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

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.

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Case No. 2018CV30349

Division: 2

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PLAINTIFFS' OPPOSITION TO SUNCOR DEFENDANTS' MOTION TO DISMISS OR TRANSFER VENUE TO THE DENVER COUNTY DISTRICT COURT

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I. INTRODUCTION

Suncor Energy (U.S.A.), Inc. ("Suncor USA"), Suncor Energy Sales, Inc., and Suncor Energy, Inc. (collectively, "Suncor"), in their Motion to Dismiss or Transfer Venue to the Denver County District Court ("Mot."), make two unfounded arguments that venue is improper in this Court and can only lie in Denver. First, Defendants argue that annual asphalt supply confirmations, which post-date the filing of this suit and have now expired, into which they inserted without notice an unreasonably broad forum selection clause, govern venue in a case that has nothing to do with the those contracts. Second, they argue that venue for a suit regarding injuries to land (among other things) is improper in the county where that land is located. Neither argument holds up.

II. BACKGROUND

A. Through the filing of this lawsuit and the Amended Complaint, San Miguel County signed ordinary asphalt purchase contracts with Suncor USA.

In 2009, San Miguel County executed a Master Product Purchase and Sale Agreement with Suncor USA. *See* Suncor Ex. 1. That agreement provided general framework terms for future supply of products, to be governed by specific "confirmations" – essentially, price terms sheets for specific purchases. *See id.* It has a standard and quite limited choice of forum clause, providing for venue "in the City of Denver, Colorado for any actions, suits, or proceedings arising out of or relating to this Agreement or the transactions contemplated thereby." *Id.* ¶ 13. The agreement was not reviewed or approved by the County Attorney or the Board of County Commissioners. Amy Markwell Aff. ¶ 5. It does not mention Suncor's Commerce City refinery. *See* Suncor Ex. 1.

Subsequently, Suncor USA and San Miguel County signed several confirmations for the purchase of "asphalt products . . . for the county's road-paving projects" – *not* fossil fuels. Mot. at 3. Each confirmation was valid only from the date of execution through the end of that calendar year.

Thus the parties executed confirmations of sale on July 17, 2012, which expired on December 31, 2012; on August 14, 2014, expiring on December 31, 2014; on July 21, 2015, expiring on December 31, 2015; and on April 11, 2016, expiring on December 21, 2016. *See* Ryan Righetti Aff. Ex. A-D.

Each of these confirmations included numbered terms to govern the details of the purchase, as well as the same boilerplate recital below the terms:

> This Confirmation is entered into pursuant to and is governed by the Master Product Purchase and Sale Agreement between the parties hereto, including but not limited to the General Terms and Conditions attached as Exhibit A thereto, (including Confidentiality obligations). This Confirmation may be executed in counterparts and delivered by email or fax, and each counterpart so delivered shall constitute an original, and together constituting one instrument.

See id. As of April 2018, there was no operative confirmation of terms between the parties.

B. San Miguel County sued over fossil fuels for *consumption*, not road paving asphalt.

Plaintiffs filed suit on April 17, 2018, and filed their currently operative Amended Complaint (AC) on June 11, 2018. That complaint charges that the Defendants are liable "for the substantial role that their production, promotion, refining, marketing and sale of *fossil fuels* played and continues to play in causing, contributing to and exacerbating alteration of the climate." AC ¶ 2 (emphasis added). Plaintiffs targeted fossil fuels because they produced greenhouse gases "when they are combusted." *Id.* ¶ 127. Plaintiffs do not seek to hold Suncor liable for altering the climate on the basis of their development, production or supply of other petroleum products – such as plastics, petrochemicals, or road-paving asphalts.[1]

Suncor's Commerce City refinery is mentioned several times, principally in relation to describing the Defendants, their relationships with each other, and their contacts with Colorado. *Id.* ¶¶ 51-52, 56-57, 91, & 104. Plaintiffs allege that the refinery is an instrument for Defendants'

[1] The term "asphalt" appears in the complaint twice, both times in relations to the *impacts* of climate change on roads, not in relation to causes of the Plaintiffs' injuries. *Id.* ¶¶ 245-46.

tortious fossil fuel activities and their alteration of the climate when it produces fossil *fuels* – such as "over 98,000 barrels per day of gasoline and diesel fuel," *id.* ¶ 57 – that are sold and combusted. Plaintiffs do not allege that they are harmed by the production of non-fuel petroleum products at the refinery.

