DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 Sixth Street Boulder, CO 80302	DATE FILED: May 1, 2020 11:05 PM FILING ID: 87E22CB340988 CASE NUMBER: 2018CV30349
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.	▲**COURT USE ONLY**▲ Case No. 2018cv30349 Division 2
Attorneys for Defendants Suncor Energy (U.S.A.) Inc., Suncor Energy Sales Inc., and Suncor Energy Inc.: Hugh Q. Gottschalk (#9750) Evan Stephenson (#37183) Wheeler Trigg O'Donnell LLP 370 Seventeenth Street, Suite 4500 Denver, CO 80202-5647 Telephone: 303.244.1800 Facsimile: 303.244.1879 Email: gottschalk@wtotrial.com stephenson@wtotrial.com	

SUNCOR DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS OR TRANSFER VENUE TO THE DENVER COUNTY DISTRICT COURT

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INTRODUCTION

In responding to the Suncor Defendants' motion, Plaintiffs rely upon inapplicable and rarely seen arguments—all of which fail. This reply demonstrates that (i) the forum selection clauses under the 2009 Master Contract, 2018 confirmation contract, and the 2019 confirmation contract must all be enforced because this action comes within their express terms, and these agreements are all valid and legally binding; (ii) as a result of this legal conclusion, the Court should transfer the entire case to Denver County under C.R.C.P. 98(f) ; (iii) Plaintiffs' new venue argument under C.R.C.P. 98(a), which was not even pled in the amended complaint, lacks any merit; and (iv) Boulder is an improper venue on any other ground. Moreover, Plaintiffs concede none of the Defendants ever operated in Boulder County. The motion should be granted.

ARGUMENT

I. THE RESPONSE'S ARGUMENTS AGAINST ENFORCING THE 2009, 2018, AND 2019 FORUM SELECTION CLAUSES ALL FAIL

A. The Master Contract's Forum Selection Clause Applies

In its motion, the Suncor Defendants ("Suncor") showed that Plaintiff San Miguel County ("San Miguel") entered into three contracts with Suncor Energy (U.S.A.) Inc. ("Suncor USA") under which it purchased asphalt, all of which require venue in Denver. (Mot. 3-12.) San Miguel has sued Suncor USA in this action in part on the basis that the Commerce City Refinery and its operations that produce and transport San Miguel's asphalt is a "nuisance" (*Id*. at 3-12.) Crucially, Plaintiffs have not denied that they consider the Commerce City Refinery and its operations a "nuisance" for which they seek damages—as they cannot. (Resp. 1-15.)

San Miguel's decision to sue Suncor USA and assert claims relating to the Commerce City Refinery's operations—which produces and transports asphalt purchased by San Miguel—

brings this case squarely within the 2009 Master Contract's forum selection clause. That clause provides that San Miguel "consents to the exclusive jurisdiction" of courts "located in the City of Denver, Colorado for any actions, suits, or proceedings arising out of or relating to this Agreement or the transactions contemplated thereby . . . ." (Mot. 3 (emphasis added).) In Colorado, the phrase "related to" in a dispute-resolution clause in a contract for services or construction applies "broadly" and to all the work "necessary" to carry out the contract. *City & County of Denver v. Dist. Court*, 939 P.2d 1353, 1366–67 (Colo. 1997). Here, that includes all steps necessary to perform the contract–making, transporting, and delivering the product.

Unable to challenge the validity or enforceability of the Master Contract, Plaintiffs attempt to characterize their claims narrowly to avoid it. Plaintiffs contend they "targeted fossil fuels because they produced greenhouse gases 'when they are combusted,'" "do not seek to hold Suncor liable" for its "development, production or supply" of asphalt, and that the "supply of asphalt for road maintenance is not related to Plaintiff's allegations of harm [or] Suncor's alteration of the climate." (Resp. 2, 8.) These assertions are untrue and misstate the amended complaint. As shown below, Plaintiffs' claims relate not only to gasoline and diesel (fossil fuels that are combusted), but also to the transportation and refining of crude oil (which is not combusted) by Suncor USA to make asphalt, gasoline, and diesel. (Thonen Decl. ¶ 71.)

