DISTRICT COURT, BOULDER COUNTY, STATE OF COLORADO Boulder County Combined Court 1777 Sixth Street Boulder, CO 80302	DATE FILED: March 19, 2020 7:34 PM FILING ID: 40BCD99A3984D CASE NUMBER: 2018CV30349
Plaintiffs: BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY; BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; CITY OF BOULDER, **v.** **Defendants:** SUNCOR ENERGY (U.S.A), INC.; SUNCOR ENERGY SALES, INC.; SUNCOR ENERGY, INC.; EXXON MOBIL CORPORATION.	▲ **COURT USE ONLY** ▲ Case No. 2018CV30349 Division: 2
Attorneys for Plaintiffs: Kevin S. Hannon, #16015 THE HANNON LAW FIRM, LLC 1641 Downing Street Denver, CO 80218 Ph: 303-861-8800 Fax: 303-861-8855 khannon@hannonlaw.com David Bookbinder, D.C. Bar No. 455525, *pro hac vice* NISKANEN CENTER 820 First Street, NE, Suite 675 Washington, DC 20002 Ph: 301-751-0611 DBookbinder@niskanencenter.org Michelle C. Harrison, *pro hac vice* Marco Simons, *pro hac vice* EARTHRIGHTS INTERNATIONAL 1612 K Street, NW #800 Washington, DC 2006 Ph: 202-466-5188 Fax: 202-466-5189 michelle@earthrights.org marco@earthrights.org	

PLAINTIFFS' OPPOSITION TO DEFENDANT EXXON MOBIL CORP.'S MOTION TO DISMISS AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION PURSUANT TO COLO. R. CIV. P. 12(b)(2)

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INTRODUCTION

Plaintiffs Boulder County, San Miguel County, and the City of Boulder have suffered injuries because of an altered climate, which they endure *entirely* in Colorado. They sued Exxon Mobil Corp. ("Exxon") for its tortious and intentional acts, including in Colorado, which caused, contributed to, and accelerated the alteration of the climate and the resulting effects on Plaintiffs in Colorado. There is jurisdiction over this suit and Exxon.

Exxon does not dispute that it purposefully maintained substantial and continuous contacts with Colorado; nor that its activities here are causally related to this case. This should end the jurisdictional dispute. Nevertheless, without support in Colorado or U.S. Supreme Court precedent, Exxon's Motion to Dismiss for Lack of Personal Jurisdiction ("Mot.") argues that the due process clause demands that its *in-state activities* be the *sole* cause of Plaintiffs' injuries; and that, because others may have contributed to altering the climate (the very conduct for which Exxon is sued – and which is sufficient for liability), its tortious conduct here cannot be a basis for specific jurisdiction. Exxon is mistaken and its Colorado contacts clearly suffice for jurisdiction.

First, while Exxon does not dispute the first prong of the specific jurisdiction inquiry – that it purposefully acted in and maintained contacts with Colorado – it fundamentally understates the scope of its jurisdictionally relevant contacts. Under U.S. Supreme Court precedent, Exxon's intentional out-of-state acts, which it knew would tortiously *affect* Colorado, are contacts with this State *and* a sufficient basis for jurisdiction.

Second, the second prong of the specific jurisdiction test is met – Plaintiffs' claims arise out of and relate to Exxon's forum contacts. Exxon does not dispute that its in-state acts relate to Plaintiffs' claims, as the Colorado component of a single global scheme, nor that those acts contribute to Plaintiffs' injuries; and while it ignores the known in state effects of its tortious out-of-

state acts, that broader course of conduct is also clearly related to and a basis for Plaintiffs' claims.

Exxon's argument that Plaintiffs' claims "do not arise out of or relate to" its contacts with Colorado is flat wrong. Neither the Colorado nor the U.S. Supreme Court demands that its in-state acts be *a*, much less *the sole*, cause of Plaintiffs' injuries. Only "an occurrence" in the forum – which creates a sufficient "affiliation" or "substantial connection" between Exxon, Colorado, and Plaintiffs' claims – is required. Plaintiffs easily meet the proper test.

Even in the federal circuits that *do* require a defendant's forum contacts to be causally related to a plaintiff's injuries, jurisdiction is proper based on "*any* event in the causal chain leading to the plaintiff's injury." *Emplrs. Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1161 (10th Cir. 2010) (emphasis added, internal quotation marks omitted). Again, Exxon does not dispute that its Colorado contacts – including its in-state acts – contribute to and are thus "events in the causal chain leading to" Plaintiffs' injuries; Plaintiffs therefore satisfy a causation test as well.

Thus, while Exxon purports to invoke federal "but-for cause" precedent, it is actually asking for a new rule where a defendant – and more specifically, its in-state acts – has to be the *sole* and *complete* cause of Plaintiffs' injuries. Its jurisdictional rule thus demands more than what liability requires. Plaintiffs have not found – and Exxon has not cited – any state or federal appellate authority that supports such a radical position. Indeed, if Exxon were correct, jurisdiction would have been foreclosed in tobacco, gun, asbestos, and opioid litigation, where numerous companies combined to create and feed crises that crossed state lines and injured individuals, cities, counties, and states across the country. Specific jurisdiction existed there and does here as well.

Third, Exxon makes no argument against Plaintiffs' Colorado Consumer Protection Act (CCPA) claims, which arise only from misrepresentations directed toward Colorado and thus cannot be subject to Exxon's "but-for cause" argument. Since the Court has jurisdiction over these claims,

it can exercise pendent jurisdiction over Plaintiffs' related tort claims as well.

Last, Exxon's registration to do business in Colorado makes it subject to "the same duties" as a domestic corporation. COLO. REV. STAT. § 7-90-805 (2019). Thus, Exxon has consented to personal jurisdiction. Consent is a traditional basis for jurisdiction that meets due process without being subject to the minimum contacts analysis and the "arising out of or relates to" prong that Exxon invokes.

*** * ***

Exxon would require a plaintiff injured by several actors to file the same claims, for the same injury, in the various States or nations where general jurisdiction over each defendant lies. This would be inefficient and unfair, and conflicts with the fact that *specific*, not *general*, jurisdiction is "the centerpiece of modern jurisdictional theory." *Daimler AG v. Bauman*, 571 U.S. 117, 128 (2014) (internal quotations omitted). An injured Coloradan "need not go to New [Jersey], [Texas], or [Canada] to seek redress from persons who . . . intentionally, knowingly and recklessly caused severe physical, emotional and economic injuries" in Colorado. *Guidry v. U.S. Tobacco Co.*, 188 F.3d 619, 630 (5th Cir. 1999); *accord Calder v. Jones*, 465 U.S. 783, 790 (1984).

BACKGROUND

I. It is undisputed that Exxon has been registered to do fossil fuel business and has developed, promoted, and sold fossil fuels in Colorado for decades.

Exxon has conducted fossil fuel business – in oil, coal, natural gas, and unconventional fossil fuels, such as oil shale – in Colorado since the 1930s. *See, e.g.*, AC ¶¶ 72, 108-09. Since at least 1972, it has been registered to transact business as a "foreign entity" in Colorado and appointed an agent for service of process. *Id.* ¶ 105.

