DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 6TH Street, Boulder, Colorado 80302 (303) 441-3750	DATE FILED: May 1, 2020 3:30 PM FILING ID: 92B8BBE3B1346 CASE NUMBER: 2018CV30349 **▲COURT USE ONLY▲**
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REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION PURSUANT TO COLO. R. CIV. P. 12(b)(2)	

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I. Introduction

Exxon Mobil Corporation ("ExxonMobil") demonstrated in its opening brief that Plaintiffs cannot—and indeed do not—allege that their claims "arise out" of ExxonMobil's supposed Colorado contacts under the most generous causal standard recognized by law: namely, "but for" causation. In an effort to counter that obvious truth, Plaintiffs dig deep into a grab bag of jurisdictional doctrines. That they must do so is unsurprising, given the novel (and erroneous) theory of causation that would be required to hold ExxonMobil liable for Plaintiffs' alleged climate change-related injuries. None of the doctrines they fall back on can save their lawsuit.

Recognizing as much, Plaintiffs dodge the "but-for" causation standard and inaccurately accuse ExxonMobil of advocating a "sole cause" standard. After setting up that strawman, Plaintiffs dodge again. They next argue that *no* causation is required, watering down the standard well beyond what constitutional due process permits. Neither argument should be credited; nor should Plaintiffs' roundly rejected theory that personal jurisdiction can arise from a defendant's mere knowledge that conduct outside the forum will have effects inside the forum. And no Colorado state court has premised personal jurisdiction on the conspiracy or "pendent" theories Plaintiffs urge here. Finally, ExxonMobil has not, and could not have, consented to general jurisdiction in Colorado by registering to do business and designating an agent for service of process there. Nor can ExxonMobil's subsidiaries' Colorado contacts be attributed to it.

In the end, the unavoidable conclusion is that Plaintiffs do not, and cannot, allege that their claims "arise out of" ExxonMobil's Colorado contacts. Their claims should therefore be dismissed for lack of personal jurisdiction.

II. Argument

A. "But For" Causation Is an Established Prerequisite to Personal Jurisdiction

Beginning with *International Shoe*, the Supreme Court has safeguarded defendants' due process rights by consistently adhering to a causation requirement for specific personal jurisdiction to ensure that a defendant cannot be haled into court based on "unconnected activities" lacking a sufficient nexus to the claims at issue.[1] *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773, 1781 (2017); *see, e.g.*, *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 319-20 (1945). Here, Plaintiffs do not dispute that Colorado federal courts—which Colorado state courts routinely consult in construing federal law, *see, e.g.*, *USA Tax Law Ctr., Inc.* v. *Office Warehouse Wholesale, LLC*, 160 P.3d 428, 431 (Colo. App. 2007)—have held that the Due Process Clause requires, *at minimum*, that a defendant's forum-related activities be a "but for" cause of plaintiff's claims, *see Tollemeri* v. *MEDL Mobile, Inc.*, 657 F. App'x 793, 796 (10th Cir. 2016); *Floyd's 99 Holdings, LLC* v. *Jude's Barbershop, Inc.*, 898 F. Supp. 2d 1202, 1210 n.9 (D. Colo. 2012).

Plaintiffs instead argue that *no* causal nexus is required, which would not only violate well-settled precedent, but also eviscerate the constitutional mandate that a lawsuit must arise out of the defendant's contacts with the forum state. *See Bristol-Myers*, 137 S. Ct. at 1780. In an attempt to support their discredited position, Plaintiffs cherry-pick a handful of decisions by Colorado courts that, they assert, are inconsistent with "but for" causation. But Plaintiffs have not identified a single, extant Colorado case that actually stands for that proposition.

[1] Nothing in Suncor's motion to dismiss for lack of personal jurisdiction is inconsistent with specific personal jurisdiction requiring "but for" causation. *Contra* Pls.' Br. 14 n.5. Rather, Suncor argues (correctly) that "Plaintiffs plead no facts describing any . . . in-forum activities by Suncor Canada . . . because none exist." Suncor's Mot. Dismiss Lack Personal Jurisdiction 12.

