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STATE OF COLORADO
Boulder County Combined Court
1777 Sixth Street
Boulder, CO 80302

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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

**PLAINTIFFS' OPPOSITION TO DEFENDANT SUNCOR ENERGY, INC.'S
MOTION TO DISMISS AMENDED COMPLAINT FOR LACK OF PERSONAL
JURISDICTION PURSUANT TO COLO. R. CIV. P. 12(b)(2)**

TABLE OF CONTENTS

INTRODUCTION..... 1

BACKGROUND 3

 I. Unchecked fossil fuel use has altered Colorado’s climate and harmed Plaintiffs 3

 II. Suncor engaged in and directed substantial fossil fuel activity in Colorado 3

 III. Suncor engaged in tortious acts knowing it would alter the climate in Colorado..... 5

STANDARD FOR RULE 12(b)(2) MOTIONS..... 6

ARGUMENT..... 7

 I. This Court has specific jurisdiction over Suncor..... 7

 A. Suncor is subject to jurisdiction for its own acts directed at Colorado 8

 1. Suncor directed fossil fuels – derived largely from its Canadian tar sands operation – through the stream of commerce at Colorado..... 9

 2. Suncor caused tortious harms and injury to land in Colorado..... 9

 3. Suncor conspired with others, such as API, who engaged in tortious and deceptive acts in furtherance of the conspiracy in Colorado 13

 B. Suncor is subject to specific jurisdiction based on fossil fuel activity in Colorado that it directed, and which was carried out by its agents..... 15

 1. Suncor directs its subsidiaries’ Colorado fossil fuel activity; this creates its own contacts here 15

 2. Suncor is subject to specific jurisdiction because it conducted parts of its in-state business through subsidiaries that are its agents..... 16

 3. Suncor’s subsidiaries act as its alter egos; their actions can be imputed under a veil-piercing standard 20

 C. Plaintiffs’ claims arise out of and relate to Suncor’s contacts 21

 II. This Court can exercise general jurisdiction over Suncor; Colorado is the only state where it has such continuous and systematic business 22

 III. The exercise of jurisdiction is reasonable 23

CONCLUSION.....25

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Align Corp. v. Boustred</i> , 405 P.3d 1148 (Colo. 2017)	9 & n.6
<i>Archangel Diamond Corp. v. Lukoil</i> , 123 P.3d 1187 (Colo. 2005)	7, 10, 12 & n.9, 23, 24
<i>Asabi Metal Industry Co. v. Superior Court</i> , 480 U.S. 102 (1987).....	9 & n.6, 24
<i>Bristol-Myers Squibb Co. v. Superior Court of California</i> , 137 S. Ct. 1773 (2017)	8
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985).....	2, 7-9, 23, 24
<i>Calder v. Jones</i> , 465 U.S. 783 (1984).....	2, 8, 10, 11 & n.8, 12 & n.9, 13, 15
<i>Castillo v. Koppes-Conway</i> , 148 P.3d 289 (Colo. App. 2006).....	22 n.14
<i>City of Milwaukee v. Illinois</i> , 451 U.S. 304 (1981).....	11
<i>City of New York v. A-1 Jewelry & Pawn Inc.</i> , 247 F.R.D. 296 (E.D.N.Y. 2007)	13
<i>Classic Auto Sales, Inc. v. Schocket</i> , 832 P.2d 233 (Colo. 1992)	7
<i>Cole v. Tobacco Institute</i> , 47 F. Supp. 2d 812 (E.D. Tex. 1999)	12, 13, 19
<i>Columbia River Packers' Ass'n v. McGowan</i> , 219 F. 365 (9th Cir. 1914).....	11
<i>D & D Fuller CATV Construction, Inc. v. Pace</i> , 780 P.2d 520 (Colo. 1989)	10 & n.7, 14 n.10
<i>Daimler AG v. Bauman</i> , 571 U.S. 117 (2014).....	17, 18, 22, 23

<i>Deacon v. Shreve</i> , 23 N.J.L. 204 (N.J. 1851)	11
<i>Far West Capital, Inc., v. Towne</i> , 46 F.3d 1071 (10th Cir. 1995)	12 n.9
<i>First Horizon Merchant Services v. Wellspring Capital Management, LLC</i> , 166 P.3d 166 (Colo. App. 2007).....	17, 18, 19
<i>Foundation for Knowledge in Development v. Interactive Design Consultants, LLC</i> , 234 P.3d 673 (Colo. 2010)	6-7, 10 & n.7
<i>Goettman v. North Fork Valley Restaurant</i> , 176 P.3d 60 (Colo. 2007).....	8, 9-10, 17, 22, 23, 24, 25
<i>In re Griffith v. SSC Pueblo Belmont Operation Co. LLC</i> , 381 P.3d 308 (Colo. 2016)	17, 18, 20
<i>Guidry v. United States Tobacco Co.</i> , 188 F.3d 619 (5th Cir. 1999).....	10, 12, 13
<i>Illinois v. City of Milwaukee</i> , 599 F.2d 151 (7th Cir. 1979).....	11
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310 (1945).....	7, 23
<i>J. McIntyre Machinery, Ltd. v. Nicastro</i> , 564 U.S. 873 (2011).....	9 n.6
<i>Keeffe v. Kirschenbaum & Kirschenbaum, P.C.</i> , 40 P.3d 1267 (Colo. 2002)	7-8, 12
<i>Keeton v. Hustler Magazine, Inc.</i> , 465 U.S. 770 (1984).....	12
<i>Magill v. Ford Motor Co.</i> , 379 P.3d 1033 (2016).....	9, 17, 18, 22, 23
<i>Martin v. Freeman</i> , 272 P.3d 1182 (Colo. App. 2012)	21
<i>Mass. v. Philip Morris</i> , No. 95-7378-J, 1998 Mass. Super. LEXIS 350 (Mass. Super. Ct., Mar. 20, 1998).....	16
<i>McCallum Family L.L.C. v. Winger</i> , 221 P.3d 69 (Colo. App. 2009).....	20

<i>Meeks v. SSC Colorado Springs Colonial Columns Operating Co.</i> , 380 P.3d 126 (Colo. 2016)	18
<i>National Union Fire Insurance Co. v. Kozeny</i> , 115 F. Supp. 2d 1231 (D. Colo. 2000)	14 & n.10
<i>Pace v. D&D Fuller CATV Construction, Inc.</i> , 748 P.2d 1314 (Colo. App. 1987)	14 n.10
<i>Pakootas v. Teck Cominco Metals, Ltd.</i> , 905 F.3d 565 (9th Cir. 2018).....	11
<i>Pfizer Inc. v. Mylan Inc.</i> , 201 F. Supp. 3d 483 (D. Del. 2016).....	18
<i>Phillips v. Englewood Post No. 322 Veterans of Foreign Wars of the United States, Inc. (In re Phillips)</i> , 139 P.3d 639 (Colo. 2006)	20, 21
<i>Rome v. Reyes</i> , 401 P.3d 75 (Colo. App. 2017).....	8, 9, 15, 16
<i>SGI Air Holdings II LLC v. Novartis International AG</i> , 239 F. Supp. 2d 1161 (D. Colo. 2003)	17, 19 n.13
<i>Simon v. Philip Morris, Inc.</i> , 86 F. Supp. 2d 95 (E.D.N.Y. 2000).....	12, 13, 15, 16, 24
<i>State v. Purdue Pharma L.P.</i> , No. PC-2018-4555, 2019 R.I. Super. LEXIS 95 (R.I. Super. Ct. Aug. 16, 2019)	17 n.12
<i>Stauffer v. Stegemann</i> , 165 P.3d 713 (Colo. App. 2006).....	14
<i>Stockdale v. Ellsworth</i> , 407 P.3d 571 (Colo. 2017)	21
<i>Taishan Gypsum Co. v. Gross</i> , 753 F.3d 521 (5th Cir. 2014).....	17 n.12, 21
<i>United States v. Bestfoods</i> , 524 U.S. 51 (1998).....	15
<i>Viega GmbH v. Eighth Judicial District Court of the State</i> , 328 P.3d 1152 (Nev. 2014)	18
<i>Walden v. Fiore</i> , 571 U.S. 277 (2014).....	8, 12