Exxon has a huge Colorado footprint and conducts nearly every kind of fossil fuel business

here: it produced fossil fuels in Colorado, *see, e.g.*, *id.* ¶¶ 107-08, 114; transported fossil fuels into and out of Colorado, *see id.* ¶ 119; sold fossil fuels directly and through the stream of commerce into Colorado, *see, e.g.*, *id.* ¶¶ 107, 121-22; and misleadingly advertised and promoted its fossil fuels, as well as unchecked fossil fuel use more broadly, in Colorado, *see, e.g.*, *id.* ¶¶ 107, 412-29.

While it carries out numerous, substantial activities *in its own name*, Exxon conducts some Colorado fossil fuel activity through subsidiaries, which act on its behalf and for its benefit. *See id.* ¶¶ 74, 112-19. Exxon pursues fossil fuel activities, throughout the corporate family and in Colorado, "according to a common design," and it runs that business as a single integrated enterprise; Exxon lays claim to and has ultimate control over those subsidiaries' assets, *id.* ¶¶ 76-77, and Exxon controls how much fossil fuel its subsidiaries produce, how they market it, and how climate is addressed in those activities. *See id.* ¶¶ 79-80. Plaintiffs allege, and Exxon does not dispute, that its subsidiaries "do not have the ability to deviate from the common design and cannot refuse to produce, promote, refine and sell and/or transport Exxon's fossil fuels." *Id.* ¶ 75.

II. It is undisputed that Exxon sold and promoted fossil fuel – across its enterprise and in Colorado – at levels it *knew* would cause harm in Colorado *and* that it misrepresented the dangers of unchecked fossil fuel use.

For decades, Exxon has known that using fossil fuel emits greenhouse gases (GHGs), which persist in the atmosphere for centuries, trap heat and alter the climate. *Id.* ¶¶ 344-45. It also knew that altering the climate would bring "catastrophic effects," *id.* ¶ 350, and have "serious consequences for man's comfort and survival." *Id.* ¶ 353. Exxon knew these effects would be suffered in Colorado. *Id.* ¶¶ 107, 327, 344, 356-57 & n.24. Finally, it knew that unchecked fossil fuel use would exacerbate and accelerate the arrival of these harmful consequences, *id.* ¶¶ 368-69, that the "mitigation of the 'greenhouse effect' would require major reductions in fossil fuel combustion," *id.* ¶ 368, and that reducing fossil fuel use could not wait for the hazards to manifest. *Id.* ¶¶ 367, 369.

Yet, since the 1960s, Exxon promoted – and profited from – unchecked fossil fuel use and deliberately sold "trillions of cubic feet of natural gas, billions of barrels of oil and millions of tons of coal and petroleum coke," *id.* ¶¶ 81, 380, knowing that when burned by consumers as intended, these fuels would emit billions of tons of GHGs, alter the climate and exacerbate that alteration. *Id.* ¶¶ 81-82, 346, 380-83. Exxon carried on its Colorado fossil fuel activities according to the same plan: to produce, promote, and sell as much fossil fuel as possible regardless of the damage they cause. *Id.* ¶¶ 85, 376-79, 392-95.

Moreover, Exxon has caused harm by increasing fossil fuel demand by concealing from and misrepresenting to the public and its consumers what it knew to be the dangers of unchecked fossil fuel use. *Id.* ¶¶ 415. Exxon engaged in this deception campaign on its own and with other fossil fuel companies and trade associations, *id.* ¶¶ 75, 79-80, 407-09, 412-14; 416 and it carried it out across the United States and in Colorado through advertising and media appearances. *Id.* ¶¶ 417-35.

III. It is undisputed that Exxon's fossil fuel activities – in and outside of Colorado – have altered the climate and contributed to Plaintiffs' Colorado injuries.

Burning fossil fuels has increased the atmospheric concentration of greenhouse gases (GHGs) – mostly CO_2 – to levels unseen in human history. AC ¶¶ 127-31. The CO_2 that Exxon caused to be released into the atmosphere – including from fuels derived from or sold for use in Colorado – has altered the climate and will continue to contribute to warming for centuries. *Id.* ¶¶ 125-26, 132-37. While the climate has been altered by the accumulation and total concentration of GHGs in the atmosphere, each added ton traps heat, disrupts the natural equilibrium, and adds to the severity and pace of the alteration. *Id.* ¶ 127. Thus, there is no point at which additional emissions become irrelevant; more emissions equal more warming, and more injury. *E.g. id.* ¶ 138.

The altered climate is "already affecting communities . . . ecosystems . . . and public health"

with "an increase in prolonged periods of excessively high temperatures, more heavy downpours, and increase in wildfires, [and] more severe droughts." *Id.* ¶ 139. Plaintiffs have been and will continue to be harmed in Colorado by the altered climate. Temperatures in Colorado have already risen 2°F since 1983 and are projected to rise an additional 2.5 to 5°F by 2050, with "a five- to ten-fold increase in heat waves." *Id.* ¶¶ 145-49. Plaintiffs are suffering and will increasingly suffer injuries from rising temperatures, *id.* ¶¶ 150-54, loss of snowpack, and precipitation changes, including both droughts and floods, *id.* ¶¶ 155-67, 221-22, and forest destruction. *Id.* ¶¶ 168-79, 180-86, 221-22. The altered climate threatens human life and health through extreme weather events, floods, and wildfires, by degrading air quality, and increasing heat-related illnesses and disease outbreaks. *Id.* ¶¶ 187-96. These effects harm Plaintiffs and their residents in Colorado and force Plaintiffs to expend considerable taxpayer dollars to protect their land, water, ecosystems, farms, infrastructure, and residents from current and future climate impacts. *Id.* ¶¶ 227; *see also id.* ¶¶ 221-320.

STANDARD FOR RULE 12(b)(2) MOTIONS

Exxon has not submitted documentary evidence or challenged Plaintiffs' jurisdictional allegations. Accordingly, an evidentiary hearing is not called for, and Plaintiffs need only "make a *prima facie* showing" of jurisdiction; *i.e.* one that "raises a reasonable inference that the court has jurisdiction over the defendant." *Found. For Knowledge in Dev. v. Interactive Design Consultants, LLC*, 234 P.3d 673, 677 (Colo. 2010) (internal quotation marks omitted). "This is a light burden intended only to screen out cases in which personal jurisdiction is obviously lacking[.]" *Id.* (internal quotation marks omitted). Plaintiffs' allegations must be taken as true and reasonable inferences taken in their favor. *See id.*; *Goettman v. N. Fork Valley Rest.*, 176 P.3d 60, 66 (Colo. 2007).

ARGUMENT

Colorado extends personal jurisdiction "to the fullest extent permitted by the due process

clause." *Classic Auto Sales, Inc. v. Schocket*, 832 P.2d 233, 235, 240 (Colo. 1992). As Exxon concedes, Mot. at 5, any exercise of jurisdiction consistent with the Constitution also satisfies Colorado law.