C. After the filing of this suit, Suncor USA unilaterally altered the annual confirmations.

After Plaintiffs filed the Amended Complaint, Suncor drafted and sent another confirmation for asphalt supply to San Miguel County, without indicating that it was in any way different from prior years. Righetti Aff. ¶ 9. The county's Director of Roads and Bridges, Ryan Righetti, signed what he believed was no different from prior years' confirmations – essentially just setting a price for that year's asphalt supply, as negotiated by the state Department of Transportation. *Id.* ¶¶ 10-13.

Unbeknownst to anyone in San Miguel County, Suncor had inserted new language in the form of a sweeping forum selection clause in the boilerplate at the bottom of the 2018 confirmation:

> The parties further agree that effective as of the date of the Master, Colorado law governs this Confirmation and any and all claims between the Parties *regarding any and all matters* shall be subject to the exclusive jurisdiction of the state or federal courts located in Denver, Colorado regardless when claimed.

Righetti Aff. Ex. E (emphasis added). This language was not included as a numbered term – as are all other terms specific to the confirmation – but was sandwiched between the two sentences of boilerplate below the terms. *Id.* This confirmation expired on December 31, 2018.

In 2019, Suncor went a step further, inserting the following new sentence:

> The Parties further agree that effective as of the date of the Master, Colorado law governs this Confirmation *and any and all claims* between the Parties *and their affiliates* regarding any and all matters shall be subject to the exclusive jurisdiction of the state or federal courts located in Denver, Colorado regardless when claimed.

Righetti Aff. Ex. F (emphasis added). Again, this language was hidden in the boilerplate at the bottom. *Id.* Again, this was drafted by Suncor, with no notice to Mr. Righetti, no indication that it

was any different from years prior, and no review or approval by the County Attorney or the Board. Righetti Aff. ¶¶ 16-18; Markwell Aff. ¶ 13. This confirmation expired on December 31, 2019.

At all points, Mr. Righetti's contracting authority, as delegated by the Board, did not extend beyond simple purchase contracts; it certainly did not extend to contracts affecting litigation. Markwell Aff. ¶¶ 6-10 & Ex. G-I. The contracting policy was published online, *id.* ¶ 7, and Mr. Righetti never represented that he had such authority. Righetti Aff. ¶ 19.

D. The Amended Complaint is replete with allegations of harm to property in Boulder County and seeks to abate the nuisance caused.

Plaintiffs seek remedies for injury to various interests in Boulder County and San Miguel County. This includes injury to "extensive real property," AC ¶ 458, in that the Defendants, "by causing and/or contributing to climate change . . . have created conditions on and/or set in motion forces that cause interference with Plaintiffs' real property, and permitted those conditions and forces to persist." *Id.* ¶ 460. This includes real property in Boulder County. *E.g. id.* ¶ 469.

Plaintiffs do not seek to limit Defendants' production or sales of fossil fuels, or to limit greenhouse gas emissions. *Id.* ¶ 542. Plaintiffs do, however, seek abatement of public and private nuisance by other means, including "restitution of their costs to abate the nuisance," *id.* ¶ 471, "remediation and/or abatement of the hazards . . . by any other practical means," *id.* ¶ 534, and "any other applicable remedies and any other relief as this Court deems just and proper." *Id.* ¶ 540.

III. ARGUMENT

A. Venue is proper under C.R.C.P. 98 because this action affects land in Boulder County and torts were committed in Boulder County.

1. This action affects land in Boulder County.

Plaintiffs' primary basis for venue is that this is an action "affecting real property" under C.R.C.P. 98(a), and the "subject matter of the action is located in Boulder County." AC ¶ 87.

Suncor's motion ignores this basis for venue, focusing instead only on C.R.C.P. 98(c)(5) and the alternate ground that the torts were committed in part in Boulder County. Mot. at 14-15.