Williams v. Yamaha Motor Co.,
851 F.3d 1015 (9th Cir. 2017) 17 n.12

Other

RESTATEMENT (SECOND) OF TORTS § 2 11 n.8

RESTATEMENT (SECOND) OF TORTS § 8A 11 n.8

INTRODUCTION

Defendant Suncor Energy, Inc. (“Suncor”)¹ has altered the climate, causing catastrophic impacts – such as fires, floods, and drought – that are now harming Plaintiffs in Colorado. This was no accident; Suncor has known for decades that these harms would result from unchecked fossil fuel use. Despite that knowledge, it developed, sold, and promoted fossil fuels at levels that it knew would alter the climate and aggravate that alteration; and it misrepresented the dangers of unchecked fossil fuel use to preserve demand and augment its profits. Suncor committed these tortious acts across its enterprise *and in Colorado*, and Plaintiffs are now suffering local injuries *entirely in Colorado*.

Despite causing serious harm in and to Colorado, and having a host of other contacts with this State, Suncor argues that it is not subject to jurisdiction in Colorado, claiming falsely to have no contacts here. It is clearly wrong and it is subject to specific *and* general jurisdiction in Colorado.

A single contact with the forum is enough for specific jurisdiction; Suncor’s numerous contacts with Colorado more than suffice. *First*, Suncor is subject to **specific jurisdiction** based on its *own* acts directed at and contacts with Colorado. Suncor deliberately sent an enormous amount of its fossil fuels into Colorado for sale and use; it committed intentional and tortious acts outside Colorado that it knew would cause tortious effects here; and it participated in a conspiracy to conceal and misrepresent the dangers of unchecked fossil fuel use, which was conducted, in part, in Colorado. Suncor does not challenge these contacts; it ignores them. Mot. at 9-11. The stream of commerce, causing tortious effects in Colorado, and conspiracy bases for jurisdiction are sufficient and do not depend on imputing Suncor’s subsidiaries’ acts in Colorado to Suncor.

Second, Suncor’s argument that certain in-state activities cannot be attributed to it because

¹ In its Motion, Defendant renames itself “Suncor Canada” to obfuscate its extensive contacts with Colorado. That name is not used on its website or in any other document Plaintiffs have seen.

they were carried out by subsidiaries is wrong. As the primary architect and principal participant in the relevant wrongdoing carried out by its subsidiaries, Suncor is directly responsible for those acts. Thus, Plaintiffs do not need agency or veil-piercing theories at all; jurisdiction properly rests on *Suncor's* own participation in its subsidiaries' forum acts. Moreover, and contrary to what Suncor argues, agency is a viable basis for exercising specific jurisdiction. Suncor's subsidiaries were its agents for the forum acts relevant to this case: Suncor controlled and benefited from the relevant fossil fuel activities undertaken by its subsidiaries; and it is uncontested that those subsidiaries could not deviate from Suncor's plan or refuse to produce, refine, sell or promote fossil fuel. Finally, even if subsidiary contacts are only relevant in alter ego scenarios, Suncor's own statements demonstrate that it disregards corporate formalities and operates as a single business.

This Court also has **general jurisdiction** over Suncor. Colorado is Suncor's principal place of U.S. business, making it essentially at home here. Suncor has no such presence in any other state.

By arguing that it is not subject to any form of jurisdiction – despite directing fossil fuels at Colorado, knowingly causing harm to this State, and having nowhere near the same presence anywhere else in the United States – Suncor is trying to erect the type of territorial barrier that the Supreme Court has repeatedly rejected. Jurisdiction does not require physical presence in this State and “the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-74 (1985). Even where a defendant acts *entirely* outside a state, it will be subject to jurisdiction where it knows its tortious acts will cause in-state harm. *Calder v. Jones*, 465 U.S. 783, 790 (1984). Suncor purposefully availed itself of the privilege of conducting business in Colorado; and it purposefully directed its tortious acts at this State. Plaintiffs need not chase Suncor to Canada to find relief.

BACKGROUND

I. Unchecked fossil fuel use has altered Colorado’s climate and harmed Plaintiffs.

Fossil fuel combustion has increased the atmospheric concentration of greenhouse gases (GHGs) – mostly CO₂ – to levels unseen in human history. AC ¶¶ 127-31. That CO₂ will warm the planet for centuries and alter the climate in devastating ways. *Id.* ¶¶ 125-26, 132-37. This alteration is “already affecting communities” with “prolonged periods of excessively high temperatures, more heavy downpours, and increase in wildfires, [and] more severe droughts.” *Id.* ¶ 139.

Colorado has been directly impacted, and Plaintiffs were and will continue to be harmed *here*. Temperatures here have risen 2°F since 1983 and an additional 2.5 to 5°F rise is projected by 2050, with “a five- to ten-fold increase in heat waves.” *Id.* ¶¶ 145-49. Plaintiffs are suffering and will suffer more from rising temperatures, *id.* ¶¶ 150-54, loss of snowpack, and precipitation changes, including both droughts and floods, *id.* ¶¶ 155-67, 222, and the decimation of their forests, *id.* ¶¶ 168-79, 180-86, 221-22. These changes threaten human life and health by bringing extreme events – like floods and wildfires – and by degrading air quality, and increasing heat-related illnesses and disease. *Id.* ¶¶ 187-96. These effects harm Plaintiffs and their property in Colorado and force them 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.

II. Suncor engaged in and directed substantial fossil fuel activity in Colorado.

Suncor produces, refines, markets, and sells fossil fuels – including in Colorado. In the last 50 years, Suncor has “sold trillions of cubic feet of natural gas, more than a billion barrels of oil, and millions of tons of petroleum coke.” *Id.* ¶ 396. In 2017 alone, Suncor produced about 685,000 barrels of oil per day, with around 430,000 of those from its oil sands. *Id.* ¶ 61; Ex. B at 17, 31.²

² All citations to Exhibits are attached to the Declaration of Naomi Glassman-Majara.

Suncor's oil is sold or sent to its refineries; including the one in Commerce City, AC ¶ 63, which refines around 100,000 barrels daily. *Id.* ¶¶ 57, 91; Ex. B at 9. To supply its Colorado refinery, Suncor operates pipelines that transport oil from Wyoming to Colorado. *Id.* ¶¶ 91, 104; Ex. J. About 20 percent of Suncor's Commerce City refinery's production comes from its Canadian tar sands operations, AC ¶ 63; fuels from tar sands release more GHGs than traditional fuels. *Id.* ¶¶ 16, 65-68.

Suncor sells refined fossil fuels, such as gasoline, in Colorado; it "operates 47 retail gasoline and/or diesel fuel stations in Colorado," *id.* ¶ 58, and it also sells fossil fuels to Coloradans through a network of gas stations and other suppliers. *Id.* ¶ 91; Ex. C; Ex. L. "Suncor markets the company's refined products" "in Colorado," Ex. A, and provides "'35% of Colorado's gasoline and diesel fuel demand,' and a third of the jet fuel supplies for Denver International Airport." AC ¶ 91; Ex. C.

Suncor conducts some of its Colorado business through six subsidiaries in this State, including Defendants Suncor Energy (U.S.A.) Inc. ("Suncor USA") and Suncor Energy Sales, Inc. AC ¶¶ 94-104. Five have their principal offices in Colorado, and three are also incorporated here. *Id.* ¶¶ 94-95, 97, 101, 103; *see also* Exs. Q, R, S, Y. All six do substantial business – including producing, refining, transporting, and selling fossil fuels – in Colorado. AC ¶¶ 57-58, 98, 100, 102, 104. As the head of an "integrated energy company," *id.* ¶¶ 49, 51; Ex. A, Suncor directs its subsidiaries' fossil fuel operations and corporate decisions. AC ¶¶ 50, 52, 54, 56, 60, 90. Suncor does not dispute that its subsidiaries "do not have the ability to deviate from [Suncor's] common design and cannot refuse to produce, promote, refine, sell and/or transport Suncor fossil fuels." *Id.* ¶ 60.

