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<tr><td>Plaintiffs:

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY;
BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; and
CITY OF BOULDER,

v.

Defendants:

SUNCOR ENERGY (U.S.A) INC.;
SUNCOR ENERGY SALES INC.;
SUNCOR ENERGY INC.; and
EXXON MOBIL CORPORATION.</td></tr>
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SUNCOR ENERGY INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION PURSUANT TO C.R.C.P. 12(b)(2)

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INTRODUCTION

Grasping to assert personal jurisdiction over Defendant Suncor Energy Inc. ("Suncor Canada")—a Canadian company, without ***any*** direct ties to Colorado—Plaintiffs attempt to blur the lines between Suncor Canada and its subsidiaries. To that end, Plaintiffs allege that Suncor Canada "directs the operations of its subsidiaries," "which act as its agents," "according to a common design." Plaintiffs' assertions are factually untrue and unsupported, and are disproved by Suncor Canada's competent evidence. Plaintiffs' strategy also fails as a matter of law under the binding precedent set out by the Colorado Supreme Court in *Griffith* and *Meeks*.

In both *Griffith* and *Meeks*, the Supreme Court made clear that jurisdiction over a nonresident parent company cannot be predicated on the forum-related contacts of its subsidiary based on theories grounded in agency or any other blurring of corporate distinctions. Instead, a "trial court shall determine whether it may pierce the corporate veil and impute the resident subsidiary's contacts to the nonresident parent company." If it cannot, "it shall treat each entity separately and analyze only the contacts that each parent company has with the state." Here, there is no basis to pierce Suncor Canada's corporate veil. Thus, Plaintiffs must show that Suncor Canada ***itself*** has sufficient forum-related contacts to warrant jurisdiction.

Plaintiffs fail to satisfy this burden. Specific jurisdiction is not established because Plaintiffs' various theories do not show that Suncor Canada purposefully availed itself of the privilege of conducting business in Colorado, or that Plaintiffs' claims "arise out of" Suncor Canada's purported forum-related contacts. Fair play also favors dismissal, both because of the unique burden attendant to litigating across international borders, and because Defendants Suncor Energy (U.S.A.) Inc. ("Suncor USA") and Suncor Energy Sales Inc. ("Suncor Sales")

will remain as defendants in the action. General jurisdiction is not established because Suncor Canada's place of incorporation and principal place of business are both in Canada, and there are no "special circumstances" that would render it "at home" in Colorado.

Plaintiffs have failed to make a *prima facie* showing that this Court has personal jurisdiction over Suncor Canada. The Court should dismiss Suncor Canada from the action.

RESPONSE TO PLAINTIFFS' BACKGROUND SECTION

Plaintiffs' "Background" section is riddled with inaccuracies, falsely suggesting that Suncor Canada (1) "engaged in and directed substantial fossil fuel activity in Colorado," and (2) "engaged in tortious acts" in Colorado. (Response at 3-6.) Critically, Plaintiffs' allegations and factual misstatements are not supported by the evidence.[1]

I. SUNCOR CANADA HAS NOT ENGAGED IN OR DIRECTED FOSSIL FUEL ACTIVITY IN COLORADO

According to Plaintiffs, Suncor Canada "produces, refines, markets, and sells fossil fuels . . . in Colorado," (Response at 3.) But Plaintiffs actually concede that ***all*** of the alleged fossil fuel activities tied in ***any way*** to Colorado are conducted by Suncor Canada's U.S. subsidiaries, ***not*** Suncor Canada. (*See, e.g.*, Response at 4-5; *see also* AC ¶ 97 (production), ¶ 57 (refining), ¶ 101 (marketing), ¶ 104 (transportation), ¶ 58 (sales).) The evidence bears this out. (*See* Ex. A, Declaration of Nancy Thonen ("Thonen Dec."), ¶¶ 8-29, 66-79, Exs. 1-9.)

As a result, Plaintiffs are forced to argue that Suncor Canada is the head of an "integrated energy company" that "directs its subsidiaries' fossil fuel operations and corporate decisions." (Response at 4.) But the fact that Suncor Canada is part of an integrated energy company (i.e.

