 3d at 475-76; *Oakland*, 325 F. Supp. 3d at 1025. Plaintiffs contend that their nuisance claim merely requires the court to consider whether "it is unreasonable for Defendants to engage in their conduct without paying for the harm done." Br. 15 (alterations omitted). Yet the case they rely on makes clear that "a finding of

[10] Even assuming foreign policy lacked the force of law, that would not eliminate its preemptive effect. *Medellin* v. *Texas*, 552 U.S. 491, 523-32 (2008), merely concluded that federal foreign policy carried out in violation of the separation of powers lacks preemptive force.

[11] To the extent the political question doctrine applies here, Plaintiffs overstate Colorado's rejection of that doctrine. In *Lobato* v. *State*, 218 P.3d 358 (Colo. 2009), the Colorado Supreme Court merely found that the doctrine did not preclude judicial review of the statute at issue *in that case*. *See id.* at 374. Defendants' citation to pre-*Lobato* case law was not "misleading" as Plaintiffs assert. Pls.' Br. 15 n.10. The issues identified as "constitutionally committed for resolution to the legislative or executive branch," include those Defendants highlighted. *Busse* v. *City of Golden*, 73 P.3d 660, 664 & n.9 (Colo. 2003). Plaintiffs also misconstrue the holding of *Juliana* v. *United States*, 947 F.3d 1159 (9th Cir. 2020), which did not decide whether the case presented a political question, or purport to attribute emissions to any particular producer, much less endorse Plaintiffs' emissions-attribution theory. *See id.* at 1169, 1174 n.9.

unreasonableness" under Colorado law "requires a determination that the social utility of the act causing the invasion that interferes with the use and enjoyment of the land does not outweigh the harm of that invasion." *Cook* v. *Rockwell Int'l Corp.*, 2006 U.S. Dist. LEXIS 89515, at *54 (D. Colo. Dec. 7, 2006). With respect to fossil fuels, that balancing is left to the political branches.

Commerce Clause: Plaintiffs cite *NAACP* v. *AcuSport, Inc.* to argue that this Court may regulate conduct outside Colorado, but it did not hold that the Commerce Clause categorically permits states to regulate out-of-state actors "whose products or activities put the state's citizens at risk." 271 F. Supp. 2d 435, 464 (E.D.N.Y. 2003). It merely determined that the need to protect state residents outweighed the burden on interstate commerce from regulating *illicit* firearms importation and manufacturing. *See id.* Plaintiffs also contend that the Commerce Clause's extraterritoriality doctrine proscribes discrimination against only out-of-state-products, Br. 16, but courts do not categorically apply the doctrine so narrowly, *see, e.g.*, *Ass'n for Accessible Meds.* v. *Frosh*, 887 F.3d 664, 669-70 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1168 (2019).[12]

Due Process: Plaintiffs do not contest that this case would impose liability on Defendants for lawful conduct. *See State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 421 (2003); *E. Enters.* v. *Apfel*, 524 U.S. 498, 549 (1998) (Kennedy, J., concurring). Instead, they attempt to overcome due process concerns by analogizing to product liability cases involving lead paint, asbestos, or tobacco. Br. 17. But unlike those products, fossil fuel production and sales continue not only to be authorized, but encouraged, by federal and state law. *See* Defs.' Br. 9-10, 13, 26-27. Indeed, lead paint was banned in the United States in 1978. *People* v. *ConAgra Grocery*

[12] Plaintiffs' effort to distinguish cases involving punitive damages also is unavailing since punitive damages, like any other damages, may amount to regulation of conduct. *See Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 21 (1991).

Prods. Co., 227 Cal. Rptr. 3d 499, 520 (Ct. App. 2017), *cert. denied*, 139 S. Ct. 377 (2018). Further, the damages alleged in this case are far more "severe[]," *Berwind Corp.* v. *Comm'r Soc. Sec.*, 307 F.3d 222, 239 & n.20 (3d Cir. 2002), as Plaintiffs seek damages purportedly resulting from 100-plus years of global sales and use of fossil fuels, not individual or local harms resulting from the local sale or use of those products.