Suncor describes its "U.S. businesses" as a "vital link between the company's large scale oil sands resource base and the growing U.S. energy market" and admits that "[t]he various parts of Suncor's businesses are tightly connected." *Id.* ¶ 56. Suncor, through Suncor USA, operates "Colorado's only petroleum refinery," *id.* ¶¶ 57, 91, which it calls "*our* Commerce City refinery." *Id.* ¶

56 (emphasis added); accord Exs. D, I, M; see also Ex. A (“We” have a refinery in Commerce City). Its CEO describes the Colorado refinery as “giv[ing] us increased control of our product from production straight through to the consumer.” AC ¶ 56.³ Suncor purchased the Colorado refinery, retail stations, and pipeline and distribution facilities, using Suncor USA as its agent. Ex. F. Suncor took “responsibility” for personnel at the new refinery. Ex. N.

Suncor disregards corporate formalities; it acts and describes itself as one company. AC ¶¶ 49-51; accord Ex. B at 9, 28, 35, 158 (Suncor financial report, discussing its Commerce City refinery). Suncor has one website, e.g., Ex. A, with one hiring system through which Suncor lists Colorado-based jobs. Exs. I, P. Suncor USA, Suncor Pipeline, and Suncor Energy Sales were incorporated in Colorado with major overlap with Suncor’s leadership and board of directors. Exs. Q, R, S, T. Suncor USA and Suncor Energy (U.S.A.) Marketing, at least, are wholly owned by Suncor Energy. AC ¶ 55. Suncor has one set of corporate filings: its consolidated regulatory filings and financial statements include its subsidiaries, claiming profit and responsibility for the production, marketing, refining, transportation, and fossil fuel sales of its subsidiaries. *Id.* ¶¶ 49, 53.

III. Suncor engaged in tortious acts knowing it would alter the climate in Colorado.

As noted, Suncor has sold immense quantities of fossil fuel. *Id.* ¶ 396. When burned as intended, *id.* ¶ 91, its fuels released billions of tons of greenhouse gases, altering the climate and exacerbating that alteration. *Id.* ¶¶ 61-62, 397-99. Suncor is one of the largest sources of GHGs in the atmosphere, *id.* ¶ 62, and earned tens of billions of dollars in profits from fossil fuels. *Id.* ¶ 69.

It is undisputed that Suncor sold and promoted fossil fuels knowing their intended and unchecked use would alter and contribute to altering the climate, including in Colorado. For

³ Suncor exercised oversight and response when their Colorado refinery polluted the air after a power outage, Ex. E, and again when their refinery leaked petroleum into a nearby creek. Ex. H. Suncor leadership takes responsibility for refining operations in all North America. See Ex. Z.

decades, it has known fossil fuel use was increasing atmospheric GHGs, *id.* ¶¶ 70, 337-40, 342, and that this would alter the climate. *Id.* ¶¶ 70, 344-53, 355. Through the American Petroleum Institute (API),⁴ Suncor was warned that “[s]ignificant temperature changes are almost certain to occur by the year 2000,” *id.* ¶ 345, with a forecasted 4.5°F rise by 2038 bringing “major economic consequences,” and a 9°F rise by 2067 bringing “catastrophic effects.” *Id.* ¶ 350. Suncor was told this had “serious consequences for man’s comfort and survival,” *id.* ¶ 353; “there was no leeway” for the transition from fossil fuels due to the time needed for other energy sources to penetrate the market. *Id.* ¶ 367.

Despite this knowledge, Suncor spent decades concealing and misrepresenting the dangers of unchecked fossil fuel use. *Id.* ¶¶ 415-16. On its own – and through agents and co-conspirators, including API and the company’s affiliates – Suncor funded and participated in efforts to mislead people and consumers, including in Colorado, about climate change and the risks of fossil fuel use. *Id.* ¶¶ 70, 93, 408, 410, 412-16, 418. For example, Suncor and its co-conspirators ran advertisements – nationally and in Colorado – downplaying the existence of climate change and fossil fuels’ role; and they promoted paid-for and sham “experts” with no background in climate science to create the *appearance* of scientific uncertainty. *Id.* ¶¶ 422-35. These efforts succeeded. *Id.* ¶¶ 410-11, 436-43.

STANDARD FOR RULE 12(b)(2) MOTIONS

Courts may decide a Rule 12(b)(2) motion either by holding a hearing or based solely on documentary evidence and the allegations in the complaint. *Found. for Knowledge in Dev. v. Interactive Design Consultants, LLC*, 234 P.3d 673, 677 (Colo. 2010). Here, neither party has requested an evidentiary hearing.⁵ Thus, Plaintiffs need only make a *prima facie* showing by raising “a reasonable

⁴ Suncor had leadership roles in API, whose research on the dangers of fossil fuels was shared with Suncor; Suncor participated in, conspired with, and ratified API’s efforts to misrepresent fossil fuels’ dangers. AC ¶¶ 71 & n.6, 335-36, 339-40, 342-43, 345, 349-52, 364, 371, 408, 416, 422-23, 426-28.

⁵ If this Court were to hold a hearing, Plaintiffs request leave to conduct discovery. *See* Pls.’ Mot. for Conditional Discovery.

inference that the court has jurisdiction over the defendant.” *Id.* This “light burden” only “screen[s] out cases in which personal jurisdiction is obviously lacking.” *Id.* The complaint’s allegations must be accepted as true unless contradicted by a defendant’s competent non-conclusory evidence; and where plaintiffs submit rebuttal evidence, any conflicts must be resolved in plaintiffs’ favor. *Id.* Thus, while Suncor submitted an affidavit with its Motion, Plaintiffs’ uncontested allegations must stand and the Court cannot credit that affidavit over Plaintiffs’ evidence without an evidentiary hearing.

ARGUMENT

Colorado extends jurisdiction “to the fullest extent permitted by the due process clause.” *Classic Auto Sales, Inc. v. Schocket*, 832 P.2d 233, 235 (Colo. 1992). Suncor need only have “minimum contacts with [Colorado] 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). This “analysis involves an ad hoc evaluation of the facts of each case.” *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1194 (Colo. 2005). While the required minimum contacts differ for specific and general jurisdiction, *Found. for Knowledge*, 234 P.3d at 678, here, Suncor has sufficient contacts for both.

Where, as here, the contacts permit jurisdiction, courts consider whether the exercise of jurisdiction “is reasonable in light of the circumstances.” *Archangel*, 123 P.3d at 1195. Jurisdiction over Suncor is clearly reasonable, given the breadth of its forum contacts and the serious interests of Plaintiffs in having, and the State of Colorado in providing, a *local* forum for remedying these harms.

I. This Court has specific jurisdiction over Suncor.

For *specific* jurisdiction, the “minimum contacts” analysis has a two-part inquiry; whether: (1) Suncor “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*, 471 U.S. at 472 (internal quotation marks omitted); *accord Keefe v. Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267,

1271 (Colo. 2002). A “single act” can establish *specific* jurisdiction. *Keefe*, 40 P.3d at 1271; *accord Goettman v. N. Fork Valley Rest.*, 176 P.3d 60, 69 (Colo. 2007). Though where, as here, a defendant has numerous contacts, they are not considered “in isolation,” but “in their totality,” to determine if it is reasonable for a defendant to respond in the forum to related claims. *Rome v. Reyes*, 401 P.3d 75, 82 (Colo. App. 2017) (citing *Calder*, 465 U.S. at 789); *accord Burger King*, 471 U.S. at 475-77 & n.18.