[1] Plaintiffs' response is laden with unsupported allegations, many of which are irrelevant to the present motion. In the interest of accuracy, these are addressed in the accompanying declarations.

one with upstream and downstream businesses in different legal entities) does not mean that it "directs" its subsidiaries' operations or decisions. (*See* Thonen Dec. at ¶ 54.) In fact, it does not. (*See id.* at ¶¶ 53-82, Exs. 11, 18.)

Plaintiffs also argue that Suncor Canada's subsidiaries cannot "deviate from [Suncor Canada's] common design and cannot refuse to produce, promote, refine, sell, and/or transport Suncor fossil fuels." (Response at 4.) To the contrary, Suncor Canada's subsidiaries direct and control their own activities. (*See* Thonen Dec. at ¶¶ 53-82, Exs. 11, 18.) For example, Suncor USA—not Suncor Canada—sets its own business strategy, its refining production levels, and just recently "refuse[d] to . . . refine . . . fossil fuels" when it decided to shut down one of its refinery plants in response to decreased demand due to the coronavirus pandemic.[2] (*See id*. at ¶¶ 68-70.)

II. SUNCOR CANADA HAS NOT ENGAGED IN TORTIOUS ACTS

Plaintiffs also claim that Suncor Canada committed tortious acts in Colorado "[o]n its own" and through "co-conspirators, including API," by funding and participating in efforts to mislead people about climate change. (Response at 5-6.) None of this is true. In fact, Suncor Canada has ***never*** denied climate change, and ***never*** funded any research in that regard. (*See* Ex. B, Declaration of Patricia O'Reilly ("O'Reilly Dec."), ¶ 15.) Further, Suncor Canada has ***never*** been a member of API, and did not commission, fund, participate in, or ratify API positions or research. (*See id*., ¶¶ 7-11, Exs. 1-2.) In addition, Suncor Canada has ***never***—on its own or with API or any other third-party—participated in any efforts to mislead the people of Colorado about climate change or fossil fuels. (*See* O'Reilly, ¶¶ 12-14.)

[2] This notwithstanding the fact that each of Plaintiffs have recognized and designated "fossil fuel activities" as "critical" and/or "essential" business activities or infrastructure, and have issued orders enabling those activities—which they complain of here—to continue during the pandemic. (Thonen Dec. at ¶¶ 50-52, Exs. 12-15.)

LEGAL STANDARD

In the absence of a hearing, Plaintiffs have the burden to establish a *prima facie* case of personal jurisdiction. *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1192 (Colo. 2005). Importantly, "the allegations in the complaint must be accepted as true" ***only*** "to the extent they are not contradicted by the defendant's competent evidence[.]" *Id.* And only "where the parties' ***competent evidence*** presents conflicting facts" will discrepancies "be resolved in the plaintiff's favor." *Id.* (emphasis added). Plaintiffs fail to meet their burden.

ARGUMENT

I. PLAINTIFFS CANNOT IMPUTE THE SUBSIDIARIES' FORUM CONTACTS

Plaintiffs cannot impute Suncor Canada's subsidiaries' contacts to Suncor Canada. *See Griffith v. SSC Pueblo Belmont Op. Co. LLC*, 381 P.3d 308 (Colo. 2016); *Meeks v. SSC Colo. Springs Colonial Columns Op. Co., LLC*, 380 P.3d 126 (Colo. 2016). As a result, Plaintiffs fail to make a *prima facie* showing of either specific or general jurisdiction. *See infra* §§ II, III.

A. The Colorado Supreme Court has Rejected Plaintiffs' "Agency" Theory of Jurisdiction

The Colorado Supreme Court has set out the specific test a trial court must perform in considering jurisdiction over a nonresident parent company based on its subsidiary's contacts:

> First, the trial court shall determine whether it may pierce the corporate veil and impute the resident subsidiary's contacts to the nonresident parent company. If … the trial court concludes that it may not pierce the corporate veil, it shall treat each entity separately and analyze only the contacts that each parent company has with the state when performing the personal jurisdiction analysis.