The case upon which Plaintiffs rely principally, *Etchieson* v. *Central Purchasing, LLC*, 232 P.3d 301 (Colo. App. 2010), has been abrogated by the U.S. Supreme Court's decision in *Bristol-Myers*. The *Etchieson* court determined that a plaintiff's claim for injuries suffered from using one of the defendant's products could "arise out of" the defendant's sales to a distributor within the forum state of a slightly different product than the one plaintiff used. *See* 232 P.3d at 308. *Bristol-Myers* subsequently squarely rejected that theory. A "defendant's relationship with . . . a third party," the Court explained there, is "standing alone, . . . an insufficient basis for jurisdiction." 137 S. Ct. at 1781 (internal quotation marks omitted). In *Bristol-Myers*, the Court rejected specific jurisdiction where certain class members had obtained and taken the defendant-pharmaceutical company's allegedly defective drug in the forum, but plaintiffs themselves had not.[2] *See id.* But the decision did not turn on the residence of the plaintiffs. To the contrary, the fact that plaintiffs were not residents of the forum was considered immaterial, for it is well recognized that personal jurisdiction demands more than "that a plaintiff is a resident of the forum and suffered harm there." *Advanced Career Techs., Inc.* v. *Does*, 2015 WL 328639 at *2 (D. Colo. Jan. 23, 2015). *Bristol-Myers* also precludes Plaintiffs' interpretation of *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770 (1984), as holding that a plaintiff may bring suit wherever a defendant can be found "carrying on a part of its general business." *Keeton*, 465 U.S. at 780. In *Bristol-Myers*, the Supreme Court explained that *Keeton* held that New Hampshire courts had

[2] Plaintiffs also look outside Colorado for supportive authority, but in doing so rely on caselaw that has either been reversed, *compare Creech* v. *Roberts*, 908 F.2d 75, 80 (6th Cir. 1990), *with Beydoun* v. *Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 507-08 (6th Cir. 2014), or abrogated, *see Jayone Foods, Inc.* v. *Aekyung Indus. Co.*, 242 Cal. Rptr. 3d 705, 720 (Ct. App. 2019) (articulating the theory on which *Etchieson* relied, but which the *Bristol-Myers* Court rejected); *Shoppers Food Warehouse* v. *Moreno*, 746 A.2d 320, 335-36 (D.C. 2000) (same).

personal jurisdiction by relying "principally on the connection between the circulation of the magazine in New Hampshire and damage allegedly caused within the State"—in-state conduct *causing* in-state injury. 137 S. Ct. at 1782.

The other cases Plaintiffs cite are perfectly compatible with "but for" causation. Those cases held that specific jurisdiction was present in situations where "but for" causation was either present or undisputed, namely, a malpractice claim arising out of an attorney's relationship with, and communications to, a Colorado client, *see Keefe* v. *Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1269 (Colo. 2002), and transactions entered into in part due to a defendant's misrepresentations into Colorado, *see Classic Auto Sales, Inc.* v. *Schocket*, 832 P.2d 233, 234-35 (Colo. 1992); *First Horizon Merchant Servs., Inc.* v. *Wellspring Capital Mgmt., LLC*, 166 P.3d 166, 172, 175 (Colo. App. 2007) (same). That a "majority" or "most" of the defendant's conduct in each case occurred outside the forum is irrelevant. *See Tollemeri*, 657 F. App'x at 796. *Contra* Pls.' Br. 16.