Suncor is subject to specific jurisdiction for several reasons. *First*, its own acts – namely, directing fossil fuels into Colorado for sale and use here; knowingly causing tortious injury in Colorado; and conspiring to misrepresent the dangers of fossil fuels, including in Colorado – create jurisdiction, even if Suncor had not acted in Colorado and had no subsidiaries that did so either. *Second*, Suncor is subject to jurisdiction based on its own participation in its subsidiaries’ in-state activities *and* because those subsidiaries acted as its agents and alter egos.

A. Suncor is subject to jurisdiction for its own acts directed at Colorado.

Even if Suncor were correct that it did not act in the forum, Mot. at 9-13, that would not preclude jurisdiction based on its own out-of-state acts, because “a nonresident’s physical presence within the territorial jurisdiction of the court is not required.” *Walden v. Fiore*, 571 U.S. 277, 283 (2014). Jurisdiction can be based on “an occurrence” in the forum. *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal.*, --- U.S. ---, ---, 137 S. Ct. 1773, 1780 (2017).

While Suncor claims to do no business in Colorado, Mot. at 9-10, it clearly does, in part, by specifically directing its fossil fuels through the stream of commerce into Colorado. Jurisdiction may also be based on Suncor’s tortious out-of-state acts expressly aimed at Colorado. And, finally, jurisdiction can rest on Suncor’s participation in a conspiracy to misrepresent the dangers of fossil fuels, which was conducted, in part, in Colorado. These acts constitute sufficient contacts with Colorado and Plaintiffs’ claims relate to them; thus, they suffice for jurisdiction.

1. Suncor directed fossil fuels – derived largely from its Canadian tar sands operation – through the stream of commerce at Colorado.

Colorado may “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][.]” *Burger King*, 471 U.S. at 473 (internal quotation marks omitted); accord *Magill v. Ford Motor Co.*, 379 P.3d 1033, 1039 (Colo. 2016). Thus, Suncor is subject to jurisdiction for its fossil fuels that were sold and burned in Colorado. See *Align Corp. v. Boustred*, 421 P.3d 163, 168 (Colo. 2017).

Suncor’s Freidin Affidavit states that Suncor has not “sold . . . any petroleum products . . . in Colorado.” Mot., Ex. A (Affidavit of Greg Freidin (“Freidin Aff.”)) ¶ 16. The Court should “not accept at face value [Suncor’s] *conclusory allegation* that [it] . . . did not conduct business in Colorado,” *Rome*, 401 P.3d at 81 n.4 (emphasis added), and cannot credit it in the face of contrary evidence. However, even if it could, that statement means only that Suncor does not directly sell in Colorado; Mr. Freidin does not dispute that Suncor put fossil fuels into the stream of commerce, nor that it specifically and knowingly directed them at the Colorado market. *Supra* Background § II.⁶

2. Suncor caused tortious harms and injury to land in Colorado.

Suncor is subject to jurisdiction for the in-state effects of its tortious out-of-state acts. “[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

⁶ Since the Colorado Supreme Court expressly rejected the “stream of commerce plus” test from plurality opinions in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011) and *Asabi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), Suncor need only foresee that its products will reach Colorado. *Align Corp.*, 421 P.3d at 168. Regardless, Suncor’s conduct meets the “plus” test, since it deliberately served the Colorado market, see *Asabi*, 480 U.S. at 112 (plurality op.), including by shipping its tar sands crude and other fuels to Colorado for refining. *Supra* Background § II.

minimum contacts analysis.” *Goettman*, 176 P.3d at 69; *accord Found. for Knowledge*, 234 P.3d at 681.⁷

Thus, jurisdiction may rest on out-of-state acts that cause tortious injury in Colorado because they “may be deemed to be [acts] committed in Colorado.” *See D & D Fuller CATV Constr., Inc. v. Pace*, 780 P.2d 520, 524-25 (Colo. 1989); *Guidry v. U.S. Tobacco Co.*, 188 F.3d 619, 628 (5th Cir. 1999).

In *Calder*, the U.S. Supreme Court upheld jurisdiction over two non-resident defendants who wrote a libelous article for a nationally distributed magazine, even though they did not act in or control the magazine’s distribution in the forum. 465 U.S. at 789-90. These out-of-state acts sufficed for jurisdiction because they were “intentional and allegedly tortious” – *i.e.*, defendants *knew* they would harm the plaintiff; and because they were “expressly aimed at California” – *i.e.*, defendants *knew* injury would be suffered there. *Id.* As the Colorado Supreme Court recognized, under *Calder*, “where a defendant’s intentional, and allegedly tortious, actions, taken outside the forum, are expressly directed at causing a harmful effect within the forum state, a sufficient nexus exists between the defendant and the state so as to satisfy due process.” *Archangel*, 123 P.3d at 1198.

a. Plaintiffs satisfy *Calder*’s “effects” test. Plaintiffs have alleged two types of tortious out-of-state acts by Suncor itself: (1) it developed and sold fossil fuels at levels it knew would alter Colorado’s climate; and (2) it promoted unchecked fossil fuel use as safe while misrepresenting the known dangers to the climate, including in Colorado. *Supra* Background § III. As a result of these tortious acts, the climate has been altered in Colorado. *Supra id.* § I. *Calder* is therefore met: Suncor does not dispute that its acts were intentional and allegedly tortious; nor does it deny that it knew its

⁷ This is “[f]requently” the case. *D & D Fuller CATV Constr., Inc. v. Pace*, 780 P.2d 520, 525 (Colo. 1989). A full minimum contacts analysis is only needed when the injury is too remote from the tortious act. *Id.* Here, it is not; Suncor knew that precisely these consequences would be suffered if it engaged in its tortious activities. *See supra* Background § III. As discussed above and below, Suncor also directed substantial fossil fuels into and conspired in Colorado; taken together, due process is met. *Compare supra* Argument § I.A.1, *infra id.* § I.A.3 *with Found. for Knowledge*, 234 P.3d at 681.

acts would harm Colorado.⁸

Effects jurisdiction has a special pedigree in pollution cases, particularly involving the creation of a nuisance or injury to land. In *Illinois v. City of Milwaukee*, jurisdiction lay in Illinois over a Wisconsin city for polluting an *interstate* body of water that caused injury in Illinois. *Illinois v. City of Milwaukee* 599 F.2d 151, 155-56 (7th Cir. 1979). While the Supreme Court vacated the decision on other grounds, it expressly upheld the personal jurisdiction ruling. *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 n.5 (1981). More recently in *Pakootas v. Teck Cominco Metals, Ltd.*, an *international* pollution case, the Ninth Circuit, relying on *Calder*, held that a Canadian defendant was subject to jurisdiction in Washington for polluting a river in Canada; the out-of-state activities were “expressly aimed” at Washington because defendant *knew* that the pollution would cause harm there. 905 F.3d 565, 577-78 (9th Cir. 2018). The same is true here. While Suncor sold fossil fuels globally, it *knew* those intentional acts would alter the climate and cause damage to land in Colorado. *Supra*

Background § III.