First Amendment: Plaintiffs' effort to reframe their action as targeting allegedly deceptive speech runs headlong into the First Amendment. Plaintiffs themselves allege that Defendants' climate-change speech was directed by lobbying organizations as part of a broad policy debate, *see* AC ¶¶ 422-25; it is thus entitled to immunity, *see Gen. Steel Domestic Sales, LLC* v. *Bacheller*, 291 P.3d 1, 7 (Colo. 2012).[13]

D. Plaintiffs' Claims Should Be Dismissed under Colorado Law

Plaintiffs cannot escape the many reasons their claims should be dismissed under state law.

Standing: In response to Defendants' argument that Plaintiffs' alleged injuries are too indirect and speculative to support standing, Defs.' Br. 21-22, Plaintiffs argue that these are "merits" questions, Br. 19. However, Plaintiffs must allege a cognizable "injury in fact" that is neither "incidental" nor "indirect" to survive a motion to dismiss. *See 1405 Hotel, LLC* v. *Colo. Econ. Dev. Comm'n*, 370 P.3d 309, 316-19 (Colo. App. 2015); *see also Lobato*, 218 P.3d at 368. Plaintiffs' cited cases addressing the foreseeability of superseding causes on the merits are inapposite. For example, the superseding causes at issue in *1405 Hotel* and *Cloverleaf Kennel*

[13] Plaintiffs' argument that Defendants' speech is merely "commercial," Br. 18, ignores that the speech relates to a "controversial subject[]" and "sensitive political topic[]" that is "of profound value and concern to the public," *Janus* v. *AFSCME*, 138 S. Ct. 2448, 2476 (2018).

Club v. *Colorado Racing Commission*, 620 P.2d 1051, 1053-57 (Colo. 1980)—competitors accessing beneficial policies—although foreseeable, were held insufficient to establish standing.[14]

Statute of Limitations: The Complaint reveals that Plaintiffs had far more than a "[g]eneralized 'suspicion'" of their claims more than four years ago. Br. 20. Plaintiffs allege a "scientific consensus" regarding the causes of climate change, misrepresentations by Defendants, local impacts of climate change, and efforts they undertook to combat them, all dating back to the *1990s*. Defs.' Br. 22-23. Although accrual can be an issue of fact, here, the "bare allegations of the complaint," *CAMAS Colo., Inc.* v. *Bd. of Cty. Comm'rs*, 36 P.3d 135, 139 (Colo. App. 2001), reveal that Plaintiffs' purported injuries, and their alleged causes, were "known or should have been known" within the limitations period, *Morrison* v. *Goff*, 91 P.3d 1050, 1053 (Colo. 2004). Further, to the extent Plaintiffs' claims concern alleged concealment or misrepresentation, the "continuing tort doctrine" is inapplicable: there is no specific allegation in the Complaint that such conduct is continuing. *Cf. Hoery* v. *United States*, 64 P.3d 214, 219 (Colo. 2003).

Causation: Plaintiffs fail to identify any allegations demonstrating the requisite causal link between Defendants' purportedly tortious acts and their purported injuries.[15] In particular, Plaintiffs fail to adequately allege, as they must, that *but for* Defendants' "promotional acts," Pls.' Br. 23, Plaintiffs' alleged injuries would not have occurred. *See Excel-Jet, Ltd.* v. *United States*,

[14] The "threatened injury" cases cited by Plaintiffs are also distinguishable: they involve *imminent*, non-speculative injuries—unlike the injuries alleged here. *See Syfrett* v. *Pullen*, 209 P.3d 1167, 1170 (Colo. App. 2008); *Colo. Manufactured Hous. Ass'n* v. *Pueblo County*, 857 P.2d 507, 511 (Colo. App. 1993).

[15] Since, for purposes of this motion, the relevant facts "are undisputed and reasonable minds could draw but one inference," causation can be resolved as a matter of law. *Boulders at Escalante LLC* v. *Otten Johnson Robinson Neff & Ragonetti PC*, 412 P.3d 751, 759 (Colo. App. 2015).