Plaintiffs' invocation of a parade of horribles following from the application of settled doctrine is unavailing. *First*, contrary to Plaintiffs' mischaracterization of ExxonMobil's position as proposing a "far stricter rule" than required, *see* Br. 18, ExxonMobil argues only that this Court should apply—and that Plaintiffs have failed to satisfy—the *least* ("but for"), not the *most* ("sole"), stringent form of causation.[3] *See Husted* v. *A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842-43

[3] The Supreme Court recently granted certiorari to review two state court decisions that disregard Supreme Court precedent mandating "but for" causation. *See Ford Motor Co.* v. *Montana Eighth Judicial District Court*, 140 S. Ct. 917 (2020); *Ford Motor Co.* v. *Bandemer*, 134 S. Ct. 916 (2020). The *Ford Motor* cases, which are scheduled to be resolved next term, are anticipated to reaffirm—if not further tighten—personal jurisdiction's causation requirement. In the unlikely event that the

(2018). *Second*, Plaintiffs' assertion that the jurisdictional causation standard cannot exceed the standard for establishing liability against multiple tortfeasors, *see* Br. 18-19, rests on a false premise given that the "substantial factor" test to which Plaintiffs allude "does not abrogate" "but for" causation. *Reigel* v. *SavaSeniorCare L.L.C.*, 292 P.3d 977, 987 (Colo. App. 2011). And even were it otherwise, "the fact that a defendant would be liable under a statute if personal jurisdiction over it could be obtained is irrelevant," because personal jurisdiction is grounded in *constitutional* due process. *GCIU-Emp'r Ret. Fund* v. *Coleridge Fine Arts*, 700 F. App'x 865, 869-70 (10th Cir. 2017). *Finally*, Plaintiffs lament that it would be "intolerable" for a defendant whose forum activities were not a cause of plaintiff's claim to be subject to personal jurisdiction only where it is at home. *See* Br. 20. But that is precisely the point of general jurisdiction.[4] *See Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 923 (2011).

Plaintiffs' repeated assertion that ExxonMobil "does not dispute . . . that its activities in Colorado are causally related to this case," is simply wrong. Br. 1. For example, ExxonMobil clearly pointed out that "Plaintiffs do not, and cannot, allege that their varied injuries purportedly resulting from rising global temperatures during the last half century . . . would not have occurred but for ExxonMobil's activities *in Colorado*." Def.'s Br. 10. Plaintiffs' assertion that ExxonMobil did not cite any case "where jurisdiction was rejected under this prong of the minimum contacts

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Supreme Court holds that a weaker standard than "but for" causation applies, ExxonMobil reserves the right to challenge personal jurisdiction under that standard.

[4] Plaintiffs' assertion that applying "but for" causation will "end" conspiracy jurisdiction is similarly misplaced. *See* Pls.' Br. 20 n.8; *Newsome* v. *Gallacher*, 722 F.3d 1257, 1265-66, 1269 (10th Cir. 2013) (applying "but for" causation in the context of conspiracy jurisdiction). Regardless, Colorado courts have never endorsed conspiracy jurisdiction. *See Gognat* v. *Ellsworth*, 224 P.3d 1039, 1053 (Colo. App. 2009) (declining to adopt conspiracy jurisdiction).

analysis despite the existence of substantial and related forum contacts" is similarly belied by ExxonMobil's brief. *See id.* at 6 (citing *Bristol-Myers*, 137 S. Ct. at 1781). Nor has ExxonMobil "eschew[ed]" proximate causation—as it is *more stringent* than and *encompasses* "but for" causation. *See Emp'rs Mut. Cas. Co.* v. *Bartile Roofs, Inc.*, 618 F.3d 1153, 1161 (10th Cir. 2010). *Contra* Pls.' Br. 17 n.6.

B. Plaintiffs Cannot Allege That ExxonMobil's Production Activities Are a "But For" Cause of Plaintiffs' Alleged Injuries

Applying the constitutionally required "but for" standard to the Amended Complaint ("Complaint" or "AC") leads to but one conclusion: Plaintiffs cannot plausibly allege that ExxonMobil's fossil-fuel production activities in Colorado are the "but for" cause of their claims. The Complaint lacks factual allegations showing, for example, that Plaintiffs would not be facing increased wildfire risk had it not been for ExxonMobil's alleged production of crude oil in Colorado. *See* AC ¶¶ 107, 256-66. Instead, the Complaint *concedes* (i) that there are countless contributors to climate change around the world (including Plaintiffs), *see, e.g.*, *id.* ¶¶ 10, 67; and (ii) that ExxonMobil's worldwide operations supply only a fraction of global oil demand, *see id.* ¶ 81. In light of the substantial fossil-fuel activity throughout the world unconnected to ExxonMobil, and ExxonMobil's worldwide operations outside of Colorado, Plaintiffs do not, and cannot, plausibly allege that the climate change consequences they complain of would not have occurred "but for" ExxonMobil's alleged contacts with Colorado.[5] *See City of Oakland* v. *BP*