Indeed, the propriety of jurisdiction is apparent in light of the common law rule in nuisance suits, where the appropriate, and in some cases *exclusive*, forum was where the affected property was located. *E.g.*, *Deacon v. Shreve*, 23 N.J.L. 204, 205 (N.J. 1851); *Columbia River Packers’ Ass’n v. McGowan*, 219 F. 365, 373-77 (9th Cir. 1914). While this rule has been relaxed, including in Colorado, the due process clause should not be read to preclude hearing nuisance suits in their traditional forum.

b. Suncor’s contrary arguments are meritless. *First*, the fact that Suncor’s acts also caused

⁸ “Act” refers to the “external manifestation of the actor’s will and does not include any of its results, even the most direct.” RESTATEMENT (SECOND) OF TORTS § 2 & cmt. C. Thus, “intentional act” refers to an intent to perform the act, not to accomplish the result of the act. Moreover, while *Calder* refers to intentional acts, not intentional *torts*, a tort is intentional when taken with knowledge of the consequences that are substantially certain to result. RESTATEMENT (SECOND) OF TORTS § 8A, cmt. B.

or contributed to injuries in other places does not foreclose jurisdiction in Colorado for the harms it caused here. Mot. at 12. Since a defendant can know harm will be suffered in more than one forum, a tortious act can be directed at more than one forum. A defendant cannot escape jurisdiction by “multiplying its wrongdoing” and engaging in “intentional wrongdoing [] aimed at more than one state.” *Cole v. Tobacco Inst.*, 47 F. Supp. 2d 812, 815-16 (E.D. Tex. 1999); accord *Simon v. Philip Morris, Inc.*, 86 F. Supp. 2d 95, 132 (E.D.N.Y. 2000) (applying the effects test where defendant targeted smokers “in all fifty states as opposed to only one” as *Calder* “does not hinge on the fact that only one plaintiff living in only one state was involved”); *Guidry*, 188 F.3d at 625 (finding tobacco trade associations that did not specifically target Louisiana subject to effects jurisdiction for deceptive communications that reached the State through national media); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984) (finding jurisdiction over libelous national story where in-state effect and circulation was small). Suncor’s cases say nothing to the contrary. See *Keefe*, 40 P.3d at 1271; *Archangel*, 123 P.3d at 1194.⁹

Second, Suncor claims that mere injury to a forum *resident* is not enough, Mot. at 11, 13 (citing *Walden*, 571 U.S. at 290, 291), but Suncor’s acts caused injury in *Colorado*, by altering the climate here. In *Walden*, a Georgia defendant harmed a Nevada resident who was *out of the forum*, in *Georgia*. 571 U.S. at 289. Nevada lacked jurisdiction because a defendant’s conduct must form the connection with the forum; “the plaintiff cannot be the only link between the defendant and the forum.” *Id.* at

⁹ Suncor suggests the forum-state must be “the focal point” of the tort, Mot. at 9 (citing *Archangel*, 123 P.3d at 1198-1200), but that is merely a restatement of *Calder*’s “expressly aimed” test. It does not mean that the conduct cannot cause harm in multiple states, only that the forum-state must have more than a “fortuitous role” in the tort. *Archangel*, 123 P.3d at 1200 (quoting *Far W. Capital, Inc., v. Towne*, 46 F.3d 1071, 1080 (10th Cir. 1995)). As *Archangel* makes clear, the dispute in *Far West Capital* arose out of a land development and property in *Nevada*, which happened to involve *Utah* parties; Utah’s relationship to the dispute, however, was incidental. *Id.* at 1199-1200. Here, by contrast, the torts involve injury to property and people in *Colorado*. Where intentional actions knowingly harm communities and property in *Colorado*, this State is necessarily the focal point of those torts.

285. By contrast, in *Calder*, an out-of-state act causing harm *in the forum* sufficed. The “crux” of *Calder* was that the “effects” of the libel connected defendants to California, not just to the plaintiff, because libel causes harm only if communicated to third persons. *Walden*, 571 U.S. at 286-87 (citing *Calder*, 465 U.S. at 788-89). While the *Walden* defendant harmed the plaintiff, who then went to and experienced effects in Nevada, the *Calder* defendants had an effect on California that consequently harmed the plaintiff there. The climate has been altered in Colorado, and people and property here are harmed as a result; *Calder*, not *Walden*, applies here.

Third, Suncor cannot escape jurisdiction simply because other people in other places have also contributed to the harm in Colorado. Mot. at 13. For example, in tobacco litigation, dozens of companies conspired to misrepresent and conceal known dangers to inflate market demand; those same companies over-supplied their injurious products across the country; which contributed to millions of third-parties becoming addicted to and using those products in all States; resulting in public health crises, the cost of which was borne by local communities and individuals across the country. Similar arguments by companies who – like Suncor here – claimed to have no physical sales or acts in the forum were specifically rejected. *See, e.g., Guidry*, 188 F.3d at 630-33; *accord Simon*, 86 F. Supp. 2d at 120-22; *Cole*, 47 F. Supp. 2d at 815-16 (E.D. Tex. 1999); *see also City of N.Y. v. A-1 Jewelry & Pawn Inc.*, 247 F.R.D. 296, 336-37 (E.D.N.Y. 2007) (gun case); *see also C.J.I. (Civ) 9:20 (2019)*.

Even if credited, Suncor’s objections would mean only that Suncor’s out-of-state tortious acts are not enough *standing alone*. Since contacts are considered in their totality, those acts would still be considered along with Suncor’s directing fossil fuels through the stream of commerce into Colorado and its participation in a conspiracy in Colorado, *supra* Argument § I.A.1, *infra* Argument § I.A.3; these additional factors distinguish Suncor from other contributors to the climate crisis.

3. Suncor conspired with others, such as API, who engaged in tortious and deceptive acts in furtherance of their conspiracy in Colorado.

The Court may also exercise jurisdiction over Suncor based on the acts of its co-conspirators – including API, Exxon, and other affiliates – in Colorado. Where, as here, there is a conspiracy and “overt acts taken in furtherance” thereof in the State, a co-conspirator’s forum contacts “may be attributed to other conspirators for jurisdictional purposes.” *Nat’l Union Fire Ins. Co. v. Kozeny*, 115 F. Supp. 2d 1231, 1237 (D. Colo. 2000), *aff’d*, 19 F. App’x 815 (10th Cir. 2001).¹⁰

Plaintiffs allege a conspiracy and acts taken in furtherance of that conspiracy in Colorado. Conspiracy requires “(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) an unlawful overt act; and (5) damages as a proximate result.” *Stauffer v. Stegemann*, 165 P.3d 713, 718 (Colo. App. 2006). Plaintiffs allege Suncor conspired with other fossil fuel companies and trade associations to preserve and increase fossil fuel demand; that the dangers of fossil fuels were known and discussed within the conspiracy; and that a plan was launched to conceal and misrepresent those dangers. AC ¶ 505; *see also id.* ¶¶ 504, 524-25; *see also* Pls.’ Opp. to Defs.’ R. 12(b)(5) at 29-30.

While the conspiracy had national (and global) scope, Plaintiffs allege wrongful acts in Colorado by co-conspirators – including API and Exxon – in furtherance of the conspiracy, most notably, efforts to mislead the public and consumers in Colorado about climate change and the risks of unchecked fossil fuel use. *See, e.g.*, AC ¶¶ 93, 415-16, 422-35, 502-503, 506, 522-23, 526. Suncor

¹⁰ Colorado courts have not yet expressly adopted this formulation of the conspiracy theory of personal jurisdiction. *See First Horizon Merch. Servs. v. Wellspring Capital Mgmt., LLC*, 166 P.3d 166, 178 (Colo. App. 2007). *National Union*, however, relied on the Colorado Court of Appeals decision in *Pace* to find conspiracy jurisdiction. 115 F. Supp. 2d at 1237 (citing *Pace v. D&D Fuller CATV Construction, Inc.*, 748 P.2d 1314 (Colo. App. 1987)). In *Pace*, personal jurisdiction was upheld over out-of-state co-conspirators who assisted with a tort in Colorado, effectively, the conspiracy theory of jurisdiction. 748 P.2d at 1315-16, *aff’d*, 780 P.2d at 525.

knew or should have known that the conspiracy would harm Plaintiffs in Colorado, *id.* ¶¶ 507, 527, and it did, in fact, cause them damage here. *Id.* ¶¶ 508, 528. Thus, as in tobacco cases – where companies and trade associations with no physical forum contacts were subject to jurisdiction for a nationwide conspiracy misrepresenting the dangers of smoking, *see, e.g., Simon*, 86 F. Supp. 2d at 120-24 – this Court likewise may exercise jurisdiction over Suncor.