There are three bases for jurisdiction in this case. *First*, Exxon has minimum contacts with Colorado that support the exercise of specific jurisdiction with respect to Plaintiffs' tort claims: Exxon has undisputed and substantial contacts with Colorado; there is a nexus between Plaintiffs' claims and those forum contacts; and the exercise of jurisdiction is reasonable. *Second*, Exxon does not challenge jurisdiction as to Plaintiffs' Colorado Consumer Protection Act claims; and, with that basis, this Court can also exercise pendent jurisdiction over the remainder of the case. *Third*, Exxon has consented to jurisdiction with respect to these claims by appointing an agent for service of process; registering to do business with the Colorado Secretary of State; and pursuant to that registration, doing fossil fuel business in Colorado.

I. Exxon is subject to specific personal jurisdiction for Plaintiffs' tort claims.

Jurisdiction exists over non-resident defendants that have "minimum contacts with the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). For *specific* jurisdiction, that "minimum contacts" analysis involves a two-part inquiry into whether: (1) Exxon "purposefully directed [its] activities at residents of" Colorado; and (2) "the litigation results from alleged injuries that arise out of or relate to those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation marks omitted); *accord Keefe v. Kirschenbaum & Kirschenbaum P.C.*, 40 P.3d 1267, 1271 (Colo. 2002). To avoid jurisdiction where there are minimum contacts, the *defendant* "must present a compelling case that the presence of some other considerations would render jurisdiction

unreasonable." *Burger King*, 471 U.S. at 477.[1] All three elements support jurisdiction here.

"A single act is sufficient to establish specific jurisdiction." *Goettman*, 176 P.3d at 69. However, because Exxon has numerous contacts, they must be assessed "in their totality" to determine whether jurisdiction is proper. *Rome v. Reyes*, 401 P.3d 75, 82 (Colo. App. 2017).

A. Exxon does not dispute the first prong of the minimum contacts test; it is subject to jurisdiction for acting in and knowingly causing injury to Colorado.

1. Exxon committed tortious *acts* and caused tortious *effects* in Colorado.

"[T]he commission of a tort, in itself, creates a sufficient nexus between a defendant and the forum state that satisfies the due process inquiry and establishes specific jurisdiction" without "need for further minimum contacts analysis." *Goettman*, 176 P.3d at 69; *accord Found. For Knowledge*, 234 P.3d at 681. The commission of a tortious act includes, and jurisdiction can rest on, *either* tortious acts taken within the State *or* intentional out-of-state acts known to and which do cause tortious effects within. *See Guidry*, 188 F.3d at 628 (finding that "commit[ting] a tort within the state, *or* an act outside the state that causes tortious injury within the state" creates "sufficient minimum contacts"). Here, there is both; this Court's analysis therefore need go no further.

a. *Exxon is subject to jurisdiction for its intentional and tortious out-of-state acts.* As the Supreme Court held in *Calder*, tortious *effects* on a forum are contacts with that forum; and here, Exxon's intentional acts were "expressly aimed" at Colorado because it *knew* they would cause injury here. 465 U.S. at 789-90. Exxon ignores but does not challenge the *Calder* "effects" test for personal jurisdiction,

[1] A "lesser showing of minimum contacts" may be permitted where the exercise of jurisdiction clearly "comport[s] with fair play and substantial justice," taking into consideration "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief," as well as the interests of the "interstate judicial system" and "the several States in furthering fundamental substantive social policies." *Burger King*, 471 U.S. at 476-77; *see also Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1194-95 (Colo. 2005).

which is set forth more fully in Plaintiffs' response to Suncor. *See* Pls.' Opp. to Def. Suncor Energy's Mot. to Dismiss for Lack of Personal Jurisdiction, ("Pls.' Opp. to Suncor's Juris. Mot.") at 9-13.

In short, jurisdiction is appropriate because Exxon deliberately engaged in tortious activity outside Colorado – selling and promoting fossil fuels at levels that would alter the climate, while misrepresenting the dangers of their unchecked use – that it knew would cause injury in this State; these activities were thus "expressly aimed" at Colorado. *Calder*, 465 U.S. at 789-90; *see also Jenner & Block v. District Court of Denver*, 590 P.2d 964, 966 (Colo. 1979) (holding jurisdiction is proper where defendants committed intentional acts out-of-state with "reason to anticipate" that they "might have an injurious effect in Colorado"). More specifically, jurisdiction lies where a defendant knows its activities will create a nuisance or injuries to land in the forum. Thus, in *Illinois v. City of Milwaukee*, jurisdiction lay in Illinois over Milwaukee for polluting an *interstate* body of water that caused injury in Illinois. 599 F.2d 151 (7th Cir. 1979) *rev'd sub nom, aff'd in relevant part City of Milwaukee v. Illinois*, 451 U.S. 304, 312 n.5 (1981). And, this principle was reaffirmed recently in an international pollution case, *Pakootas v. Teck Cominco Metals, Ltd.,* 905 F.3d 565, 577-78 (9th Cir. 2018), citing *Calder*.

Exxon does not dispute Plaintiffs' allegations that it conducted its fossil fuel activities in an intentional and tortious manner, nor that it knew that its fossil fuel activities would alter the climate and cause harm in Colorado. That is sufficient for personal jurisdiction under *Calder*.

b. *Exxon is subject to jurisdiction for in-state tortious acts.* Although jurisdiction is proper based on Exxon's tortious activities wherever conducted, jurisdiction is *also* appropriate based on Exxon's tortious acts in Colorado. Exxon has engaged in two types of undisputed and tortious acts in Colorado. *First*, it deceptively marketed its fossil fuels in Colorado and misrepresented the dangers of fossil fuel use to Colorado consumers. *Supra* Background § II. Messages exclusive to the Colorado market, and those that reached Colorado customers through national media, are both

tortious acts in Colorado. *See Classic Auto Sales, Inc.*, 832 P.2d at 236-37; *Guidry*, 188 F.3d at 625-26. *Second*, Exxon promoted unchecked fossil fuel use in Colorado and sold fossil fuels here *knowing* they would release greenhouse gases, trap heat, and alter the climate. *Supra* Background § I, II. That its Colorado efforts were part of broader tortious scheme does not alter the analysis. *Cf. Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-80 (1984) (finding jurisdiction where in-state acts were "part of its general business" and defendant caused harm in multiple states) (internal quotation omitted).