[5] ExxonMobil explained in its opening brief that Plaintiffs had, in opposing removal under the outer Continental Shelf Lands Act, raised the very argument they reject here, namely, that alleged climate-change injuries cannot be traced to particular emissions sources, which, they argue, refutes "but for" causation. *See* Br. 10 n.3. In their opposition brief before this Court, Plaintiffs neglected

p.l.c., 2018 WL 3609055, at *3 (N.D. Cal. July 27, 2018), *appeal pending,* No. 18-16663 (9th Cir.).

Perhaps recognizing this fatal flaw, Plaintiffs unsuccessfully try to manufacture new jurisdictional contacts from which their claims purportedly arise. Relying on *Calder* v. *Jones*, 465 U.S. 783 (1984), Plaintiffs contend that the alleged Colorado "effects" of ExxonMobil's non-Colorado acts are nonetheless sufficient to confer jurisdiction "because [ExxonMobil] knew they would cause injury" in Colorado. Br. 8-9. Consistent with Supreme Court precedent, however, Colorado courts have given *Calder* a "restrictive reading." *Shrader* v. *Biddinger*, 633 F.3d 1235, 1244 (10th Cir. 2011); *see also Walden* v. *Fiore*, 571 U.S. 277, 287 (2014) (explaining that the jurisdictional holding in *Calder* "was largely a function of the nature of the . . . tort" alleged). Under that precedent, in-forum effects cannot constitute sufficient jurisdictional contacts unless the "defendant *deliberately directed* its message at an audience in the forum state *and intended harm to the plaintiff* occurring primarily or particularly in the forum state." *Shrader*, 633 F.3d at 1241 (emphasis added). Contrary to Plaintiffs' argument, it is "not enough that a plaintiff is a resident of the forum and suffered harm there," *Advanced Career Techs.*, 2015 WL 328639 at *2; *accord Int'l Ass'n of Certified Home Inspectors* v. *Lesh*, 2018 WL 6249908, at *4 (D. Colo. Nov. 29, 2018), or even that the defendant is alleged to have known that harm would befall plaintiff in the forum state,[6] *see Old Republic Ins. Co.* v. *Contl. Motors, Inc.*, 877 F.3d 895, 907 (10th Cir.

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to respond to, and thus have conceded, this point. *See Stichting Pensioenfonds ABP* v. *Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011).

[6] Even assuming mere knowledge were enough, Plaintiffs' vague allegations that ExxonMobil was informed of projected effects in the "American Midwest" and "the Rockies," AC ¶¶ 356-57 n.24, would not suffice. *See Noonan* v. *Winston Co.*, 135 F.3d 85, 90 (1st Cir. 1998).

2017).

Here, the Complaint contains no plausible allegation that ExxonMobil's fossil-fuel production outside Colorado was "deliberately directed" at Colorado, or that ExxonMobil "intended harm" to Colorado residents from those activities. *See Shrader*, 633 F.3d at 1241. To the contrary, the Complaint alleges global conduct purportedly contributing to global climate change, which, in turn, allegedly caused harms in Colorado. Plaintiffs' causation theory is thus novel and expansive—"a global complex of geophysical cause and effect involving all nations of the planet" and its billions of inhabitants. *Oakland*, 2018 WL 3609055, at *3 (rejecting virtually identical climate-related tort claims for lack of personal jurisdiction). That is the very opposite of a defendant intentionally aiming its conduct at the forum state. *See Shrader*, 633 F.3d at 1246; *cf. Pakootas* v. *Teck Cominco Metals, Ltd.*, 905 F.3d 565, 572, 577-78 (9th Cir. 2018) (dumping waste into a river a mere ten miles upstream from the forum state's border), *cert. denied*, 139 S. Ct. 2693 (2019); *Illinois* v. *City of Milwaukee*, 599 F.2d 151, 156 (7th Cir. 1979) (discharging raw sewage into Lake Michigan, which forum state bordered), *vacated on other grounds*, 451 U.S. 304 (1981); *Jenner & Block* v. *District Court*, 590 P.2d 964, 966 (Colo. 1979) (coercing corporation to execute a contract in Illinois divesting it of its interest in Colorado realty).