* * *

Each of the three types of contacts described above is sufficient for jurisdiction. Even if they were not, they clearly suffice when considered together, as they must be. By specifically directing fossil fuels to Colorado, knowingly causing harm to Colorado and its residents, and conspiring to spread misinformation, Suncor itself has minimum contacts with Colorado.

B. Suncor is subject to specific jurisdiction based on fossil fuel activity in Colorado that it directed, and which was carried out by its agents.

Suncor does not dispute that the Colorado fossil fuel activity alleged in the Complaint is sufficient for specific jurisdiction. Instead, it submitted a short affidavit of single-sentence conclusory statements essentially denying that Suncor conducts *any* activity in Colorado, and argued that all Colorado acts are only attributable to its subsidiaries. Mot. at 14. While Suncor is subject to jurisdiction on agency and alter ego theories for its subsidiaries' acts, those theories are unnecessary. Plaintiffs' allegations and evidence show that Suncor itself directs and participates in its subsidiaries' activities in Colorado, establishing a *prima facie* case for jurisdiction.

1. Suncor directs its subsidiaries' Colorado fossil fuel activity; this creates its own contacts here.

Where a parent corporation itself participates in the wrong complained of, the plaintiff need not show vicarious responsibility, such as agency or alter ego relationships; the parent is responsible for *its* actions. *United States v. Bestfoods*, 524 U.S. 51, 64-65 (1998). Thus, acting through a subsidiary

does not insulate a parent from jurisdiction where it is the primary participant in alleged wrongdoing. *Cf. Rome*, 401 P.3d at 82-83 (finding jurisdiction where an officer is the “primary participant[] in the wrongdoing giving rise to the court’s jurisdiction” (internal quotation marks omitted)); *accord Calder*, 465 U.S. at 790 (finding jurisdiction where out-of-state defendants were “primary participants in an alleged wrongdoing” directed at the forum). Thus, in tobacco cases, jurisdiction existed over parent companies, who directed subsidiaries’ tortious forum acts, even where the parent *itself* had no direct forum contacts. *See Mass. v. Philip Morris, Inc.*, No. 95-7378-J, 1998 Mass. Super. LEXIS 350, at *27 (Mass. Super. Ct., Mar. 20, 1998); *Simon*, 86 F. Supp. 2d at 128.

Plaintiffs have submitted evidence – chiefly Suncor’s own statements – establishing Suncor’s primary participation in Colorado fossil fuel activities; and that it directed the subsidiaries in their course of action, from production to sale of fossil fuels. The Court must credit Plaintiffs’ evidence over the Freidin Affidavit; and Plaintiffs’ evidence shows that *Suncor* markets and sells fossil fuel in Colorado; *Suncor* runs the Commerce City refinery and takes responsibility for its personnel; *Suncor* has offices in Denver; and *Suncor* exercises tight control over and is involved in its Colorado fossil fuel operations.¹¹ *Supra* Background § II. Indeed, Suncor is the head of an “integrated energy company,” Ex. A; AC ¶¶ 49, 51, where it has “control of our product from production straight through to the consumer.” AC ¶ 56. And, it is *undisputed* that Suncor has this control and directs the relevant fossil fuel activities. *Id.* ¶¶ 50-54, 60. This evidence meets Plaintiffs’ burden for jurisdiction.

2. Suncor is subject to specific jurisdiction because it conducted parts of its in-state business through subsidiaries that are its agents.

¹¹ Courts do “not accept at face value” a conclusory allegation that defendant did not conduct business in Colorado. *Rome*, 401 P.3d at 81 n.4. This includes Mr. Freidin’s conclusory statements that Suncor “does not conduct, any business” or have “any operations in Colorado,” and “has not produced, refined, marketed, or sold . . . any petroleum products . . . in Colorado.” Freidin Aff. ¶¶ 10-12, 14-16. Regardless, those statements do not dispute that Suncor directs the decisions to do those acts. Moreover, the Freidin Affidavit does not actually refute the complaint’s allegations that Suncor directs and controls the operations in Colorado.

Even if Suncor were correct that only its subsidiaries carried out activities in Colorado, and even if Suncor's own out-of-state activities were insufficient for jurisdiction, jurisdiction is still proper because the acts of Suncor's subsidiaries are attributable to it under agency principles.

a. A subsidiary's contacts are attributable to the parent when it is the parent's agent; it need not be an alter ego. “[A] nonresident defendant may be subject to personal jurisdiction in Colorado based on the imputed contacts of the defendant's agent.” *Goettman*, 176 P.3d at 67; *accord Magill*, 379 P.3d at 1039 (agency relationships within the state may support a finding of specific jurisdiction). This is so because “a principal is responsible for the actions of his agent.” *Goettman*, 176 P.3d at 67. Agency theory applies equally in the case of corporate parent-subsidary relationships. *See e.g., SGI Air Holdings II LLC v. Novartis Int'l AG*, 239 F. Supp. 2d 1161, 1166 (D. Colo. 2003).

Defendant argues that Colorado law forecloses specific jurisdiction based on agency where the agent is the defendant's subsidiary, Mot. at 14, but there is no special rule for subsidiaries. The U.S. Supreme Court has recognized that a corporation can purposefully avail itself of a forum by directing its agents to take action there, and that a subsidiary “m[ay] be its parent's agent” for specific jurisdiction purposes. *Daimler AG v. Bauman*, 571 U.S. 117, 135 & n.13 (2014); *accord First Horizon Merch. Servs. v. Wellspring Capital Mgmt., LLC*, 166 P.3d 166, 177-78 (Colo. App. 2007) (wholly owned subsidiary may be parent's agent for jurisdiction purposes). Since specific jurisdiction based on a subsidiary's agency accords with due process, Colorado law encompasses this theory.¹²

Nothing in *In re Griffith v. SSC Pueblo Belmont Operation Co. LLC*, 381 P.3d 308 (Colo. 2016), is to the contrary. There, the trial court attributed subsidiaries' contacts to nonresident corporations by

¹² Courts outside Colorado also apply an agency theory for specific jurisdiction over a parent. *See e.g., Taishan Gypsum Co. v. Gross*, 753 F.3d 521, 531 (5th Cir. 2014); *Williams v. Yamaba Motor Co.*, 851 F.3d 1015, 1024-25 (9th Cir. 2017); *State v. Purdue Pharma L.P.*, No. PC-2018-4555, 2019 R.I. Super. LEXIS 95, at *18-20 (R.I. Super. Ct. Aug. 16, 2019).

merely finding that they acted “as one business.” *Id.* at 312. Defendants argued that the trial court “failed to apply an agency or alter-ego test,” and the *Griffith* Court agreed, finding that the trial court did not apply any “established” attribution test. *Id.* Thus, *Griffith* simply held that a court must “apply[] *the appropriate* test to determine whether the subsidiary’s contacts with Colorado may be imputed to the Nonresident Defendants.” *Id.* at 314 (emphasis added). The Court went on to apply the alter ego test, which applies when the argument is, as it was in *Griffith*, that a parent and a subsidiary are actually one unified business for all purposes. *See id.* at 313-14. Agency, by contrast, asks whether the agent is engaging in specific acts on behalf of the principal. *First Horizon Merch. Servs.*, 166 P.3d at 177; *see also Pfizer Inc. v. Mylan Inc.*, 201 F. Supp. 3d 483, 489 (D. Del. 2016); *Viega GmbH v. Eighth Judicial Dist. Ct. of the State*, 328 P.3d 1152, 1158-59 (Nev. 2014). *Griffith* did not consider the applicability of an agency theory to those facts. The notion that *Griffith* intended to silently abrogate *Magill* – written by the same Chief Justice two weeks earlier – is untenable.