Griffith, 381 P.3d at 310-11; *see also Meeks*, 380 P.3d at 128-29. In both *Griffith* and *Meeks*, petitioners expressly raised the prospect of an agency-based analysis, "arguing that the trial court failed to apply an agency or alter-ego test to determine whether they were subject to personal jurisdiction." *Griffith*, 381 P.3d at 312; *see also Meeks*, 380 P.3d at 128. The Supreme Court

rejected the agency theory, making clear that unless a nonresident parent company's veil can be pierced, jurisdiction over such company may only be based on its own forum-related contacts.

Plaintiffs ignore *Griffith* and *Meeks*, arguing that Suncor Canada's subsidiaries' actions are attributable to it "under agency principles," (Response at 17), according to *Daimler AG v. Bauman*, 571 U.S. 117, 135 n.13 (2014) and its progeny *Magill v. Ford Motor Co*., 379 P.3d 1033, *1039 (Colo. 2016). But neither of those cases actually held that an agency relationship will justify the exercise of specific jurisdiction. *See Williams v. Yamaha Motor Co. Ltd.*, 851 F.3d 1015, 1024 (9th Cir. 2017) (recognizing "*Daimler's* ***express reservation*** on the question of agency theory's application to specific jurisdiction") (emphasis added); *Magill*, 379 P.3d at 1039 (citing *Daimler*). *Griffith* thus clarified the law in Colorado post-*Daimler* and *Magill* by explaining that veil piercing—not agency—was the proper legal standard.[3]

Plaintiffs' attempts to distinguish *Griffith* and *Meeks* fail. Plaintiffs argue *Griffith* held that a court must apply "*the appropriate* test," suggesting that any "established" test will do. (Response at 18.) But *Griffith* was clear as to "the appropriate" test: "the trial court ***shall*** first determine whether it may ***pierce the corporate veil*** in order to impute the resident subsidiary's contacts." *Griffith*, 381 P.3d at 315 (emphasis added). Plaintiffs also argue that *Meeks* is inapposite because it "involved only *general* jurisdiction." (Response at 18.) In fact, *Meeks* made clear that *Griffith* applies in the context of both general *and* specific jurisdiction. 380 P.3d at 129 ("[T]he trial court must apply the *Griffith* test before determining whether it may exercise either general or ***specific personal jurisdiction*** over the Nonresident Defendants.") (emphasis added).

[3] ***All*** of Plaintiffs' other Colorado authorities also predate *Griffith* and *Meeks*. (*See* Response at 17-18.) As a result, *Griffith* and *Meeks* control.

B. <u>Plaintiffs' Allegations Do Not Satisfy the *Griffith* Veil-Piercing Test</u>

Plaintiffs cannot satisfy any of the three prongs set out in *Griffith*. *See* 381 P.3d at 313.

1. The subsidiary companies are not mere alter egos of Suncor Canada

Suncor Canada's subsidiaries are ***not*** its alter egos. Notably, ***all*** of Suncor Canada's U.S. subsidiaries are adequately capitalized (Thonen Dec. at ¶ 46), pay their own salaries and expenses (*Id*. at ¶¶ 45, 47), do business with entities other than their affiliates (*Id*. at ¶ 44), have their own bank accounts and hold the assets, permits, and licenses for their businesses (*Id*. at ¶¶ 43, 8-32, Exs. 1-9), observe all formal legal requirements (*Id*. at ¶¶ 33-42, Exs. 10-11), have full boards of directors (*Id*. at ¶ 34), have never had ***any directors*** in common with Suncor Canada (*Id*. at ¶ 63), and have directors and officers that act independently of Suncor Canada and in each of the subsidiaries' own interests, (*Id*. at ¶ 62).

Plaintiffs ignore these facts, arguing that Suncor Canada's subsidiaries "are not really separate" because they are "wholly owned," "have common directors, officers and offices," have "one set of corporate filings," and because Suncor Canada allegedly "controls decision-making for its integrated corporate family." (Response at 20-21.) But as the evidence reflects, Suncor Canada has never had any directors or physical office space in common with, and does not control decision-making for, any of its U.S. subsidiaries. (Thonen Dec. at ¶¶ 61-65).