It has long been the law that suits for injuries to real property may be filed where the property is located. Rule 98(a) is the successor to a statute that provided "that actions 'for injuries to real property' shall be tried in the county 'in which the subject of the action . . . is situated.'" *Twin Lakes Reservoir & Canal Co. v. Sill*, 89 P.2d 1012, 1014 (Colo. 1939). Under that statute, an action for trespass was proper in the county where the injured land was located. *Id.* This statute was combined with another to form the original Rule 98(a), which applied to actions "affecting property," including actions alleging "injury" to property. *Craft v. Stumpf*, 170 P.2d 779, 780 (Colo. 1946). The Colorado Supreme Court has applied this to the current Rule 98(a): "An action affecting real property is one in which 'title, lien, *injury*, quality or possession' is at issue." *7 Utes Corp. v. District Court of Eighth Judicial Dist.*, 702 P.2d 262, 266 (Colo. 1985) (quoting *Craft*, 170 P.2d at 779) (emphasis added). This is unquestionably an action alleging injury to real property. Venue is proper in Boulder County.

2. The torts were committed in part in Boulder County.

Alternatively, torts were committed in Boulder County, based both on injuries and tortious acts occurring there, and venue is therefore proper under C.R.C.P. 98(c)(5).

In Colorado, the location where the tort occurred includes where injuries are suffered. In *Magill v. Ford Motor Co.*, 379 P.3d 1033 (Colo. 2016), the Colorado Supreme Court considered the proper venue in a case where Ford had allegedly committed tortious acts outside Colorado (manufacturing cars with defective components), leading to injury in Colorado (an auto accident in Douglas County). *Id.* at 1035. The court held that venue would have been proper under Rule 98(c)(5) where the accident occurred and injuries were suffered, even though none of Ford's tortious acts occurred there. *Id.* at 1041. *Cf. Classic Auto Sales, Inc. v. Schocket*, 832 P.2d 233, 235-36 (Colo.

1992) (recognizing that Colorado's long arm statute, which provides jurisdiction over tortious acts in Colorado, is satisfied even "when only the resulting injury occurs in this state"). Thus venue is proper because Plaintiffs suffered injury in Boulder County.

Aside from Plaintiffs' local injuries, however, Plaintiffs also base venue on "carrying out of deceptive trade practices" in Boulder County. AC ¶ 87. Plaintiffs allege that Defendants have misleadingly marketed their fossil fuels, including in Boulder County, AC ¶¶ 415-16, and that Colorado residents – including in Boulder County – were the target of Defendants' deceptive trade practices. *Id.* ¶ 498. This activity is an integral part of Plaintiffs' complaint – indeed, Suncor appears to concede that venue is proper where they "made misrepresentations." Mot. at 15. Thus these allegations also form an adequate basis for venue.

Plaintiffs also allege that a Suncor subsidiary, Petro-Canada Resources (USA) Inc., "produced fossil fuels . . . in Boulder County." AC ¶ 98. Suncor does not dispute that this conduct is a sufficient basis for venue, but argues that it is irrelevant because it was carried out by a "nonparty." Mot. at 4 n.2. As Plaintiffs argue elsewhere, however, Suncor Energy is responsible for its subsidiaries' conduct. Pls.' Opp. to Suncor Energy Inc.'s Mot. to Dismiss for Lack of Personal Jurisdiction at 15-21 ("Opp."); *see, e.g.*, AC ¶¶ 48-56. Thus the production of fossil fuels in Boulder County is also conduct on which Plaintiffs' complaint is based, providing another basis for venue.

B. Venue is also proper because this is an action to abate a nuisance.

Venue is also proper under COLO. REV. STAT. §16-13-307 (2019), because Plaintiffs are seeking to abate a public nuisance, and "some part" of the land at issue lies in Boulder County. *Id.* § 16-13-307(2). Moreover, the public nuisance act was committed in Boulder County. *Id.*

Defendants' contrary argument depends on the notion that an action primarily seeking the *costs* to address a public nuisance is not an action for abatement. Their only source is COLO. REV.

STAT. § 16-13-301(1), but that statute does not say that actions for money cannot be considered abatement; the definition it provides is circular, stating that an "'[a]ction to abate a public nuisance' means any action authorized by this part 3 to restrain, remove, terminate, prevent, *abate*, or perpetually enjoin a public nuisance." (Emphasis added.) "Abate" is not defined.