Suncor also cites *Griffith*’s companion case, *Meeks v. SSC Colo. Springs Colonial Columns Operating Co.*, 380 P.3d 126 (Colo. 2016), but it is inapposite for the same reasons, plus one more. *Meeks* involved only *general* jurisdiction. *Id.* at 128. The Colorado Supreme Court has noted that agency is not an available theory for general jurisdiction, even while holding that it is for specific jurisdiction. *Magill*, 379 P.3d at 1039 (citing *Daimler*, 571 U.S. at 135 n.13).

The special rule Suncor proposes for subsidiaries makes little sense. There is no basis to find that the only person or entity who cannot be a corporation’s agent is its own subsidiary. Nor does Suncor posit any reason for a stricter jurisdictional analysis where a defendant’s agent is a subsidiary instead of a non-subsiidiary. *Daimler* held the opposite: a subsidiary can be a corporation’s agent just like any unrelated person or entity. 571 U.S. at 135 & n.13. Suncor cites no Colorado case limiting jurisdiction to something less than the full extent that due process permits; but its rule – that agency

is never available in cases involving parent-subsidary relations – *would be* clearly less than permitted.

b. Suncor’s subsidiaries are agents acting for its benefit and pursuant to its direction.

Plaintiffs must only make a *prima facie* showing of an agency relationship for personal jurisdiction; thus there need only be a “reasonable inference” that Suncor’s subsidiaries were its agents. *Goettman*, 176 P.3d at 66, 70. A subsidiary may be its parent’s agent for personal jurisdiction purposes “when its activities as an agent are of such a character as to amount to *doing business of the parent*.” *First Horizon Merch. Servs.*, 166 P.3d at 177 (internal quotation marks omitted).¹³

Suncor cursorily asserts that its subsidiaries are not agents, Mot. at 15 n.5, but it is incorrect. Suncor directs its subsidiaries in the business of producing, distributing, selling, and advertising fossil fuels; and they act on Suncor’s behalf in Colorado. AC ¶ 50. Plaintiffs *also* allege, and Suncor does not dispute, that it sets the level of production and sale across the corporate family, as well as how fossil fuel will be promoted; and that its subsidiaries pursue their activities according to that scheme and cannot deviate from it or refuse to promote, refine, or sell Suncor fuels. *Id.* ¶ 60.

These facts establish jurisdiction over Suncor, not for decisions its subsidiaries made or that were within their sphere of control, but rather for *Suncor’s* decisions about its fossil fuel strategy – namely, the decision to produce, sell, and promote as much fossil fuel as possible. These plans were Suncor’s and merely put into effect in Colorado, in part, through the in-state subsidiaries. *Cf. Cole v. Tobacco Inst.*, 47 F. Supp. 2d 812, 814 (E.D. Tex. 1999) (upholding jurisdiction over corporate parent

¹³ In *SGI Air Holdings*, the court looked at “(1) capital investment decisions; (2) personnel decisions; and (3) business and management decisions” and found that the subsidiary was doing the business of the parent holding company. 239 F. Supp. 2d at 1166-69. In particular, the subsidiary followed the parent’s guidelines for large scale expenses and was subject to the parent’s oversight for personnel and business decisions. *Id.* at 1167-68. Here, Suncor is involved in the financial, personnel, and management decisions of its Colorado subsidiaries: it lists Colorado-based jobs on its own website, Exs. I, P; Suncor USA acted as Suncor’s agent for the purchase of a refinery, retail stations, and pipeline and distribution facilities, Ex. F; Suncor took “responsibility” for personnel at the new refinery, Ex. N; and it exercised oversight when their Colorado refinery polluted, Exs. E, H.

tobacco company where it “transcended the role of a ‘holding company’ and actively participated in the research and design of cigarettes sold by its subsidiaries”).

3. Suncor’s subsidiaries act as its alter egos; their actions can be imputed under a veil-piercing standard.

Under *Griffith*, jurisdiction lies over a corporate parent where: 1) the subsidiary is the parent’s alter ego, 2) the corporate form is used to perpetuate a wrong, and 3) equity so requires. 381 P.3d at 313. An alter ego analysis is holistic, looking at the specific facts of each case. *McCallum Family L.L.C. v. Winger*, 221 P.3d 69, 74 (Colo. App. 2009). Equity is the paramount goal. *Phillips v. Englewood Post No. 322 Veterans of Foreign Wars of the United States, Inc. (In re Phillips)*, 139 P.3d 639, 644 (Colo. 2006). Under the *Griffith* alter-ego standard, this Court has jurisdiction over Suncor.

a. Suncor’s Colorado subsidiaries are its alter egos. A subsidiary is its parent’s alter ego where the subsidiary is “a mere instrumentality . . . and there is such unity of interest in the ownership that the separate personalities of the corporation and the owners no longer exist.” *Griffith*, 381 P.3d at 313 (quoting *In re Phillips*, 139 P.3d 639, 644 (Colo. 2006)). Factors include whether:

- (1) The parent owns all the stock;
- (2) both have common directors and officers;
- (3) the parent finances the subsidiary;
- (4) the parent causes the subsidiary’s incorporation;
- (5) the subsidiary has grossly inadequate capital;
- (6) the parent pays salaries or expenses of the subsidiary;
- (7) the subsidiary has no business except with its parent or subsidiary corporation or no assets except those transferred by its parent or subsidiary;
- (8) directors and officers do not act independently in the interests of the subsidiary;
- (9) formal legal requirements of the subsidiary such as keeping corporate minutes are not observed;
- (10) distinctions between the parent and subsidiary . . . are disregarded or confused;
- (11) subsidiaries do not have full board[s] of directors.

Id. Suncor’s own public disclosures and documents create a reasonable inference, and thus a *prima facie* case, that its subsidiaries are not really separate. Suncor consistently disregards the distinctions within its corporate structure, treating itself as one company. AC ¶¶ 49-51; Exs. B, G. Suncor has one website, with one hiring system, and one set of corporate filings. *See* Exs. A, B, D, I, P, Z. Its subsidiaries are wholly owned; have common directors, officers and offices; and were incorporated

in connection with Suncor. *Supra* Background § II; Exs. O, Q, R, S, T, Y. Suncor controls decision-making for its integrated corporate family. AC ¶¶ 52, 60, 90-93.

b. Suncor abused the corporate form. Piercing the corporate veil is appropriate where the relationship between the corporations is “used to perpetrate a fraud or defeat a rightful claim.” *In re Phillips*, 139 P.3d at 645. However, “[p]roof of wrongful intent or bad faith is not required,” *Martin v. Freeman*, 272 P.3d 1182, 1186 (Colo. App. 2012), and courts sometimes consider this factor fluidly with the equity and alter ego prongs. *See Stockdale v. Ellsworth*, 407 P.3d 571, 577-78 (Colo. 2017); *see also, e.g., Taishan Gypsum*, 753 F.3d at 546 (not applying a fraud analysis as the alter ego test for jurisdiction purposes is “less stringent” than that for liability). Here, Suncor used its alter egos to tortiously sell and promote its fossil fuels to Colorado consumers, and to mislead them, harming Plaintiffs. *See, e.g., AC ¶¶ 408, 410-16, 418.* If Suncor escaped jurisdiction despite devising a campaign of deceptive communication occurring in Colorado, that would defeat a rightful claim.

c. Equity requires piercing the corporate veil. Suncor masterminded, implemented, and financed the tortious conduct in this case, and if it is not subject to personal jurisdiction here then Colorado communities would have no U.S. forum in which to seek a remedy. The corporate veil can be pierced where there would not otherwise be “any meaningful opportunity for the injured parties to recover.” *Stockdale*, 407 P.3d at 577. While Plaintiffs could theoretically sue in Canada, they should not be at the mercy of foreign law or courts; particularly not where such uniquely Coloradan issues – harm to land here, as well as local public health and safety – is at stake. Suncor designed and implemented the subsidiaries’ extraction, development, sale, and advertisement of fossil fuels in Colorado, and equity requires that they at least respond in Colorado court for those decisions.