Moreover, even if true, such allegations would be legally insufficient. *See Lowell Staats Mining Co., Inc. v. Pioneer Uravan, Inc.*, 878 F.2d 1259, 1264 (10th Cir. 1989). In *Lowell*, it was alleged that the corporate parent owned "all of the capital stock" of its subsidiary, that the two shared "common officers and directors" and filed "consolidated financial reports," and that the

subsidiary "did not act independently." *Id*. at 1263-64. Applying Colorado law, the court held the evidence "clearly insufficient" to pierce the corporate veil. *Id.* at 1265.

Plaintiffs other allegations are similarly lacking. For example, Plaintiffs argue that Suncor Canada and its subsidiaries have "one website" with "one hiring system." (Response at 20.) This is not true; indeed, merely clicking the link for any U.S. position reveals that the hiring entity is a U.S. subsidiary, not Suncor Canada. (*See* Thonen Dec. at ¶80, Ex. 18.) And again, even if true, such allegations would be insufficient.[4] Plaintiffs also argue that Suncor Canada "disregards the distinctions within its corporate structure" because it "files consolidated regulatory filings that include its subsidiaries" and "refers to its subsidiaries as part of . . . a single enterprise." (Response at 20 (citing AC ¶¶ 49-51).) The law, however, says otherwise.[5]

2. The corporate form is not a fiction used to perpetrate a wrong

Plaintiffs fail to even allege that any "corporate fiction was used to perpetrate a fraud or defeat a rightful claim." *In re Phillips*, 139 P.3d 639, 644 (Colo. 2006) (quotation omitted). Nor

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[4] *See Bridge v. New Holland Logansport, Inc.*, 815 F.3d 356, 364 (7th Cir. 2016) (that entities "shared a website. . . . bespeaks a certain degree of integration" but "does not suggest [] a misuse of corporate form"); *21st Century Fin. Serv., LLC v. Manchester Fin. Bank*, 255 F.Supp.3d 1012, 1023 (S.D. Cal. 2017) ("[T]hat a website presents affiliated entities as a single business 'carries no weight' in proving alter ego liability."); *Reers v. Deutsche Bahn AG*, 320 F.Supp.2d 140, 157-58 (S.D.N.Y. 2004) ("[T]hat the parent decides to present several corporations on a website in a unified fashion, is insufficient to show lack of formal separation between two entities.").

[5] *See, e.g.*, *Lowell*, 878 F.2d at 1264 ("[W]e do not consider the fact of consolidated financial reports to be a sufficient basis to impose liability under the alter ego doctrine."); *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 342 F.Supp.2d 207, 216 (S.D.N.Y. 2004) ("[F]actors such as sole ownership, overlapping directors, consolidated financial statements, and reference to the subsidiary as a department are insufficient to establish the type of day-to-day control necessary to disregard corporate separateness.") (applying Colorado law); *Calvert v. Huckins*, 875 F.Supp. 674, 678-79 (E.D. Cal. 1995) ("[C]onsolidating the activities of a subsidiary into the parent's annual reports is a common business practice."); *Action Mfg. Co., Inc. v. Simon Wrecking Co.*, 375 F.Supp.2d 411, 423-24 (E.D. Pa. 2005) (refusing to impute contacts where parent's annual report referred to parent "and its subsidiaries as 'we,' 'our,' and 'us.'").

could they, as Suncor Canada's subsidiaries are all adequately-capitalized, full-fledged corporations. (*See* Thonen Dec. at ¶¶ 33-48, Exs. 10-11.) Instead, Plaintiffs argue that Suncor Canada "used its alter egos to tortiously sell and promote its fossil fuels to Colorado consumers, and to mislead them, harming Plaintiffs." (Response at 21.) This is both factually untrue (*see id.* at ¶¶ 53-79), and misses the point, as the operative inquiry asks whether the fact of the corporate distinction functioned "***as a means***" to some wrong. *See, e.g.*, *Industrial Comm'n v. Lavach*, 439 P.2d 359, 361 (Colo. 1968) (emphasis added). Plaintiffs' argument is just a restatement of their general (and misguided) theory of the case, but it does not suggest that the corporate distinctions between Suncor Canada and its subsidiaries functioned as a means to the alleged transgressions.