Nuisance abatement is not limited to an injunction requiring the party responsible for the nuisance to remove it. Colorado law recognizes that public entities may address the nuisance and charge the costs of the abatement to the responsible party. *E.g. Munn v. Corbin*, 44 P. 783, 788 (Colo. App. 1896) (quoting 1893 Colo. Sess. Laws § 55); COLO. REV. STAT. § 25-1-518(3) (2019). A public entity may seek a remedy in which it undertakes to "abate the nuisance" while making the defendant "responsible for the reasonable costs of abatement." *Price v. Lakewood*, 818 P.2d 763, 765 (Colo. 1991); *see also Oberst v. Mays*, 365 P.2d 902, 904 (Colo. 1961) (noting that abatement under one statute includes "work to be done by the State of Colorado at the landowner's expense").[2] The phrase "action to abate a nuisance" in Section 16-13-307(2) thus include actions in which the plaintiff seeks the costs of addressing the nuisance – such as this one.

Moreover, Plaintiffs have not abandoned all potential for an order to the Defendants to take corrective action. While they have made clear that they are not seeking to enjoin the production or combustion of fossil fuels, there may be other corrective action that Defendants can take that would help to abate the nuisance. That remains to be seen, but it is among the remedies Plaintiffs seek.

C. San Miguel County's contracts with Suncor USA do not require transfer to Denver.

1. The 2009 Master Contract does not apply to these claims.

[2] *See also, e.g.*, *Orange County Water Dist. v. Unocal Corp.*, No. SACV 03-01742, 2016 U.S. Dist. LEXIS 193938, *23 (N.D. Cal. Nov. 3, 2016) ("Sometimes, courts award plaintiffs the cost of abatement, rather than issue an injunction ordering defendants' abatement . . . This occurs even when . . . the damages accrued by bearing future remediation costs are necessarily prospective.").

Suncor wrongly argues that the choice-of-forum clause in the 2009 Master Contract governs San Miguel County's claims, because they are claims "relating to" the contract. Mot. at 7-8.

Suncor misleadingly states that Plaintiff's claim is that the operation of the Commerce City refinery is itself a nuisance, Mot. at 8. Rather Plaintiff claims that Defendants' fossil fuel activities – i.e., knowingly producing, promoting, refining, marketing and selling a substantial amount of *fossil fuels* used at levels sufficient to alter the climate, and misrepresenting the dangers associated, with their use – has caused, created, contributed to a nuisance. AC ¶ 445. The supply of asphalt for road maintenance is not related to Plaintiff's allegations of harm Suncor's alteration of the climate, which are in turn not related to the contract for the supply of asphalt.

Still too, the Master Contract does not state that all claims relating to the Commerce City refinery are covered by its forum selection clause; it states that all claims relating to the *contract* are covered. Suncor Ex. 1 ¶ 13. The contract does not even mention the Commerce City refinery, or anything about the production of asphalt. Suncor is essentially arguing that a forum selection clause for claims relating to a purchase contract covers any and all torts committed in the production, marketing, and distribution of the product at issue – even where the contract itself only covers the purchase and supply of the product, and the claim has nothing to do with the contract.

Courts do not interpret such clauses so broadly. In general, "relating to" an agreement means having "some 'logical or causal connection' to the" agreement. *John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1074 (3d Cir. 1997) (quoting Webster's Third New International Dictionary, 1916 (1971)). While contractual forum selection clauses *can* cover related tort claims, "[w]hether a forum selection clause applies to tort claims depends on whether resolution of the claims relates to interpretation of the contract." *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d

509, 514 (9th Cir. 1988); *see also Crescent International, Inc. v. Avatar Communities, Inc.,* 857 F.2d 943, 944 (3d Cir. 1988) (finding tort claims covered by a choice of forum clause so long as they "arise out of the contractual relation and implicate the contract's terms"). This suit has no logical connection to the Master Contract, and does not implicate its terms.

"[T]he Court must also consider what the phrases 'arising out of' and 'relating to' modify." *Lawson v. Global Payments, Inc.*, No. 18-cv-03360-PAB-SKC, 2019 U.S. Dist. LEXIS 157656, *8 (D. Colo. Sep. 16, 2019). In *Lawson*, the court concluded that these phrases in the context of an employment agreement encompassed "only those claims relating to either the Agreement itself or those aspects of plaintiff's employment specifically governed by the Agreement," and therefore did not even cover employment-related claims not addressed in the contract. *Id.* at *12. Here, those phrases modify the Master Contract; they cannot apply to claims that do not relate to it.