2. Exxon acted in and sent fossil fuels into Colorado through the stream of commerce.

Even if Exxon's tortious acts did not obviate the need for a full minimum contacts analysis, those acts are buttressed by Exxon's presence in the forum and continuous forum activities. Taken together, these contacts clearly satisfy due process. *See Found for Knowledge*, 234 P.3d at 681-82. It is undisputed that Exxon developed fossil fuels in Colorado; sold large quantities of fossil fuel directly and through the stream of commerce in Colorado; and marketed, advertised, and promoted fossil fuel in Colorado. *Compare* Background Part II *with* Mot. at 4. The activities Exxon carried out in Colorado are quintessential forum contacts. Colorado may also "'assert[] personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in [Colorado][.]'" *See Burger King*, 471 U.S. at 473 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980)); *accord Magill v. Ford Motor Co.*, 379 P.3d 1033, 1039 (Colo. 2016) ("placing products into the stream of commerce – may support a finding of specific . . . jurisdiction"); *Align Corp. v. Boustred*, 405 P.3d 1148, 168-171 (Colo. 2017).[2]

[2] The Colorado Supreme Court has expressly refused to adopt the "stream of commerce plus test" from plurality opinions in *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 879 (2011) and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112-13 (1987). *Align Corp.*, 405 P.3d at 168. Plaintiffs meet that test, however, because Exxon has branded stations in and targeted the Colorado market. *Supra* Background § I; AC ¶ 107.

3. Exxon participates in, directs, and benefits from its subsidiaries' Colorado fossil fuel activities; their acts count as Exxon contacts with Colorado.

Exxon argues, in passing, that jurisdiction cannot be based on a subset of its in-state activities conducted by subsidiaries. Mot. at 12. This argument is unavailing for several reasons. *First*, it is not clear what conduct Exxon purports to exclude, but its argument cannot apply to its subsidiaries' in-state sales of fossil fuels produced by Exxon outside of Colorado. As just noted, Exxon is subject to jurisdiction under the stream-of-commerce theory for those activities.

Second, because its subsidiaries were enacting tortious policies set by Exxon, Plaintiffs do not need either a veil-piercing theory or an agency theory. Where the parent directly participates in the wrong complained of, the plaintiff need not show vicarious responsibility; the parent is directly liable for its own actions. *United States v. Bestfoods*, 524 U.S. 51, 64-65 (1998). This principle applies in the jurisdiction context; acting through a subsidiary does not insulate a parent from jurisdiction where it is the "primary participant" in alleged wrongdoing. *See Rome*, 401 P.3d at 82-83 ("[W]hile serving as an officer for a Colorado company . . . might not be sufficient to satisfy the minimum contacts inquiry," jurisdiction is proper where that officer is the "primary participant[] in the wrongdoing giving rise to the court's jurisdiction over the corporation." (internal quotation marks omitted)); *accord Calder*, 465 U.S. at 790 (since out-of-state defendants were "primary participants in an alleged wrongdoing [directed at the forum] . . . jurisdiction over them is proper.").

Third, contrary to Exxon's claim, Mot. at 12, agency is a basis for specific jurisdiction over a parent company based on the in-state activities of its subsidiaries. *See Magill*, 379 P.3d at 1039 ("[H]aving agency relationships within the forum state . . . may support a finding of specific . . .

jurisdiction."); *accord Daimler*, 571 U.S. at 134-35.[3] While Exxon cursorily states that Plaintiffs have not alleged an agency relationship, Mot. at 13, they are wrong. Plaintiffs allege that Exxon controls, directs, and profits from the relevant fossil fuel activities of its subsidiaries – including, how much fossil fuel they produce and sell in Colorado and how it is marketed. *Supra* Background § Part I. Its subsidiaries are thus effectively "conducting the 'real' business of the parent." *First Horizon Merch. Servs. v. Wellspring Capital Mgmt., LLC*, 166 P.3d 166, 177-78 (Colo. App. 2007) (noting that "a wholly owned subsidiary *may be an agent* and when its activities . . . amount to *doing business of the parent*, the parent is subjected to the in personam jurisdiction of the state" (internal quotation marks omitted)).

Plaintiffs are not arguing that every act by a subsidiary is a contact of the parent. Here, however, Plaintiffs are not suing Exxon for *decisions* made by or within the sphere of control of its in-state subsidiaries – such as how they manage the physical operations in Colorado or negotiate contracts. Rather Exxon was sued for core decisions about its fossil fuel strategy – namely, the decision to produce, sell, and promote as much fossil fuel as possible. These plans were Exxon's and merely put into effect in Colorado, in part, through the in-state subsidiaries. *See Cole v. Tobacco Inst.*, 47 F. Supp. 2d 812, 814 (E.D. Tex. 1999) (upholding jurisdiction over the British American Tobacco Co., where it "transcended the role of a 'holding company' and actively participated in the research and design of cigarettes sold by its subsidiaries"). Exxon does not dispute that its subsidiaries could not – on their own initiative – stop selling, producing, marketing, or transporting its fossil fuels.

B. Plaintiffs satisfy the second prong of the minimum contacts test: there is a sufficient nexus between Plaintiffs' claims and Exxon's Colorado contacts; Exxon's causation argument is not the law.

Exxon argues against specific jurisdiction almost entirely under the "arising out of or relates

[3] This argument is more fully addressed in Plaintiffs' response to Suncor. *See* Pls.' Opp. to Suncor's Juris. Mot. at 16-19.

to" prong of the minimum contacts analysis, stating that it cannot be met unless the climate would not have been altered and Plaintiffs' injuries would not have occurred "but for" its in-state *acts*. Mot. at 10-13. This is wrong. Neither the Colorado nor the U.S. Supreme Court has imposed a "but for" causation test; and other (inapplicable) causation tests followed in certain federal circuits require only causally contributing or substantively relevant forum contacts.

Indeed, Exxon does not cite a single Colorado, U.S. Supreme Court or federal appellate case where jurisdiction was rejected under this prong of the minimum contacts analysis despite the existence of substantial and related forum contacts. Moreover, Exxon does not deny that its Colorado contacts relate to Plaintiffs' *claims* nor that they contribute to Plaintiffs' *injuries*. Thus, Exxon's motion cannot be granted under Colorado's test or any other properly followed one.

Exxon thus effectively asks this Court to adopt a new rule: that jurisdiction is permissible only when in-state *acts* are the *sole* and *complete* cause of a plaintiff's injuries, and impermissible if others contribute to the harm suffered. In support of this radical position, Exxon cites a single district court case - *City of Oakland v. BP p.l.c.*, No. C 17-06011, 2018 U.S. Dist. LEXIS 126258 (N.D. Cal. July 27, 2018) *appeal pending*, No. 18-16663 (9th Cir.) – which did not apply Colorado's rule, and which was wrongly decided under federal precedents. Exxon and *City of Oakland* simply cannot be right; if they were, jurisdiction would have been foreclosed in multiple contributing tortfeasor cases – such as those involving guns, tobacco, MTBE, lead paint, and opioids – where it was previously found. This Court should reject Exxon's invitation to upend Colorado law and these precedents.

1. The Colorado and U.S. Supreme Courts require an "occurrence" in the forum that creates a "substantial connection" between the claims, the defendant, and the forum; the test does not turn on causation.