2010 WL 2501113, at *7 (D. Colo. July 17, 2010). Attempting to avoid this requirement, Plaintiffs treat the "substantial factor" doctrine as an alternative means of establishing cause-in-fact, Br. 21-23, but it is not, *see Reigel* v. *SavaSeniorCare L.L.C.*, 292 P.3d 977, 987 (Colo. App. 2011).[16]

Plaintiffs also cannot establish legal causation, particularly under their "promotion" theory. Any alleged connection between Defendants' purported "promotional acts," and the litany of damages Plaintiffs claim to have suffered, such as "managing and repairing damage from bark beetle and other pest infestations," "increased landscape maintenance costs," and "reduced employee productivity," AC ¶ 454, is far "too attenuated" to impose legal liability in light of the many intervening events. *See Boulders at Escalante*, 412 P.3d at 762, 765-66. Indeed, although Plaintiffs make several assertions about what Defendants "knew" about climate change, Br. 23, nowhere does the Complaint plausibly allege that Defendants "knew" or foresaw that the particular "promotional acts" identified in the Complaint would cause the damages alleged.[17]

Nuisance: Plaintiffs' brief fails to revive their nuisance claims. *First*, Plaintiffs argue that their nuisance claims merely require a determination that "it is unreasonable for defendants to engage in their conduct without paying for the harm done." Br. 15. But that is not the standard.

[16] In any event, since "[e]veryone has contributed to the problem of global warming," no Defendant can be a substantial factor. *Oakland*, 325 F. Supp. 3d at 1026; *see Smith* v. *State Comp. Ins. Fund*, 749 P.2d 462, 464 (Colo. App. 1987).

[17] Plaintiffs' assertion that legal causation demands only that Defendants foresee that "some injury will likely result in some manner," not "the exact nature and extent" of, or "precise manner" in which, injuries occur, Br. 23-24, speaks to the foreseeability component of establishing a duty of care, not *causation*. *See Elliot* v. *Turner Constr. Co.*, 381 F.3d 995, 1006 (10th Cir. 2004); *HealthONE* v. *Rodriguez ex rel. Rodriguez*, 50 P.3d 879, 888-91 (Colo. 2002). *City of New York* v. *A-1 Jewelry & Pawn, Inc.*, 501 F. Supp. 2d 369 (E.D.N.Y. 2007), also is inapposite. That court's discussion of causation was to determine whether the cumulative parallel conduct of separate out-of-state defendants sufficed to establish *personal jurisdiction*, not legal causation. *Id.* at 423.

A finding of unreasonableness requires a balancing between Plaintiffs' alleged harm and "the social utility" of fossil fuel production and sale, which Plaintiffs do not dispute.[18] *See Cook*, 2006 U.S. Dist. LEXIS 89515, at *54. *Second*, Plaintiffs are incorrect that the rule that public nuisance liability will not lie where defendants' conduct is sanctioned by law only applies to zoning injunctions, *see, e.g.*, *Ft. Lyon Canal Co.* v. *Bennett*, 156 P. 604, 609 (Colo. 1916), and does not apply to damages claims, *see, e.g.*, *Platte & Denver Ditch Co.* v. *Anderson*, 6 P. 515, 520-21 (Colo. 1885).[19] Plaintiffs' argument that Defendants' activities are not "authorized" ignores the various laws that regulate—and approve of—their activities. *See* Defs.' Br. 9-10, 13, 26-27. *Finally*, Plaintiffs concede that Defendants had no control over fossil fuels at the time they were combusted by third parties, but nevertheless contend that the Restatement obviates that requirement. *See* Br. 26-27. Yet many courts applying the Restatement have found control to be an indispensable element of a public nuisance claim,[20] *see, e.g.*, *State* v. *Lead Indus., Ass'n, Inc.*, 951 A.2d 428, 448-53 (R.I. 2008), which makes sense, as "without control a defendant cannot abate the nuisance," *Tioga Pub. Sch. Dist. No. 115* v. *U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993).

[18] Plaintiffs' contention that "[t]here are no social benefits from Defendants' concealment and deception" highlights the opportunistic nature of Plaintiffs' promotion theory since the prior sentence in their brief makes clear that they are focused on production and sale. Br. 25-26. Cases holding that activities lacking social benefit are per se unreasonable are inapposite.

[19] *Green* v. *Castle Concrete Co.*, 509 P.2d 588 (Colo. 1973), does not preclude application of the authorization defense *outside* the realm of zoning regulations. And *Hobbs* v. *Smith*, 493 P.2d 1352 (Colo. 1972), concerned an action for *private* nuisance.

[20] Citing the Second Circuit and a select Maryland case, Plaintiffs say a "control" requirement is inconsistent with "the modern rule." Br. 26. But other federal circuits and district courts, including other federal courts in Maryland, require a showing of control. *See Camden Cty. Bd. of Chosen Freeholders* v. *Beretta, USA Corp.*, 273 F.3d 536, 541 (3d Cir. 2001); *Cofield* v. *Lead Indus. Ass'n, Inc.*, 2000 WL 34292681, at *7 (D. Md. Aug. 17, 2000).