C. Plaintiffs’ claims arise out of and relate to Suncor’s contacts.

While Suncor purports to argue that Plaintiffs’ claims do not arise out of or relate to

Suncor’s own forum contacts, Mot. at 11, that section of their brief just makes arguments, addressed above, that there are no cognizable contacts. The only exception is its suggestion that Plaintiffs do not identify the acts from which the case arises. *Id.* at 12. But Suncor’s Colorado contacts are the *same* acts for which Plaintiffs seek to hold Suncor liable. AC ¶¶ 61-62, 89-91, 396-99 (fuels Suncor put in stream of commerce to Colorado contributed to the harm), ¶¶ 49-55 (Suncor’s acts outside Colorado contributed to the harm), ¶¶ 408, 412-16 (conspiracy contributed to the harm).¹⁴

II. This Court can exercise general jurisdiction over Suncor; Colorado is the only state where it has such continuous and systematic business.

Suncor is subject to general jurisdiction in Colorado, which lies where a corporation’s forum “affiliations” are “so continuous and systematic as to render them essentially at home” there. *Magill*, 379 P.3d at 1037 (internal quotation marks omitted). A defendant is “essentially at home” where its contacts “set[] the forum apart from other states where [the] defendant may conduct business — contacts that render the forum in some manner equivalent to a principal place of business.” *Id.* at 1039 (internal quotation marks omitted; second alteration in original).

Colorado is Suncor’s most important jurisdiction in the United States, AC ¶ 90; and it is second only to Calgary as a hub for directing Suncor’s global operations, *see* Exs. A, K, L, M. Suncor – and its alter-ego subsidiaries – conduct extensive, “continuous and systematic” in-state activities, *supra* Background § II, Argument § I.B.3, which render Suncor “essentially at home” in Colorado.

Suncor relies on *Daimler* and *Magill*, Mot. at 5-9, but those defendants did business with so many states and so many countries (with respect to *Daimler*), that an “appraisal of [the]

¹⁴ Suncor generically purports to “incorporate[] by reference all of [Exxon’s personal jurisdiction] arguments,” Mot. at 2 n.2, but it cannot do so by footnote. *See, e.g., Castillo v. Koppes-Conway*, 148 P.3d 289, 291 (Colo. App. 2006). Regardless, to the extent Suncor seeks to incorporate Exxon’s argument that, if there are multiple causes of harm, specific jurisdiction is improper over any tortfeasor, the argument is wrong for the reasons explained in Plaintiffs’ response to Exxon’s motion. Pls.’ Opp. to Def. Exxon Mobil Corp.’s R. 12(b)(2) Mot. to Dismiss for Lack of Personal Jurisdiction.

corporation[s'] activities in their entirety, nationwide and worldwide,” showed there was nothing special setting the forum apart from other states. *Magill*, 379 P.3d at 1039 (quoting *Daimler*, 571 U.S. at 139 n.20). As *Magill* explained, Ford “conducts business throughout the country,” and there was no evidence that its “contacts with Colorado are somehow different or more substantial than its contacts with other states where it sells cars.” 379 P.3d at 1039.

Here, by contrast, it is uncontested that nearly *all* of Suncor’s U.S. affiliations are with a single state: Colorado. AC ¶ 90. Although it appears to have minor contacts with Wyoming, they do not compare to its extensive contacts in this state. *See* Exs. C, D, J. Suncor’s Colorado contacts are plainly “different” and far “more substantial” than those it has with any other state. *Magill*, 379 P.3d at 1039. Nor does Suncor have global reach comparable to that in *Daimler*. Outside the U.S. and Canada, Suncor appears to have only a few and limited operations, namely shared interests in oil fields in the United Kingdom, Norway and possibly Libya. Exs. U, V, W, X.

Although *Daimler* expressed concern that allowing general jurisdiction over a defendant with substantial business in virtually every state would mean companies would be unable “to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit,” 571 U.S. at 139 (internal quotation marks omitted), there are no such concerns here. There is only *one* U.S. state where Suncor could be considered “essentially at home” and expect to be answerable to suit: Colorado.

III. The exercise of jurisdiction is reasonable.

Personal jurisdiction over Suncor comports with “traditional notions of fair play and substantial justice,” given Suncor’s extensive forum contacts and other factors. *Goettman*, 176 P.3d at 71 (citing *Int’l Shoe*, 326 U.S. at 316). Since Suncor purposefully directed its activities at Colorado, it must “present a compelling case that the presence of some other considerations would render

jurisdiction unreasonable.” *Burger King*, 471 U.S. at 477; *see also Archangel*, 123 P.3d at 1195.

Courts consider factors such as “the burden on the defendant, the forum state’s interest in resolving the controversy, and the plaintiff’s interest in attaining effective and convenient relief.” *Archangel*, 123 P.3d at 1195. While these factors all favor jurisdiction, for it to be unreasonable, Plaintiffs’ and Colorado’s interests must be so attenuated that they are “clearly outweighed” by the burden on Suncor. *Simon*, 86 F. Supp. 2d at 133; *accord Goettman*, 176 P.3d at 71 (holding that a plaintiff’s and the state’s interests “often . . . justify even [] serious burdens placed on the alien defendant” (quoting *Asahi*, 480 U.S. at 114 (plurality op.)). Here, they clearly are not.

First, Suncor’s burden is minimal; it is “a multibillion dollar multinational enterprise” with “all the resources and connections necessary for it to defend this suit in [Colorado] with relative ease.” *Simon*, 86 F. Supp. 2d at 133-34. While foreign defendants sometimes bear unique burdens, *Mot.* at 19, Suncor has experienced local counsel, extensive forum contacts, and manages six subsidiaries in Colorado, *supra* Background § II; it can easily manage this lawsuit.

Second, Colorado “has a ‘manifest interest’ in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.” *Burger King*, 471 U.S. at 473-74. 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 state has interest where case concerns safety of people in Colorado). 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.* Suncor simply should not be heard to argue that Colorado has “no legitimate interest in holding [Suncor] answerable on a claim related to [its tortious] contacts” with this State. *Burger King*, 471 U.S. at 482-83 (internal quotation marks omitted).

Third, Plaintiffs' interests override Suncor's. *Goettman* held that an *out-of-state* plaintiff's interests were "substantial" because, as here, if the plaintiff could not sue in Colorado, she might have to travel abroad to defendant's home forum. *Id.* Here, Plaintiffs' interest is even stronger. While the *Goettman* plaintiff would have to sue outside her home-forum even if she sued in Colorado, Suncor is asking Plaintiffs to leave their home-forum (and the site of the harm). Moreover, it is far more burdensome for Plaintiffs to litigate in Canada, where they have no connections, than for Suncor to litigate in Colorado, where at a minimum, they have subsidiaries.

Suncor's only argument about the second and third factors is that other Suncor Defendants would remain in the case, Mot. at 19-20, but that does not diminish Colorado's nor Plaintiffs' interests in relief from Suncor. While it claims Plaintiffs' interests "can be pursued fully on the merits in Colorado against the remaining [Suncor] Defendants," Mot. at 20, that is wrong – unless Suncor is conceding its subsidiaries are liable for *all* of Suncor's conduct and the subsidiaries are bound by that concession. Suncor cannot argue that suing one Suncor entity is the same as suing any other, while arguing in the same brief that the subsidiaries are independent. Of course, if Suncor is dismissed, the subsidiaries will also claim independence. Absent a binding commitment from Suncor *and* its subsidiaries that the subsidiaries are liable for *all* Suncor's acts, these factors favor jurisdiction.

CONCLUSION

Suncor is subject to personal jurisdiction on multiple grounds. A major oil corporation, which uses Colorado as its second headquarters and knowingly causes severe harm to Colorado communities, while deriving enormous benefits from its activity in this State, is amenable to suit here. Nothing in the Constitution requires that when a corporation carries on business in Colorado and harms people and communities here, those injured may only seek redress in a foreign court.

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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 DEFENDANTS' MOTION TO DISMISS THE 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:

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