3. Disregarding the corporate form would not achieve an "equitable result"

Plaintiffs also fail to show that piercing the corporate veil would achieve an equitable result. Plaintiffs argue that "[t]he corporate veil can be pierced where there would not otherwise be 'any meaningful opportunity for the injured parties to recover,'" (Response at 21 (quoting *Stockdale*, 407 P.3d at 577)), and that "if [Suncor Canada] is not subject to personal jurisdiction here then Colorado communities would have no U.S. forum in which to seek a remedy." *Id.*

Plaintiffs are mistaken. In *Stockdale vs. Ellsworth,* 407 P.3d 571 (Colo. 2017), the corporate entity at issue was "insolvent and ha[d] no assets," thus "foreclose[ing] any . . . opportunity for the injured parties to recover." *Id*. at 577. Here, on the other hand, declining to pierce the corporate veil will not foreclose Plaintiffs' opportunity to recover from the two of Suncor Canada's adequately capitalized subsidiaries—Suncor USA and Suncor Sales—that will remain as defendants in the action. Moreover, Plaintiffs are not promised a U.S. forum, and as they concede, they "could theoretically sue in Canada" if they so desired. (Response at 21.)

II. THE COURT LACKS SPECIFIC JURISDICTION OVER SUNCOR CANADA

In the absence of Suncor Canada's subsidiaries' contacts, Plaintiffs cannot make a *prima facie* showing of specific jurisdiction over Suncor Canada.

A. Suncor Canada did not Purposefully Avail Itself of Conducting Business in Colorado

1. Stream of Commerce Jurisdiction Does Not Apply

Plaintiffs argue that because Suncor Canada "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in [Colorado]," it is "subject to jurisdiction for its fossil fuels that were sold and burned in Colorado." (Response at 9.) The stream of commerce theory of jurisdiction, however, originates in the product liability context, *Avocent Huntsville Corp. v. Aten Int'l. Co., Ltd.*, 552 F.3d 1324, 1331 (Fed. Cir. 2008), and courts have been "reluctant to extend the stream-of-commerce principle outside the context of products liability cases," *Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 472 (5th Cir. 2006).[6] In particular, courts have refused to do so where—unlike in the products liability context—the relationship between the defendant's conduct and the alleged injury is "highly attenuated." *Ham v. La Cienega Music Co.*, 4 F.3d 413, 416 (5th Cir. 1993). Notably, Colorado courts have not applied the stream of commerce theory outside the products liability context.

In this case, the relationship between Suncor Canada's alleged conduct (i.e. delivery of fossil fuels into the stream of commerce) and Plaintiffs' alleged injury is attenuated for multiple reasons. First, like *Ham*, the product introduced into the stream of commerce is ***not*** the product

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[6] *See also Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 299 n.12 (3rd Cir. 1985) (questioning whether "the same tolerance for broad [stream of commerce] jurisdiction is reasonable" where "unlike a products liability case, there is no showing of particularly localized harm"); *Guinness Import Co, v. Mark VII Distrib., Inc.*, 971 F.Supp. 401, 409 (D. Min. 1997) ("Courts typically do not extend the stream of commerce theory beyond the products liability context.").

that allegedly gave rise to the harms at issue. Plaintiffs argue that Suncor Canada "is subject to jurisdiction for its fossil fuels that were sold and burned in Colorado." (Response at 9.) But Suncor Canada does not sell ***any*** fossil fuels in Colorado. (*See* Thonen Dec. at ¶ 72.) And the one fossil fuel it allegedly mines for processing at the Commerce City refinery—crude oil—is not burned at all. (*See* AC ¶ 57; Thonen Dec. at ¶ 71.) Only after that crude oil is transformed into an ***entirely different product*** (i.e. gasoline, etc.) is such product sold to consumers and burned.[7]