In an attempt to avoid dismissal due to their inability to satisfy the "but for" jurisdictional requirement, Plaintiffs unpersuasively analogize their unprecedented claims to various mass tort cases.[7] *See* Br. 18-19. But those cases are clearly distinguishable. Unlike the climate change claims asserted here, those cases involve direct, discrete harms that (i) are indisputably caused by

[7] Notably, *State ex rel. Hunter* v. *Purdue Pharma LP*, 2019 WL 4019929 (Okla. Dist. Ct. Aug. 26, 2019), on which Plaintiffs rely, does not even address personal jurisdiction.

the use of certain products *within* the forum state (e.g., fatalities from guns); (ii) are linked to discrete products (e.g., cancer to cigarettes); and (iii) do not depend on the actions of billions of actors around the world (e.g., opioid addiction).

Plaintiffs' invocation of the "stream of commerce" doctrine is inappropriate for similar reasons. The doctrine requires not only that products be delivered into the stream of commerce with foreseeable use therein, but also that "those products subsequently injure forum consumers." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 473 (1985); *see World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297-98 (1980). And unlike the stream of commerce cases on which Plaintiffs rely, which concern mass torts, Plaintiffs do not allege that they were directly injured through their own consumption of ExxonMobil's products in the forum.[8] Indeed, Colorado has not applied the stream of commerce doctrine outside the product liability context.

C. Plaintiffs Cannot Allege That ExxonMobil's Promotion Activities Are a "But For" Cause of Plaintiffs' Alleged Injuries

Plaintiffs' efforts to establish personal jurisdiction based on ExxonMobil's promotional activities fare no better. As an initial matter, Plaintiffs have not alleged that ExxonMobil "purposefully availed itself" of Colorado through its promotional activities. The Complaint nowhere alleges that ExxonMobil made discrete statements or advertising communications directed into, or specifically tailored for, Colorado consumers. Instead, it alleges only general,

[8] Further, Plaintiffs have not satisfied *J. McIntyre* and *Asahi*'s stream-of-commerce-plus test. *See J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 881-87 (2011) (plurality opinion); *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 112 (1987) (plurality opinion). Nowhere do Plaintiffs allege that ExxonMobil specifically "targeted" Colorado; it is "not enough" that ExxonMobil "might have predicted that its products w[ould] reach" Colorado. *J. McIntyre*, 564 U.S. at 882; *see also Asahi*, 480 U.S. at 112 (describing factors relevant to whether a defendant targeted the forum, none of which Plaintiffs have alleged).

geographically unspecified communications, made principally by third parties. *See* AC ¶¶ 407-435. Such communications are insufficient to confer specific jurisdiction. *See Walden*, 571 U.S. at 286; *Shrader*, 633 F.3d at 1239-46.[9]

Moreover, Plaintiffs' inability to allege "but for" causation is even more pronounced under their deceptive promotion theory. Because, as discussed above, the Complaint does not allege *any* promotion directed at Colorado, Plaintiffs cannot allege that promotion directed at Colorado was a "but for" cause of their alleged injuries. And even if Plaintiffs could allege that *some* promotion was directed at Colorado, they still could not allege that, "but for" any such promotional activities, consumers worldwide would have consumed less of ExxonMobil's fossil fuels and that this lower level of consumption would have resulted in corresponding changes in the climate that would have lessened Plaintiffs' alleged harms *in* Colorado. *See Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 346-47 (2013). Absent any allegation that ExxonMobil's promotional activities were purportedly directed at Colorado, Plaintiffs have failed to allege that these promotional activities were the "but for" cause of some or all of their claimed injuries. *See id.*