The Eleventh Circuit specifically considered a forum-selection clause in a purchase contract, and found that a claim was not "related in any way" to the contract where the plaintiff did not "rely on the terms of the . . . purchase contract," "attempt to hold the [defendants] to the terms of the . . . purchase contract or any obligations under the . . . purchase contract," and did not "seek any relief concerning the . . . purchase contract." *Bah. Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1340-1344 (11th Cir. 2012). Suncor puts forward no argument suggesting that the claims here have anything to do with interpretation of the Master Contract.

Suncor's only case interpreting the scope of a forum selection clause, *MPVF Lexington Partners, LLC v. W/P/V/C, LLC*, 148 F. Supp. 3d 1169 (D. Colo. 2015), is leagues away from the instant case. There, the parties had entered into a contract, and subsequently entered into a settlement agreement to resolve all disputes arising out of that contract; the forum selection clause covered all claims "concerning" the settlement agreement. *Id.* at 1175. The district court held that a

later suit alleging breach of the original contract – "claims regarding which were supposed to have been settled" by the agreement – was encompassed by the forum selection clause. *Id.* at 1180-81.

Here, by contrast, Plaintiff's claims have nothing whatsoever to do with the purchase contract. And if there is any ambiguity regarding the scope of the forum selection clause, it "should be more strictly construed against the drafter" – Suncor. *Mt. States Adjustment v. Cooke*, 412 P.3d 819, 825 (Colo. App. 2016). The forum selection clause does not cover San Miguel County's claims here.

2. The 2018 and 2019 confirmations do not require transfer to Denver.

a. The confirmations post-date the filing of this suit and have now expired.

Regardless of their applicability or enforceability otherwise, the forum selection clauses in the 2018 and 2019 confirmations do not apply to this suit for two simple reasons: the suit and Amended Complaint were filed first, and these confirmations have now expired.

Suncor cites no case supporting the position that a subsequently executed contract can oust venue regarding a previously filed lawsuit. The case it cites *Zink v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 13 F.3d 330, 332 (10th Cir. 1993) was about an arbitration clause, not a forum selection clause, and says nothing about applying such a clause to a previously-filed lawsuit.

Suncor's argument thus depends on the position that the forum selection clause was retroactive, and that the parties intended that it cover this already-filed lawsuit – despite the fact that one party, San Miguel County, did not even know the clause was in the contract. Their support for this is the fact that the clause states that it is "effective as of the date of the Master." Mot. at 7. This vague language does not suffice, because each confirmation also has a very specific term – from June 18 through December 31, 2018, and from March 22 through December 31, 2019. Righetti Ex. E & F. Because Suncor drafted this contract, its terms are construed against Suncor, *Green Shoe Mfg. Co. v. Farber,* 712 P.2d 1014, 1016 (Colo. 1986), and thus the vague "effective" language must yield to

the very specific and obvious time period of the confirmation.

Venue is determined at the time of suit. *See, e.g.*, *Ajaj v. United States*, No. 15-cv-02849, 2020 U.S. Dist. LEXIS 25649, *19-20 (D. Colo. Feb. 13, 2020). The U.S. Supreme Court has construed language nearly identical to Colorado's rule to refer to where a plaintiff could have brought the case *at the time of filing*. *Hoffman v. Blaski*, 363 U.S. 335, 343 (1960); *accord Stafford v. Briggs*, 444 U.S. 527, 535-36 (1980) (reading another provision of the federal venue statute, cast "in the present tense," as describing the defendant "at the time of the suit"). Any other rule could lead to chaos in the courts, with venue being ousted at any point in the case – whether by a change in residence of a party, the dismissal of a party, or a later edited forum selection clause.[3] Suncor's argument would mean that even if venue was proper when filed, and the litigation had proceeded in this Court for years, one defendant could at any point execute a forum selection clause in an unrelated contract with one plaintiff and oust venue for the entire action.

Even if venue were determined at the present time, rather than at the time of suit, that would not help Suncor's argument. The 2018 and 2019 confirmations have both expired; by their express terms, they each expired at the end of the year in which they were executed. Only the Master Contract's forum selection clause could apply; it does not because it is unrelated to Plaintiff's claims.

b. These forum selection clauses are unenforceable.