Moreover, unlike in the products liability context, Plaintiffs do not (and cannot) allege any localized harm in Colorado caused by Suncor Canada's crude oil. Instead, Plaintiffs' theory is that Suncor Canada's crude oil was transformed into another product, sold to consumers in Colorado, and burned, resulting in emissions of greenhouse gases, and that those gasses then combined with gasses emitted from innumerable sources ***around the world*** to cause changes to the ***global*** climate, which changes allegedly manifested in certain harmful effects in Colorado. (*See, e.g.*, AC ¶¶ 67, 134). This is just the type of attenuation that has led courts to refuse to expand the stream of commerce theory. This Court should likewise decline to do so here.

2. Suncor Canada's Conduct Was Not "Expressly Aimed" at Colorado

Second, Plaintiffs argue that Suncor Canada "is subject to jurisdiction for the in-state effects of its tortious out-of-state acts." (Response at 9-10 (citing *Calder v. Jones*, 465 U.S. 783 (1984)).) As Plaintiffs concede, however, *Calder* turned on the fact that the conduct there at issue—the writing and editing of an allegedly libelous article—was "***expressly aimed*** at California," the jurisdiction at issue. (Response at 10 (emphasis added).) In *Calder*, the article

[7] (*See* Thonen Dec. at ¶ 71); *Cf., e.g.*, *Belliston v. Texaco, Inc.*, 455 F.2d 175, 180 (10th Cir. 1972) ("[W]hen crude oil is refined into gasoline, the character of these products is so changed that they cannot be equated as the 'same stuff' to satisfy the requirements of the 'flow of commerce' theory.").

"was drawn from California sources," "concerned the activities of a California resident" whose "career was centered in California," and was circulated there at "almost twice the level of the next highest state." *Calder*, 465 U.S. at 785-88. As a result, "the brunt of the harm . . . was suffered in California." *Id.* at 791. Thus, jurisdiction was proper because petitioners' conduct was "calculated to cause injury to respondent in California." *Id.* at 789-91 ("In sum, California is the focal point both of the story and of the harm suffered.").

According to Plaintiffs, *Calder* applies because Suncor Canada "knew its acts would harm Colorado." (Response at 10-11.) First, Plaintiffs are wrong, as Suncor Canada did not develop or sell any of the fossil fuels at issue (Thonen Dec. at ¶ 72), and did not misrepresent anything related to climate change, (O'Reilly Dec. at ¶¶ 7-15, Exs. 1-2). Second, for *Calder* to apply, the allegedly tortious conduct at issue must have been ***expressly aimed*** at Colorado specifically. (*See* Response at 10.) But here, the alleged acts and resulting harms are concededly ***global*** in scope and thus have no particular connection to Colorado. (*See, e.g.*, AC ¶¶ 134, 137.)

Plaintiffs employ various arguments to make *Calder* fit, but none succeed. For example, Plaintiffs contend that "[e]ffects jurisdiction has a special pedigree in pollution cases . . . involving the creation of a nuisance or injury to land," pointing to *Illinois v. City of Milwaukee*, 599 F.2d 151, 155-56 (7th Cir. 1979), and *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 577-78 (9th Cir. 2018). (Response at 11.) In those cases, however, the effects of the tortious out-of-state conduct at issue were, again, ***expressly aimed*** at the forums in question.[8]

[8] *See Illinois*, 599 F.2d at 167 ("[D]efendants dump substantial quantities of . . . sewage into Lake Michigan each year [where] the lake currents carry the pathogens ***into Illinois waters***.") (emphasis added); *Pakootas*, 905 F.3d at 577-78 ("We have no difficulty concluding that Teck ***expressly aimed its waste at the State of Washington*** . . . when Teck deposited it into the powerful Columbia River just miles upstream of the border.") (emphasis added).