D. Exercising Specific Jurisdiction over ExxonMobil Would Be Unreasonable

As they dug deeper into their doctrinal grab bag, Plaintiffs twisted the reasonableness analysis by improperly focusing on the burden to *Plaintiffs* of litigating in a proper forum, ignoring that the "primary concern" animating personal jurisdiction jurisprudence is the "burden on the *defendant*." *Bristol-Myers*, 137 S. Ct. at 1780 (emphasis added, citation omitted); *accord Axiom*

[9] *See also PS Audio, Inc.* v. *Allen*, 2018 WL 5309834, at *5 (D. Colo. Aug. 10, 2018); *Advanced Career Techs.*, 2015 WL 328639, at *2; *cf. Commonwealth* v. *Purdue Pharma, L.P.*, 2019 WL 5617817, at *7-8 (Mass. Super. Ct. Oct. 8, 2019) (finding specific jurisdiction where defendants "knowingly targeted," approved "tailored" marketing materials to, and had sales operations "based" in, the forum).

Foods, Inc. v. *Acerchem Int'l, Inc.*, 874 F.3d 1064, 1068 (9th Cir. 2017). Here, that burden is constitutionally significant. If this Court were to exercise personal jurisdiction over ExxonMobil in this case under Plaintiffs' unprecedented and sweeping jurisdictional theory, *any* company or individual connected to *any* product that purportedly contributes to climate change in *any* way would be amenable to suit in *every* jurisdiction affected by climate change.[10] The "territorial limitations on the power of the respective States" imposed by the Constitution, and the constitutional protection of the power of each entity's or individual's home jurisdiction over their citizens, do not permit such a breathtaking expansion of personal jurisdiction.[11] *See Bristol-Myers*, 137 S. Ct. at 1780-81; *cf. Daimler AG* v. *Bauman*, 571 U.S. 117, 138-39 (2014).

E. None of the Jurisdictional Doctrines Cited by Plaintiffs Provides a Basis for Personal Jurisdiction

Plaintiffs' attempt to save their claims from dismissal by resort to clearly inapplicable jurisdictional doctrines and miscellaneous arguments fails.

1. Plaintiffs' Reliance on Pendent Personal Jurisdiction Is Unavailing

Plaintiffs assert that the doctrine of pendent personal jurisdiction permits the Court to

[10] The resulting judicial inefficiencies and inconsistent outcomes are precisely why the application of federal common law is needed here. *See Illinois* v. *City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972); *cf. OMI Holdings, Inc.* v. *Royal Ins. Co. of Can.*, 149 F.3d 1086, 1097 (10th Cir. 1998); *see also* Defs.' Merits Br. 7-9; Defs.' Merits Reply Br. 1-6.

[11] *Simon* and *Goettman* are clearly distinguishable. Not only did plaintiffs present a materially stronger minimum contacts showing in those cases, *see Archangel Diamond Corp.* v. *Lukoil*, 123 P.3d 1187,1195 (Colo. 2005), but they involved unique considerations, absent here, rendering jurisdiction reasonable, *see Simon* v. *Philip Morris, Inc.*, 86 F. Supp. 2d 95, 134 (E.D.N.Y. 2000) (defendant's executives "regularly travel[ed]" to the forum "seeking capital and for other business reasons"); *Goettman* v. *N. Fork Valley Rest.*, 176 P.3d 60, 71 (Colo. 2007) (unique public interest in automobile safety).

exercise personal jurisdiction over all of their claims based on the Court's purported jurisdiction over their Colorado Consumer Protection Act ("CCPA") claim. That argument fails for an obvious reason: personal jurisdiction does not lie over their CCPA claim.[12] *See United States* v. *Botefuhr*, 309 F.3d 1263, 1274 (10th Cir. 2002) (refusing to exercise pendent personal jurisdiction where "anchor claim" has been dismissed).