Trespass: Plaintiffs' trespass claims are similarly flawed, particularly in light of Plaintiffs' reframed promotion theory. Plaintiffs offer no authority, in Colorado or elsewhere, for basing trespass liability on "promotional acts." *See In re Paulsboro Derailment Cases*, 2013 WL 5530046, at *8 (D.N.J. Oct. 4, 2013) ("[M]odern courts do not favor trespass claims for environmental pollution."); Dan B. Dobbs et al., Law of Torts § 53 (2d ed. 2019). The Complaint also nowhere plausibly alleges that Defendants knew the "promotional acts" alleged, or any other purported acts, would "to a substantial certainty" result in a trespass in Colorado. *Hoery*, 64 P.3d at 218. Nor do Plaintiffs have a response to the rule that a trespass claim fails where, as here, the alleged entry is "authorized by legislative enactment." Defs.' Br. 28. Plaintiffs' attempts to dispute that their breathtaking theory of liability would reach fossil fuel sales anywhere in the world are unavailing. *See Oakland*, 325 F. Supp. 3d at 1022. Their assertion that their claims would only reach "substantial fossil fuel production, promotion, and sales," but not "negligible" contributions, Br. 27, is not grounded in any allegation in the Complaint and is inconsistent with their own arguments. *See* Br. 22 (citing case for proposition that manufacturer responsible for less than one percent of market share may be liable in tort).

CCPA: Plaintiffs' opposition confirms that their CCPA claim is deficient. *First*, as Plaintiffs concede, because their CCPA claim sounds in fraud, Br. 28, Rule 9(b)'s heightened pleading standard applies. However, Plaintiffs' opposition fails to identify the specific fraudulent statements they purportedly relied on, or explain who made each statement, when and where it was made, or how exactly it was misleading. *Second*, Plaintiffs argue that "Defendants' advertisements," which are not identified with any specificity, were directed at consumers, Br. 28-29, but do not dispute that non-advertisements, *see, e.g.*, AC ¶¶ 409; 422-25, cannot support a

claim under Section 6-1-105(1)(e), *Hall* v. *Walter*, 969 P.2d 224, 235 (Colo. 1998). *Third*, although Plaintiffs argue that "Defendants' misrepresentations were about the 'characteristics' of their fossil fuels," Br. 29, they do not identify any such statements. They also do not dispute that statements relating to climate change cannot support liability under Section 6-1-105(1)(e). *Fourth*, Plaintiffs' brief adds nothing to the vague and conclusory allegations in the Complaint seeking to attribute statements by third-party groups such as API to defendants. *Finally*, Plaintiffs do not dispute that their Section 6-1-105(1)(u) claims fail. *See* Defs.' Br. 29 n.13.

Conspiracy: Plaintiffs confirm that the conspiracy claim relies almost entirely on conclusory allegations "on information and belief" regarding Defendants' membership in API. *E.g.*, AC ¶¶ 71, 86, 335. Such vague allegations cannot support a conspiracy claim. *Boyd* v. *Tkach*, 2007 WL 678640, at *1 (D. Colo. Mar. 1, 2007); *see also Zinna* v. *Cook*, 2010 WL 3604170, at *11 (D. Colo. June 2, 2010), *aff'd*, 428 F. App'x 838 (10th Cir. 2011). Plaintiffs' efforts to evade Rule 9(b) also fall short; their allegations clearly sound in fraud. *E.g.*, AC ¶ 526.

Unjust Enrichment: Plaintiffs assert that Defendants "ma[d]e no specific challenge to unjust enrichment." Br. 30. But they did. *See* Defs.' Br. 23 n.9. Plaintiffs do not dispute their failure to allege that any purchaser or user of Defendants' products did not receive "a valuable product for which they bargained and which they intend to keep." *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).

III. Conclusion

For the reasons above and in Defendants' opening brief, the Complaint should be dismissed with prejudice.

Dated: March 5, 2020 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 5th day of March 2020 a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM PURSUANT TO COLO. R. CIV. P. 12(b)(5)** was electronically filed with the Court through CCES and served on all counsel of record.

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