Plaintiffs also argue that "a tortious act can be directed at more than one forum," pointing to *Cole v. Tobacco Inst.*, where the Eastern District of Texas exercised personal jurisdiction over a nonresident parent company ("BAT") despite the fact that the alleged conduct did not target that forum in particular. (Response at 11-12 (citing 47 F.Supp.2d at 813, 815-16 (E.D. Tex. 1999)).) But *Cole* is an outlier that misapplied *Calder*, as the "overwhelming number" of courts to consider the very same question have refused to exercise personal jurisdiction over BAT. *See U.S. v. Phillip Morris Inc.*, 116 F.Supp.2d 116, 129 n.15 (D. D.C. 2000) (collecting cases).[9]

3. Colorado Does Not Recognize Conspiracy Jurisdiction

Third, Plaintiffs argue that Suncor Canada participated in a conspiracy, and that the forum-related acts of its alleged co-conspirators may be imputed to Suncor Canada. (Response at 14.) As an initial matter, the foundation for this argument—that Suncor Canada was a member of API—is not true. (*See* O'Reilly Dec. at ¶¶ 7-12, Exs. 1-2.) Moreover, Colorado ***has not recognized*** a conspiracy theory of personal jurisdiction. *See First Horizon Merch. Servs. v. Wellspring Capital Mgmt., LLC*, 166 P.3d 166, 178 (Colo. App. 2007) ("Some courts, not including those in Colorado, have also recognized a conspiracy theory of personal jurisdiction.").

4. Suncor Canada Is Not Directly Liable for Its Subsidiaries' Conduct

Fourth, Plaintiffs argue that "[w]hen a parent corporation itself participates in the wrong complained of . . . the parent is responsible for *its* actions." (Response at 15 (citing *United States*

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[9] *See also*, *e.g., id.* ("The Government fail[ed] to show that [BAT's] activities were expressly targeted at the District of Columbia."); *Laborers Local 17 Health and Benefit Fund v. Phillip Morris, Inc.*, 26 F.Supp.2d 593, 600 (S.D.N.Y. 1998) (finding that BAT's conduct was not "expressly aimed" at, and that the "brunt" of any harm had not been felt in, New York); *Insolia v. Phillip Morris Inc.*, 31 F.Supp.2d 660, 673 (W.D. Wis. 1998) ("[T[he geographic focal point of [BAT's] participation was not Wisconsin, but all of North America. [BAT's] 'focus,' or lack thereof, is simply too diffuse to say that it could have anticipated being haled into court in Wisconsin.").

v. Bestfoods, 524 U.S. 51, 64-65 (1998)).) As an initial matter, Suncor Canada does not "direct" its subsidiaries. (Response at 15; Thonen Dec. at ¶¶ 53-82, Exs. 11, 18.) Furthermore, *Bestfoods* was decided under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and its holding—which turned on the meaning of the term "operator" as it was used in that statute—was clearly limited to the specific statutory context there at issue. 524 U.S. at 60 (considering "the extent to which parent corporations may be held liable under CERCLA for operating facilities ostensibly under the control of their subsidiaries").

B. <u>Plaintiffs' Case Does Not "Arise out of" Suncor Canada's Forum-Related Contacts</u>

Plaintiffs also fail to show that Suncor Canada's "suit-related conduct . . . create[s] a substantial connection with the forum" *Walden v. Fiore*, 571 U.S. 277, 284 (2014). In an attempt to do so, Plaintiffs argue that Suncor Canada's "acts caused injury in *Colorado*, by altering the climate." (Response at 12-13 (emphasis in original).) But as set forth herein, Suncor Canada's alleged conduct does not "connect[] [it] to the forum in a meaningful way," and as a result, "the relationship among the defendant, the forum, and the litigation" does not evince the necessary "minimum contacts." *Walden*, 571 U.S. at 290-91.

C. <u>Fair Play and Substantial Justice Favor Dismissal</u>

The weaker the showing of minimum contacts, "the less a defendant need show in terms of unreasonableness to defeat jurisdiction." *Archangel*, 123 P.3d at 1195. Here, Plaintiffs' showing is exceptionally weak. As a result, fair play favors dismissal due to the burden of litigating across international borders, and because concern for Colorado's and Plaintiffs' interests is minimal where both Suncor USA and Suncor Sales will remain as defendants.