Plaintiffs have not pleaded any basis for personal jurisdiction over their CCPA claim because they do not, and cannot, allege that they would not have been injured "but for" ExxonMobil's promotional activities in Colorado. But even if, contrary to fact and law, Plaintiffs had adequately pleaded personal jurisdiction as to their CCPA claim, pendent personal jurisdiction would not apply here. As Plaintiffs concede, Colorado has never endorsed application of pendent personal jurisdiction. *See Found. for Knowledge in Dev.* v. *Interactive Design Consultants, LLC*, 234 P.3d 673, 682 n.5 (Colo. 2010).[13] Nor could it under these circumstances. A state court's exercise of pendent personal jurisdiction would still "have to satisfy due process," 4A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1069.7 (4th ed. 2020) ("Wright & Miller"), which requires that a plaintiff "secure personal jurisdiction over a defendant with respect to each claim she asserts," *id.*; *see also Dental Dynamics, LLC* v. *Jolly Dental Grp., LLC*, 946 F.3d 1223, 1228 (10th Cir. 2020). Pendent personal jurisdiction is therefore permissible, at most, to extend a long-arm statute's reach—but no farther than the constitutional ceiling. *See, e.g.*, *Action Embroidery Corp.* v. *Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180-81 (9th Cir. 2004). But

[12] ExxonMobil explained, in its Rule 12(b)(5) opening and reply briefs, that Plaintiffs have failed to state a viable CCPA claim. *See* Defs.' Merits Br. 28-29; Defs.' Merits Reply Br. 14-15.

[13] ExxonMobil has not identified any other published Colorado decision that even refers to the doctrine.

in Colorado (as in most states), the long-arm statute is coextensive with due process. *See* Colo. Rev. Stat. § 13-1-124; *Goettman*, 176 P.3d at 67; Wright & Miller § 1069. Thus, pendent personal jurisdiction lacks any constitutionally permissible application in Colorado. Indeed, unsurprisingly, "[t]here does not . . . appear to be any state court opinion that has articulated a pendent personal jurisdiction policy." Wright & Miller § 1069.7.

2. ExxonMobil Has Not "Consented" to General Jurisdiction in Colorado

Plaintiffs also contend that, merely by registering to do business and designating an agent for service of process in Colorado, ExxonMobil has consented to general personal jurisdiction for any and all claims against it. That is incorrect.

First, Colorado's business registration statutes do not confer general jurisdiction over ExxonMobil. Colorado courts "will not judicially legislate by reading a statute to accomplish something the plain language does not suggest, warrant or mandate." *Shelter Mut. Ins. Co.* v. *Mid-Century Ins. Co.*, 246 P.3d 651, 661 (Colo. 2011) (citation omitted). The plain text of the provisions to which Plaintiffs point do not even *hint* of jurisdictional effect.[14] *See* Colo. Rev. Stat. §§ 7-90-801, -803, -805(2). *Second*, as the "vast majority" of courts have concluded following *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014), Plaintiffs' argument runs afoul of due process, *see, e.g.*, *Lanham* v. *BNSF Ry. Co.*, 939 N.W.2d 363, 371 (Neb. 2020).[15] The *Daimler* Court criticized

[14] The court in *Packaging Store, Inc.* v. *Leung*, 917 P.2d 361 (Colo. App. 1996), stated expressly that Colorado courts had *not* "addressed the issue of consent to personal jurisdiction by appointment of an agent for service of process," and cabined its holding to the inapposite situation in which the parties' contract designated an agent for service of process, *id.* at 363; *cf. M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

[15] *See also In re Asbestos Prods. Liab. Litig. (No. VI)*, 384 F. Supp. 3d 532, 540-41 (E.D. Pa. 2019); *Beasley* v. *Providence Hosp.*, 2018 WL 2994380, at *3 (S.D. Ala. June 13, 2018); *Perry* v. *JTM Capital Mgmt., LLC*, 2018 WL 1635855, at *3 (N.D. Ill. Apr. 5, 2018); *Howe* v. *Samsung*

as "unacceptably grasping" the plaintiff's request there to "approve the exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuing, and systematic course of business." 571 U.S. at 138-39 (internal quotation marks omitted). "A corporation that operates in many places," the Court explained, "can scarcely be deemed at home in all of them." *Id.* at 139 n.20. Because "every state in the union . . . has enacted a business registration statute," *Brown* v. *Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016), that is exactly the impermissible scenario Plaintiffs are attempting to apply here.