While specific jurisdiction requires a nexus between Plaintiffs' claims and Exxon's contacts, the suit need only "arise out of *or* relate to [its] contacts with [Colorado]." *Bristol-Myers Squibb Co. v.*

Superior Ct., 137 S. Ct. 1773, 1780 (2017) (emphasis added). Specific jurisdiction is thus only improper where the suit is wholly unconnected to a defendant's forum contacts. In *Bristol-Myers*, for example, the Supreme Court held that *California* did not have jurisdiction – for claims by *Nevada* residents, for *Nevada* injuries, based on their *Nevada* use of defendant's products, which were purchased in *Nevada* – because the claims had no connection to *California*. *Id.* at 1781.

However, neither Colorado's courts nor the U.S. Supreme Court have tied this prong of the minimum contacts analysis to a searching assessment of causation.[4] Rather, for specific jurisdiction, the due process clause demands only "an *affiliation* between the forum and the underlying controversy, principally, *an occurrence* that takes place in the forum State[.]" *Id.* at 1780 (internal alterations and quotations omitted, emphasis added). Under this proper test, jurisdiction only fails where the forum contacts are "unrelated to the operative facts of the controversy." *Creech v. Roberts*, 908 F.2d 75, 80 (6th Cir. 1990); *accord Bristol-Myers*, 137 S. Ct. at 1780; *Vons Cos., Inc. v. Seabest Foods, Inc.*, 926 P.2d 1085 (Cal. 1996), *cert denied*, 522 U.S. 808 (1997). The Colorado Supreme Court similarly requires only that "the actions of the defendant giving rise to the litigation . . . create[] a 'substantial connection' with the forum state." *Archangel*, 123 P.3d at 1194 (quoting *OMI Holdings v. Royal Ins. Co. of Can.,* 149 F.3d 1086, 1091 (10th Cir. 1998)); *accord Align Corp.*, 421 P.3d at 168.[5]

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[4] The U.S. Supreme Court has granted *certiorari* in two cases addressing the "arising out of or relates to" requirement; in both, Petitioners objected that courts below did not "require [] plaintiff's claim to have at least *some* causal connection to some act the defendant took in, or aimed at, the forum." Pet. for Cert., *Bandemer v. Ford Motor Co.*, at 3-4, *cert. granted* No. 19-369, 2020 U.S. LEXIS 536 (Jan. 17, 2020); Pet. for Cert., *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, at 3, *cert. granted*, No. 19-368, 2020 U.S. LEXIS 533 (Jan. 17, 2020). Here, Exxon's acts in and directed at Colorado *are* causally connected; Exxon would require that forum acts be the *exclusive* cause of Plaintiffs' injuries.

[5] Even Suncor recognizes that the *Bristol-Myers* test applies, rather than Exxon's erroneous but-for test. Def. Suncor Energy, Inc.'s Mot. to Dismiss for Lack of Jurisdiction at 11.

Colorado courts have expressly rejected a causation-focused inquiry. For example, in *Etchieson v. Central Purchasing LLC*, jurisdiction was upheld over a Chinese manufacturer for personal injuries suffered from a defective product. *Etchieson v. Central Purchasing LLC* ,232 P.3d 301 (Colo. App. 2010). The defendant directly distributed a specific product in Colorado, while the plaintiff was injured by "a slightly different" model that the defendant did not directly distribute; emphasizing the "relate to" language, the court nonetheless found jurisdiction because that inquiry is "somewhat broader" than whether the forum conduct was a cause-in-fact of the injury. *Id.* at 308. In so holding, *Etchieson* expressly relied on out-of-state decisions rejecting a causation-focused test. *Id.* (citing *e.g. Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 335-36 (D.C. 2000) (rejecting a strict causation test and finding that claims satisfied the nexus requirement in an out-of-state slip-and-fall where non-resident grocery store advertised in the forum); *see also Jayone Foods, Inc. v. Aekyung Indus. Co. Ltd.*, 242 Cal. Rptr. 3d 705, 720 (Cal. App. 2019) (reversing a trial court that imposed a "strict causation requirement in the specific jurisdiction context").

Moreover, a causation-focused test is inconsistent with Colorado cases where jurisdiction has rested on solitary Colorado acts that were part of a much broader chain of tortious conduct. Numerous Colorado Supreme Court cases – while not expressly decided under the "arising under or relates to" prong – refute that a strict assessment of causation is required. Take *Keefe*, 40 P.3d 1267, which involved a malpractice claim brought by a Colorado resident in connection with representation in New York litigation. There, the lawyer did not commit the wrongful acts in Colorado: the only Colorado contacts involved communications to the plaintiff in Colorado that related to the lawsuit. The injury "arose" out of the ongoing lawsuit, but the communications themselves were not considered the but-for cause of the injury. *Id.* at 1272.

Similarly, in *Classic Auto Sales*, the court upheld a finding of jurisdiction over the defendant

where its allegedly tortious in-state conduct involved just one telephone call to the plaintiff in Colorado, while most of the injurious conduct occurred out-of-state, including interactions that occurred entirely in Nebraska. 832 P.3d at 236-238; *see also First Horizon Merch. Servs., Inc.*, 166 P.3d at 175 (finding jurisdiction where Colorado conduct involved mailing two letters, emailing one presentation, and making one telephone call to plaintiffs, while the majority of tortious conduct – fraud by misrepresentation and concealment – occurred in Florida).

2. Plaintiffs satisfy the Colorado and U.S. Supreme Court test: the claims relate to contacts creating a "substantial connection" with Colorado.

Plaintiffs satisfy the proper test. *First*, as noted above, Exxon ignores its out-of-state acts that have massively contributed to Plaintiffs' tortious in-state injuries; the in-state effects of out-of-state acts are forum contacts. *Supra* Argument § I.A.1.a. These tortious effects are "an occurrence" in Colorado and create "an affiliation between [Colorado] and the underlying controversy," *Bristol-Myers*, 137 S. Ct. at 1780; indeed these tortious effects are at the heart of Plaintiffs' claims.

Second, even if – as Exxon erroneously implies – only its in-state acts matter, Exxon does not dispute that its substantial in-state acts *relate* to Plaintiffs' claims. Exxon's fossil fuel operations have a huge footprint in Colorado; it sells large amounts of fossil fuels – itself and through the stream of commerce – in Colorado; and it deceptively promotes fossil fuels and their unchecked use in Colorado. *Supra* Background § I, II. These acts are the Colorado component of a single scheme – to develop and sell fossil fuels and misleadingly promote their unchecked use everywhere – that is the basis for Exxon's liability. Thus, these numerous, decades-long and substantial in-state acts create a sufficient "affiliation," *Bristol-Myers*, 137 S. Ct. at 1780, and a "substantial connection" between, *Archangel*, 123 P.3d at 1194, Plaintiffs' claims against Exxon and Colorado.

That Plaintiffs' claims against Exxon involve more than its in-state acts does not somehow

erase the existence of in-state acts, nor offend due process. As the U.S. Supreme Court recognized in *Keeton*, a defendant's in-state acts need not be the sole or entire basis for their claim to satisfy the due process clause; there, the Supreme Court permitted New Hampshire to exercise jurisdiction over libel injuries the plaintiff suffered in all 50 states, even though the "bulk of the harm done . . . occurred outside New Hampshire," because the claims arose "out of the very activity being conducted, *in part*, in New Hampshire." 465 U.S. at 779-81 (emphasis added).