Suncor USA cannot, by sneaking language into a purchase contract with a county department head – language that was neither highlighted as a new term nor approved by the Board of County Commissioners – oust venue for this suit. Thus, the only reasonable interpretation of the clauses here is the same as in Master Contract – that they only cover claims relating to the purchase

[3] *E.g. Driver v. Helms*, 577 F.2d 147, 150 n.8 (1st Cir. 1978) ("[I]f a court were not able to determine venue at the time an action is brought, judicial processes could be thrown into chaos by mobile litigants."), *rev'd sub nom.* on other grounds *Stafford v. Briggs*, 444 U.S. 52 (1979).

of asphalt, and thus do not cover this suit. Any attempt to give these clauses broader interpretation, and cover claims having no relation to the underlying contract, fails as such interpretation is unenforceable as patently unreasonable and the product of overreaching.

The U.S. Supreme Court has held a forum selection clause does not control where "the party seeking to void the clause shows (1) that the clause was unreasonable and unjust; (2) that it was the product of fraud or overreaching; or (3) that enforcement of the clause would contravene a strong public policy of the forum in which suit is brought." *Cagle v. Mathers Family Trust*, 295 P.3d 460, 464 (Colo. 2013) (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)). Colorado follows the *Bremen* rule. *Nickerson v. Network Solutions, LLC*, 339 P.3d 526, 530 (Colo. 2014).

Forum selection clauses that attempt cover claims unrelated to the contract are unreasonable. "[I]t would be unreasonable to apply a broad forum selection clause contained in a contract to a lawsuit that is completely unrelated to the subject of the contract." *Terra Int'l v. Mississippi Chem. Corp.*, 119 F.3d 688, 692 n.6 (8th Cir. 1997). Indeed, courts go out of their way to avoid interpreting facially broad forum selection clauses in this manner. For example, when a plaintiff argued that a forum selection clause was unconscionable because it would apply to all claims between the parties – regardless of their relation to the contract – one federal court rejected that interpretation as "unreasonable," concluding that the clause should be interpreted to mean that "disputes *related* to the [contract] are subject to the clause, while those *unrelated* to the contract may be filed in any court where jurisdiction is proper." *Arion, LLC v. LMLC Holdings, Inc.*, No. 18 C 5904, 2018 U.S. Dist. LEXIS 211415, *7 (N.D. Ill. Dec. 14, 2018).

The clauses are also the product of overreaching. "Overreaching is defined as the 'act or an instance of taking unfair commercial advantage of another.'" *United Rentals, Inc. v. Pruett*, 296 F. Supp. 2d 220, 227 (D. Conn. 2003) (quoting Black's Law Dictionary (7th Ed. 1999)). In this case, Suncor's

overreaching is evident from its behavior in inserting a sweeping forum selection clause into the fine print of a purchase contract presented to a county department head – a provision that had not been in any prior version of the pattern of annual contract confirmations. The confirmation was drafted by Suncor without any discussion, and signed by Mr. Righetti without any awareness that he was purporting to agree to move the county's climate lawsuit to Denver as part of an asphalt supply contract. Such a provision has no place in these contracts. There was simply no meeting of the minds. *Bejmuk v. Russell*, 734 P.2d 122, 123 (Colo. App. 1986); s*ee also* C.J.I (Civ.) 19:2.

Suncor's attempt to alter proper venue during the course of this case by inserting an obviously inappropriate clause into a routine purchase agreement must fail.

c. The forum selection clauses cannot be given a broad interpretation, because they would have been executed without authority.

Suncor's attempt here – sneak a sweeping forum selection clause covering claims completely unrelated to the contract and even covering parties outside the contract – is ultimately self-defeating. These clauses cannot be interpreted the way Suncor wants because if they were, the confirmations would have been executed without authority.[4]

The contracting power of a county is vested in the Board of Commissioners, which may delegate that authority according to specified "policies and procedures." COLO. REV. STAT. § 30-11-107(1)(aa) (2019). For department heads such as Mr. Righetti, San Miguel County's contracting policy delegates authority to enter into purchase contracts below a certain threshold. Markwell Aff. ¶¶ 6-9. While that purchase authority may carry the implicit authority over contract terms relating to the purchase – such as a forum selection clause for claims arising out of the contract itself – it does *not* include authority to determine venue for unrelated litigation. *Id.* ¶ 10. Suncor knew this. The

[4] This is also true of the forum-selection clause in the Master Contract.