3. ExxonMobil's Subsidiaries' Colorado Contacts Are Irrelevant

Unable to allege personal jurisdiction over ExxonMobil based on its own limited Colorado contacts, Plaintiffs seek to substitute the alleged contacts of ExxonMobil subsidiaries. But imputing a subsidiary's jurisdictional contacts to its parent is permissible only if the subsidiary's corporate veil is pierced; it may not be predicated on theories grounded in agency or any other blurring of corporate distinctions. *Griffith* v. *SSC Pueblo Belmont Operating Co.*, 381 P.3d 308, 314-15 (Colo. 2016); *see Meeks* v. *SSC Colo. Springs Colonial Columns Operating Co.*, 380 P.3d 126, 128-29 (Colo. 2018). Doing so requires an "extraordinary" showing for which the Complaint alleges no facts.[16] *In re Phillips*, 139 P.3d 639, 643-44 (Colo. 2006); *see also* Def.'s Br. 12.

Elecs. Am., Inc., 2018 WL 2212982, at *5 (N.D. Fla. Jan. 5, 2018); *Genuine Parts Co.* v. *Cepec*, 137 A.3d 123, 137-48 (Del. 2016). Plaintiffs point to no post-*Daimler* Colorado authority to the contrary.

[16] Veil-piercing is necessary to impute a subsidiary's contacts to its parent because "[i]nsulation from individual liability is an inherent purpose of incorporation." *Griffith*, 381 P.3d at 312 (citation omitted). Plaintiffs' cases concerning the employee-employer relationship are therefore inapposite. *See Calder*, 465 U.S. at 790; *Rome* v. *Reyes*, 401 P.3d 75, 82-83 (Colo. App. 2017). *United States* v. *Bestfoods*, 524 U.S. 51 (1998), does not address personal jurisdiction whatsoever.

That a parent company's agency relationship with a subsidiary may itself be a jurisdictional contact does not save Plaintiffs' claims. Notably, despite ExxonMobil highlighting the absence of any allegation that ExxonMobil's subsidiaries are authorized to act on behalf of and bind ExxonMobil (as the law of agency requires), *see* Def.'s Br. 12-13, Plaintiffs' opposition does not identify any such allegation, either.[17] *See Eim* v. *CRF Frozen Foods LLC*, 2019 WL 1382790, at *4 (D. Colo. Mar. 26, 2019); *see also Dworkin*, *Chambers & Williams, P.C.* v. *Provo*, 81 P.3d 1053, 1058 (Colo. 2003); Restatement (Second) of Agency § 1 (Am. Law Inst. 1958). As important, even if the contacts of ExxonMobil's subsidiaries somehow could be attributed to it for jurisdictional purposes, Plaintiffs *still* do not (and cannot) allege that the total activity of ExxonMobil and its Colorado subsidiaries formed a "but for" cause of the alleged climate-change injuries. *See supra* §§ II.A-C.

III. Conclusion

For the reasons above and in ExxonMobil's opening brief, the Complaint should be dismissed for lack of personal jurisdiction.

Dated: May 1, 2020

Respectfully submitted,

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

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[17] It is simply not true that agency demands only that the subsidiary "conduct[s] the real business of the parent," Br. 12 (internal quotation marks omitted), *see First Horizon*, 166 P.3d at 177.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of May 2020 a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION PURSUANT TO COLO. R. CIV. P. 12(b)(2)** was electronically filed with the Court through CCES and served on all counsel of record.

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