3. Even if this Court adopted a causation-focused test, Plaintiffs meet that test as followed in some federal circuits.

Even if this Court could adopt a causation test in place of the one laid down by the Colorado Supreme Court, Exxon's argument would fail because the "but for" test used by some federal courts is met here. Under that test, jurisdiction is properly based on "'any event in the causal chain leading to the plaintiff's injury.'" *Emplrs. Mut. Cas. Co.*, 618 F.3d at 1161 (quoting *Dudnikov v. Chalk & Vermilion Fine Arts,* 514 F.3d 1063, 1078 (10th Cir. 2008)).[6]

Here, Plaintiffs allege that the combustion of *all* Exxon's fossil fuels – including those produced, refined, or burned in the State – released greenhouse gases, which persist in the atmosphere, trap heat, and substantially contribute to the concentration of those gases altering the climate; and, that through a campaign of deception and concealment conducted across the country and in Colorado, Exxon has ensured dangerous levels of fossil fuel demand and use. *Supra* Background § II, III. Plaintiffs therefore allege that Exxon knowingly caused, contributed to, exacerbated, and accelerated Plaintiffs' injuries in Colorado, including through acts in this State;

[6] Exxon eschews the "proximate cause" test adopted by other federal courts, but that is met here because "defendant's contacts with the forum are relevant to the merits of the plaintiff's claim." *Emplrs. Mut. Cas. Co.*, 618 F.3d at 1161 (internal quotations omitted). *See supra* § III.B.1.

indeed, Exxon does not dispute that its forum contacts contribute to Plaintiffs' injuries, nor that they are "event[s] in the causal chain." *Emplrs. Mut. Cas. Co.*, 618 F.3d at 1161.

Nor is the causal chain here any more complex, *contra* Mot. at 10-11, than it was in other comparable cases. For example, in tobacco and opioid cases, dozens of companies conspired to misrepresent and conceal known dangers to inflate market demand. Those same companies over-supplied the injurious products across the country, while millions of third-parties became addicted to and used those products in and across all states, resulting in public health crises – the cost of which was borne by communities and local governments. *See generally, e.g.*, *State ex. rel. Hunter*, No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486 at *43 (Okla. Dist. Ct. Aug. 26, 2019) (opioid case); *Simon v. Philip Morris, Inc.*, 86 F. Supp. 2d 95 (E.D.N.Y. 2000) (tobacco case); *see also City of N.Y. v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 337 (E.D.N.Y. 2007) (gun case involving dozens of manufacturers, distributors, and thousands of third party criminal acts).

4. Exxon's new causation test should not be adopted and would upend specific jurisdiction.

Exxon purports to apply the "but for" test some federal circuits apply, but its claim that in-state acts must be the *sole* cause is not supported by those precedents. Exxon seeks a new, far stricter rule, which would bar jurisdiction in any multiple tortfeasor case. Its proposal should be rejected.

First, while Exxon cites tort *liability* rules, Mot. at 11 (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346-47 (2013)), Colorado does not require "but for" causation in multiple contributor cases for tort liability. As previously briefed, Exxon is liable for causing, contributing to, and accelerating the climate alteration that injured Plaintiffs. Pls.' Opp. to Defs.' Mot. to Dismiss for Failure to State a Claim at 19-30. So, even if tort causation standards – rather than the tests articulated by the U.S. Supreme Court, the Colorado Supreme Court, or even the Tenth Circuit –

governed the jurisdictional inquiry, that test must account for multiple contributing tortfeasors in the same way that the law does in the liability context. A jurisdictional rule cannot impose a greater burden on Plaintiffs than what is required to win tort liability on the merits. *See Burton v. Am. Cyanamid*, 128 F. Supp. 3d 1095, 1101 (E.D. Wis. 2015) (refusing to adopt a causation rule for jurisdiction stricter than what was required for liability).

Were Exxon's position the law, specific jurisdiction would have been improper in numerous multiple-tortfeasor cases where it was found, such as in cases against oil companies whose MTBE-laden gasoline traveled through commerce and combined to contaminate water supplies across the country, *see, e.g.*, *State v. Atl. Richfield Co.*, 142 A.3d 215 (Vt. 2016); tobacco companies and their trade associations who conspired and whose fraud and sales combined to create public health crises in nearly every State, *see, e.g.*, *Simon.*, 86 F. Supp. 2d at 126-28; *accord Cole*, 47 F. Supp. 2d at 815-16; *Hollar v. Philip Morris Inc.*, 43 F. Supp. 2d 794, 804 (N.D. Ohio 1998); and asbestos companies who contributed to plaintiffs' aggregate exposure and ultimate injuries, *see, e.g.*, *In re Conn. Asbestos Litig.*, 677 F. Supp. 70 (D. Conn. 1986).[7] As one court held in a case against the gun industry, a defendant "can not be allowed to avoid liability by contending that [its] isolated act[ ] is not sufficient for the court to gain jurisdiction," when it "act[ed] with knowledge that others [were] acting in the same way." *City of N.Y.*, 247 F.R.D. at 337. Such is also the case here.

Second, Exxon's argument is inconsistent with the cornerstone of the due process inquiry: whether it should reasonably expect to be haled into court in Colorado because of its contacts here. *See Burger King*, 471 U.S. at 474-75; *accord Keefe*, 40 P.3d at 1270. A defendant can reasonably expect to

[7] Jurisdiction is proper even where "the bulk of the harm" is suffered out-of-state, so long as there are some in-state *acts* causing in-state harm. *See Keeton*, 465 U.S. 770 at 781. This case thus has a stronger jurisdictional foundation than *Keeton*, because only in-state injuries will be adjudicated.

be sued in a forum that suffers harms it contributes to. The inquiry does not depend on whether others also contributed; jurisdiction should not turn on something other than the defendant's acts.

Third, Exxon's test would have intolerable consequences. A company like Exxon would be free to cause harm across the U.S., and so long as it acted alongside others, it could only be sued where *it* is at home. Thus, Exxon is arguing it can only be subject to general jurisdiction even though such jurisdiction "has [ ] a reduced role" and specific jurisdiction is "the centerpiece of modern jurisdictional theory." *Daimler*, 571 U.S. at 118. The possibility of general jurisdiction elsewhere does not support a miserly approach to specific jurisdiction here. Indeed, under Exxon's view, a similarly situated foreign company – which, unlike Suncor, likely would not be subject to general jurisdiction *anywhere* in the U.S. – would evade U.S. jurisdiction entirely. This would be so even if it conspired with people and intentionally contributed to injuries in the United States; and even if it did substantial business and its contributing injurious acts took place substantially in the United States.[8]

Last, against the weight of precedent and logic, Exxon relies on a single case: *City of Oakland*. This out-of-state, unpublished decision purports to apply a "but for" test, not Colorado's or the Supreme Court's standard. Exxon cannot simply throw away Colorado jurisdictional rules. Mot. at 10-12. The decision also is not supported by Ninth Circuit precedent. While the Ninth Circuit applies a "but for" approach, Plaintiffs have not located any Ninth Circuit case demanding an