County's purchasing policy was online, *id.* ¶ 7, Mr. Righetti never represented that he had broader authority, Righetti Aff. ¶ 19, and Suncor knew the contracts were not approved by the only entity with the requisite authority – the Board of County Commissioners. Markwell Aff. ¶ 13.

Contracts made by public officials without valid authority are not binding. *E.g.*, *Big Sandy School Dist. v. Carroll*, 433 P.2d 325, 328 (Colo. 1967). Indeed, decisions affecting litigation probably *cannot* be delegated. Decisions involving "judgment and discretion on the part of the municipal body, which have been vested by statute in a municipal corporation may not be delegated unless such has been expressly authorized by the legislature." *Id.* The powers of a county, including the power "to sue," COLO. REV. STAT. § 30-11-101(1)(a) (2019), are vested in the Board, *id.* § 30-11-103; while some duties may be delegated, there are no specific provisions for delegating power over litigation.

Suncor's argument requires the court to find that even though the Board approved the filing of a lawsuit in a particular county, and that lawsuit is already filed, any department head could then sign a contract ousting otherwise proper venue and binding the County to a different forum. That position is untenable on its face and only serves to highlight the invalidity of Suncor's gambit here.

3. Transfer of the entire action is not required.

Even if any part of San Miguel County's claims must be transferred to Denver County, that does not entail that the entire suit should be – especially for the claims of Boulder County and the City of Boulder. If the clause does require transfer, only San Miguel County consented to have its claims tried in Denver; the Boulder Plaintiffs are entitled to have claims for injuries to their land heard in the county where the land is located.

Suncor cites no Colorado cases suggesting that the transfer of one plaintiffs' claims under a forum selection clause should lead to the transfer of the entire action. Such a result would be unjust in the extreme. The three Plaintiffs joined together to enhance the convenience to the parties and

the courts; they were not required to do so. Suncor argues that it makes no sense to have multiple courts considering similar claims, but in fact that happens all the time; indeed, in California, at least eight cities and counties have separately filed similar climate nuisance suits. *City of Oakland v. BP p.l.c.,* 325 F. Supp. 3d 1017 (N.D. Cal. 2018); *County of San Mateo v. Chevron Corp.,* 294 F. Supp. 3d 934 (N.D. Cal. 2018).

Even when claims between some parties are governed by a forum selection clause, the courts analyze the propriety of a venue transfer for the other parties independently of the forum-selection clause, and then determine whether the claims should be severed and transferred, or all claims kept together (in either court). *E.g.*, *In re Howmedica Osteonics Corp.*, 867 F.3d 390, 403-05 (3d Cir. 2017).

> In exercising its discretion to determine whether it should retain the case in its entirety, transfer the case in its entirety, or sever certain parties or claims in favor of another forum, the court considers the nature of any interests weighing against enforcement of any forum-selection clause; the relative number of non-contracting parties to contracting parties; and the non-cont[r]acting parties' relative resources, keeping in mind any jurisdiction, venue, or joinder defects that the court must resolve.

Id. at 405. In this case, there are strong interests against enforcement of the forum selection clause. Only one plaintiff (out of three) and one defendant (out of four) contracted for the clause, and Suncor easily has the resources to litigate in two forums. Thus, if judicial efficiency weighs strongly in favor of keeping all the claims together, the appropriate course is to retain them in *this* Court. Otherwise, any claims covered by the clause should be severed and transferred.

IV. CONCLUSION

Venue for this climate alteration suit is proper in Boulder County because much of the injured property at issue in this suit is located there, and the alleged torts occurred there. And it cannot be ousted by an asphalt supply contract. Suncor's motion must be denied.

Dated: March 19, 2020

Respectfully submitted,

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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 SUNCOR DEFENDANTS' MOTION TO DISMISS OR TRANSFER VENUE TO THE DENVER COUNTY DISTRICT COURT** was electronically filed with the court through CCE and served on the following counsel of record through CCE:

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