According to Plaintiffs, Suncor Canada would not be burdened here because it is "a multibillion dollar multinational enterprise" with "extensive forum contacts" and "subsidiaries in Colorado." (Response at 24.) But Suncor Canada is not "multinational"—it is a Canadian corporation based in Canada. (*See* AC ¶ 47; O'Reilly Dec., at ¶ 3.) And, as set forth herein, its alleged forum contacts do not exist, and its subsidiaries' forum contacts are irrelevant.

Benton v. Cameco Corp. is instructive. 375 F.3d 1070 (10th Cir. 2004). Like Suncor Canada, the defendant in *Benton*—Cameco, Corp. ("Cameco")—was a Canadian corporation with its principal place of business in Canada. *Id*. at 1073. And like Suncor Canada, Cameco was a sizable company with a U.S. subsidiary "licensed to do business in Colorado." *Id.* at 1080-81. Moreover, the court found that, unlike Suncor Canada here, Cameco had sufficient minimum contacts (unrelated to its subsidiary) to support the exercise of personal jurisdiction. *Id.* at 1078. Nonetheless, the court concluded that doing so "would be inconsistent with traditional notions of fair play and substantial justice" due, in part, to the "burden . . . of litigating the case in a foreign forum." *Id.* at 1079. As the court explained, like Suncor Canada here, Cameco—as distinct from its subsidiary—"has no office or property in Colorado, is not licensed to do business in Colorado, and has no employees in Colorado." *Id.*; (*see* Affidavit of Greg Frieden ¶¶ 8-12; *see also* Thonen Dec. ¶¶ 15-16, 65.) Thus, the court found that "the burden on the defendant is significant" because its "officers and employees" would be forced to "travel outside their home country" in order to mount a defense. 375 F.3d at 1079. The same is true of Suncor Canada here.

Finally, Plaintiffs argue that the opportunity to proceed against Suncor USA and Suncor Sales "does not diminish Colorado's nor Plaintiffs' interests in relief from [Suncor Canada]." (Response at 25.) In fact, Colorado and Plaintiffs *never had any* interest in relief from Suncor

Canada, as ***all*** of Suncor Canada's purported forum-related contacts tie back to Suncor Canada's subsidiaries. As a matter of fairness, where Plaintiffs have failed to show minimum contacts because they cannot connect Suncor Canada—as distinct from its subsidiaries—to Colorado, an opportunity to proceed against those subsidiaries is all Plaintiffs are due.

III. THE COURT LACKS GENERAL JURISDICTION OVER SUNCOR CANADA

The Court also lacks general jurisdiction because Suncor Canada is incorporated and based in Canada, and Plaintiffs have not shown "special circumstances" to prove that Suncor Canada is "at home" in Colorado. *See Daimler*, 571 U.S. at 139 n.19; *Magill,* 379 P.3d at 1039.

Plaintiffs attempt to distinguish both *Daimler* and *Magill* by arguing that the defendants in those cases had contacts with "many states," whereas Suncor Canada is alleged to have U.S.-based contacts principally with Colorado. (Response at 22.) Thus, according to Plaintiffs, "[t]here is only *one* U.S. state where [Suncor Canada] could be considered 'essentially at home' and expect to be answerable to suit: Colorado." (*Id.* at 23.)

Plaintiffs are mistaken. Whether a defendant has contacts in one state or several is irrelevant. The question is whether Suncor Canada's contacts with Colorado are such that it is "at home" in this forum. Here, Suncor Canada does not have ***any*** contacts with Colorado, and none of its subsidiaries function as its alter ego. (*See supra* §§ II.B, III.A.) Thus, Suncor Canada is not at home in Colorado. Further, no "special circumstances—such as temporarily relocating the company's principal place of business during wartime—indicate that this is an 'exceptional case'" requiring a different conclusion. *Magill*, 379 P.3d at 1039.

CONCLUSION

The Court should dismiss Suncor Energy Inc. for lack of personal jurisdiction.

Respectfully submitted this 1st day of May, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **SUNCOR ENERGY INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION PURSUANT TO C.R.C.P. 12(b)(2)** was filed and served via the manner indicated below this 1st day May, 2020, to the following:

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