[8] Exxon's argument would also end conspiracy jurisdiction, even though its constitutionality has been upheld, where *a single act* in furtherance of the conspiracy occurs in the forum. *See, e.g.*, *Melea, Ltd. v. Jawer Sa,* 511 F.3d 1060, 1070 (10th Cir. 2007) (recognizing "a co-conspirator's presence within the forum" can "create the 'minimum contacts' . . . if . . . substantial steps in furtherance of the conspiracy are taken in the forum"); *Newsome v. Gallacher,* 722 F.3d 1257, 1266 (10th Cir. 2013) ("we do not believe the Constitution would foreclose . . . courts from exercising jurisdiction . . . simply because [conspirators] confined themselves" to another state).

inquiry different from that required to establish liability over joint tortfeasors.[9] Moreover, *City of Oakland*, like Exxon, ignored the effects test and considered only California *acts*, not the out-of-state fossil fuel activities causing harm to California. 2018 U.S. Dist. LEXIS 126258, at *12. *City of Oakland* therefore conflicts with *Calder* and the Ninth Circuit's subsequent decision in *Pakootas*, which made clear that where the defendant *knows* that harm will result in the forum, activities causing that harm are "expressly aimed" at, and are contacts with, the forum. 905 F.3d at 577.

C. Exercising jurisdiction over a multibillion-dollar company with decades-long presence in Colorado is clearly reasonable.

Exxon fails to meet its burden to "present a compelling case that . . . jurisdiction [is] unreasonable." *Burger King*, 471 U.S. at 477. The plaintiff's interests and the forum's interests in exercising jurisdiction will often "justify" even a serious burden on an alien defendant. *Goettman*, 176 P.3d at 71 (quoting *Asahi*, 480 U.S. at 114). Jurisdiction is reasonable here.

Exxon's burden from litigating in Colorado is minimal. Exxon "is not a 'mom and pop' [] shop . . . but a multibillion dollar multinational enterprise" with a huge in-state footprint and "the resources and connections necessary for it to defend this suit in [Colorado] with relative ease." *Simon*, 86 F. Supp. 2d at 133-34. Exxon's only complaint – that multinational companies that produce, sell, or promote fossil fuels in Colorado or direct those activities at this state might be sued

[9] The only Ninth Circuit case *City of Oakland* cited does not support its holding that in-state "slices" contributing to the injury are insufficient and that defendant's in-state conduct, standing alone, must cause the entire injury. 2018 U.S. Dist. LEXIS 126258, at *12-13. In *Doe v. American National Red Cross*, a widow sued a Washington, D.C.-based U.S. government official in Arizona after her husband died from a contaminated blood transfusion in Arizona. 112 F.3d 1048, 1049-1051 (9th Cir. 1997). Defendant allegedly failed to adequately regulate the national blood supply from Washington; there was no allegation that he had any specific contacts with Arizona or role in the husband's blood transfusion, or that he committed tortious out-of-state acts directed at Arizona; on those facts, the Ninth Circuit held that the regulatory oversight allegations were "too attenuated" to satisfy the Ninth Circuit's "'but for' test." *Id.* at 1051-52. *Doe* did not hold that in-state acts or tortious out-of-state acts that combine with others and contribute to a plaintiff's injuries are insufficient.

if they cause injury here – gets the law backwards; Due Process "may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed" by entities that "purposefully derive benefit from their interstate activities." *Burger King*, 471 U.S. at 474 (internal quotation omitted); *accord Goettman*, 176 P.3d at 72.

Colorado's and Plaintiffs' interests outweigh whatever interests Exxon may have. Colorado "has a 'manifest interest' in providing its resident with a convenient forum for redressing injuries inflicted by out-of-state actors," *Burger King*, 471 U.S. at 473, and Plaintiffs' claims implicate public health, safety, and property in Colorado, which makes that interest even more acute. *See Goettman*, 176 P.3d at 71 (finding that forum has interest where case concerns safety of people in Colorado). Moreover, it is far more burdensome for Plaintiffs to litigate in Exxon's home, where they have no connections, than for Exxon to litigate in Colorado, where it has conducted business for decades.

Indeed, "when a defendant commits a tort, he becomes so connected with the forum state that traditional notions of fair play and substantial justice are not offended by the state's exercise of jurisdiction." *Id.* Exxon cannot show jurisdiction is unreasonable here.

II. Exxon's argument does not apply to the Colorado Consumer Protection Act claim, and the Court can exercise pendent jurisdiction over the whole action.

A. Plaintiffs' Consumer Protection Act claim arises from Exxon's Colorado acts.

Plaintiffs have alleged violations and sufficiently stated a claim under the CCPA based on Exxon's deceptive business practices directed at audiences *in Colorado*. This includes Exxon's concealment of fossil fuel risks in connection with its branded fossil fuel ads and sales in Colorado, and its broader campaign misrepresenting the dangers of unchecked fossil fuel use. Pls.' Opp. to Defs.' R. 12(b)(5) Mot. to Dismiss for Failure to State a Claim at 28-29. Since Exxon does not dispute that this conduct was directed to Colorado consumers or argue that the CCPA claims arise

from other acts, Mot. at 4, there is undisputed specific jurisdiction over Plaintiffs' CCPA claims. *See also Exxon Mobil Corp. v. Attorney General*, 94 N.E.3d 786, 797 (Mass. 2018) (Massachusetts AG had jurisdiction over Exxon's climate deception in that State); *Commonwealth v. Purdue Pharm, L.P.*, Nos. 143403, 1884-cv-01808, 2019 Mass. Super. LEXIS 590, at *24 (Mass. Super. Ct. Oct. 8, 2019) (specific jurisdiction in opioid case where the Complaint was premised on alleged misrepresentations defendants allegedly directed to Massachusetts). Similarly, there is no question that it is reasonable to exercise jurisdiction over claims for conduct in violation of the CCPA directed toward Colorado audiences.

B. This Court can exercise pendent jurisdiction over all of Plaintiffs' claims.

Since this Court has personal jurisdiction over Exxon for Plaintiffs' CCPA claims, it can exercise pendent personal jurisdiction over the remaining claims, even if those claims lack an independent basis for jurisdiction. "Pendent personal jurisdiction . . . exists when a court possesses personal jurisdiction over a defendant for one claim, lacks an independent basis for personal jurisdiction over the defendant for another claim that arises out of the same nucleus of operative fact, and then, because it possesses personal jurisdiction over the first claim, asserts personal jurisdiction over the second claim." *United States v. Botefuhr*, 309 F.3d 1263, 1272 (10th Cir. 2002).

The Colorado activities giving rise to Plaintiffs' CCPA claims are part of a broader scheme to sell fossil fuels and profit from unchecked fossil fuel demand by concealing and misrepresenting the dangers of fossil use. Those claims thus share the same common nucleus of operative fact with Plaintiffs' other claims, which are based on those same facts, but also additional Exxon in-state and out-of-state activities. As Colorado extends jurisdiction to the maximum the Constitution permits, *see Classic Auto Sales, Inc.*, 832 P.2d at 239-40, and as pendent jurisdiction poses no constitutional issue, *see CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1076 (9th Cir. 2011); *Action Embroidery*

Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174, 1180-81 (9th Cir. 2004) (collecting cases), this Court should find pendent jurisdiction here as an alternative or added jurisdictional basis.[10]

III. Exxon has consented to jurisdiction in Colorado.

The exercise of jurisdiction over a non-resident defendant satisfies the due process clause where that defendant consents to jurisdiction in the forum. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 174-75 (1939). Thus, "[a] defendant may, by consent, *confer personal jurisdiction upon a court that would otherwise not have jurisdiction over it*, and one of the most solidly established ways of giving such consent is to designate an agent for service of process within the state." *Packaging Store v. Kwan Leung*, 917 P.2d 361, 363 (Colo. App. 1996) (emphasis added). Traditional bases for jurisdiction over a nonresident – such as consent – are not governed by the minimum contacts inquiry. *See Burnham v. Superior Ct. of Cal.*, 495 U.S. 604, 618 (1990). Thus, Exxon's but-for-causation argument and reasonableness argument is irrelevant to this basis for jurisdiction. *See Burger King*, 471 U.S. at 472 (applying the minimum contacts test only "[w]here a forum seeks to assert specific jurisdiction over an out-of-state defendant *who has not consented to suit there*") (emphasis added).

"It is well-settled that a corporation that authorizes an agent to receive service of process in compliance with the requirements of a state statute, consents to the exercise of personal jurisdiction in any action that is within the scope of the agent's authority." *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695, 697 (1st Cir. 1984); *accord Neirbo Co.*, 308 U.S. at 174-75. Pursuant to Colorado's Corporations and Associations Act, Exxon has registered as a "foreign entity" in order to conduct its business and appointed a registered agent for servicing judicial process. *See* COLO. REV. STAT. §§

[10] The Colorado Supreme Court has not yet applied this doctrine, but it has not foreclosed it. *See Found for Knowledge*, 234 P.3d at 682 n.5 (finding sufficient contacts for each claim, and thus no need to address whether pendent personal jurisdiction would suffice).

7-90-801, -803, 805(2) (2019); AC ¶ 105. A registered "foreign entity . . . is subject to the same duties, restrictions, penalties, and liabilities imposed upon, a functionally equivalent domestic entity." COLO. REV. STAT. § 7-90-805(2).

While *Magill* concluded that maintaining a registered agent for service does not "convert" a foreign corporation into a Colorado resident for *venue* purposes, and rejected Ford's registration as a *contact* sufficient for general jurisdiction after *Daimler*, 379 P.3d at 1038-39, 1041, it did not evaluate whether registration under the Colorado Corporations and Associations Act amounts to *consent* to personal jurisdiction. While cases have gone both ways, similar state laws have been interpreted as providing consent to jurisdiction for all claims after *Daimler*.[11] However, even if Exxon's consent is limited to claims arising out of their business in Colorado – which no authority suggests would violate due process – there is still jurisdiction for Plaintiffs' claims. If this Court has jurisdiction over some of Exxon's acts, it can also exercise pendent jurisdiction over the remainder of its related acts. *Supra* § II.B.

CONCLUSION

Exxon does not deny that it has maintained substantial contacts with Colorado. Plaintiffs' claims arise out of or relate to those forum contacts, because the in-state and out-of-state conduct that constitutes those contacts is the same conduct for which Exxon is liable. This Court should reject Exxon's attempt to create a new causation standard and find that it has jurisdiction over Exxon.

[11] *E.g. Grubb v. Day to Day Logistics, Inc.*, No. 2:14-CV-01587, 2015 U.S. Dist. LEXIS 86543, at *8-11 (S.D. Oh. July 2, 2015); *Perrigo Co. v. Merial Ltd.*, No. 8:14-CV-403, 2015 U.S. Dist. LEXIS 45214, at *17-19 (D. Neb. Apr. 7, 2015); *Spanier v. Am. PopCorn Co.*, No. C15-4071-MWB, 2016 U.S. Dist. LEXIS 50071, at *11-13 (N.D. Iowa Apr. 14, 2016).

Dated: March 19, 2020

Respectfully submitted,

/s/ Kevin S. Hannon
Kevin S. Hannon, #16015
THE HANNON LAW FIRM, LLC
1641 Downing Street
Denver, CO 80218
Ph: 303-861-8800
Fax: 303-861-8855
Khannon@hannonlaw.com

David Bookbinder, D.C. Bar No. 455525, *pro hac vice*
NISKANEN CENTER
820 First Street, NE, Suite 675
Washington, DC 20002
Ph: 301-751-0611
DBookbinder@niskanencenter.org

Michelle C. Harrison, *pro hac vice*
Marco Simons, *pro hac vice*
EARTHRIGHTS INTERNATIONAL
1612 K Street, NW #800
Washington, DC 2006
Ph: 202-466-5188
Fax: 202-466-5189
michelle@earthrights.org
marco@earthrights.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of March 2020, a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANT EXXON MOBIL CORP.'S MOTION TO DISMISS AMENDED COMPLAINT 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:

Hugh Q. Gottschalk (#9750)
Evan Stephenson (#37183)
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202-5647
Telephone: (303) 244-1800
Facsimile: (303) 244-1879
Email: gottschalk@wtotrial.com
stephenson@wtotrial.com

Attorneys for Defendants Suncor Energy (U.S.A.), Inc., Suncor Energy Sales Inc., and Suncor Energy Inc.

Colin G. Harris (#18215)
Matthew D. Clark (#44704)
Faegre Drinker Biddle & Reath LLP
1470 Walnut Street, Suite 300
Boulder, CO 80302
Telephone: (303) 447-7700
Facsimile: (303) 447-7800
Email: colin.harris@faegredrinker.com
matthew.clark@faegredrinker.com

Theodore V. Wells, J., *PHV*
Daniel J. Toal, *PHV*
Jaren Janghorbani, *PHV*
Yahonnes Cleary, *PHV*
Caitlin E. Grusaukas, *PHV*
Justin Anderson, *PHV*
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019
Telephone: (212) 373-3089
Facsimile: (212) 757-3990
Email: twells@paulweiss.com
dtoal@paulweiss.com
jjanghorbani@paulweiss.com
ycleary@paulweiss.com
cgrusauskas@paulweiss.com
janderson@paulweiss.com

Kannon K. Shanmugam, *PHV*
Paul, Weiss, Rifkind, Wharton & Garrison LLP
2001 K Street, N.W.
Washington, DC 20006
Telephone: (202) 233-7300
Facsimile: (202) 223-7420
Email: kshanmugam@paulweiss.com

Attorneys for Defendant Exxon Mobil Corporation

/s/ Kevin S. Hannon
Kevin S. Hannon