In other words, Plaintiffs' "nuisance" claim is not limited to fossil fuel "consumption." It includes the entire process that produces both fossil fuels and San Miguel's asphalt, including (i) the operation of "pipeline systems that transport crude oil from Cheyenne, Wyoming to Commerce City, Colorado" (Am. Compl. ¶ 91); (ii) the manner in which the "Commerce City refinery processes Canadian [oil] sands crude from Suncor Energy's mining operations in Canada and products from fractured oil and gas production in Colorado" (*id.* ¶ 57); (iii) the

"marketing, transportation, and storage of crude oil . . . products," including asphalt (*id.* ¶ 101); (iv) "Suncor's operations in Colorado," including "refining and transportation activities," which Plaintiffs allege "emitted approximately one million metric tons" of greenhouse gases in one year (*id*. ¶ 92); and (v) the "emissions traceable to Suncor's products," including San Miguel's asphalt (*id.* ¶ 399). Plaintiffs have criticized the "entire production lifecycle" of fuels, not just "combustion emissions alone" (*id.* ¶ 401). That "lifecycle" produces San Miguel's asphalt, because the same process creates both. (Ex. A to Suncor Pers. Jur. Reply, Thonen Decl. ¶ 78 ("Thonen Decl.").)

In light of these allegations, Plaintiffs' alleged "nuisance" includes the actions Suncor USA performs to make San Miguel's asphalt and transport it. (*Id.* ¶ 78.) In the 2009 clause's words, this action is presently "relating to" the Master Contract and the "transactions" for asphalt purchase "contemplated thereby." (Mot. 3.) By claiming what Suncor USA does to perform under the Master Contract is tortious, this lawsuit establishes a "relationship" or "discoverable relation" with the Master Contract and its "transactions" under Colorado law that triggers the 2009 clause. *MPVF Lexington Partners, LLC v. W/P/V/C, LLC*, 148 F. Supp. 3d 1169, 1178 (D. Colo. 2015).

The response offers no contrary Colorado authority. The only Colorado-law case cited, *Lawson v. Glob. Payments Inc*., 2019 WL 4412271 (D. Colo. Sept. 16, 2019), involved a forum selection clause governing employment to disputes "related to" an employment contract. *Id.* at *1. Unlike here, the *Lawson* clause did not apply to all "transactions contemplated thereby." The *Lawson* contract is narrower than the Master Contract. And the *Lawson* clause could not be triggered by all that is "necessary" to make a product. *Denver*, 939 P.2d at 1366–67.

Because *Lawson* is off-point and Colorado law requires the 2009 clause to apply to all that is "necessary" to make and deliver San Miguel's asphalt, *id.*, Plaintiffs look to other jurisdictions for support, but find none. Plaintiffs cite *Bah. Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1340-44 (11th Cir. 2012). (Resp. 9.) However, *Byers* conflicts with Colorado law by reading "related to" narrowly as requiring a direct causal connection, *id.* at 1341, which Colorado law rejects by construing "relating to" as being "broader than the concept of a causal connection," *MPVF*, 148 F. Supp. 3d at 1178. Moreover, the forum selection clause in *Byers* was missing the language here extending the 2009 clause to all "transactions contemplated thereby." *Compare Byers*, 701 F.3d at 1340, *with supra* p. 2. But even if *Byers* applied, its standard is satisfied by Plaintiffs' allegations: San Miguel has sued Suncor USA in part for doing what the contract required (*see supra* pp. 2-3), which is a direct causal connection.

Finally, Plaintiffs argue that the 2009 clause must be construed against Suncor USA as the drafter, but the Master Contract opts out of *contra proferentem*. (Mot. Ex. 1 (Ex. A § 30).)

B. The 2018-19 Forum Selection Clauses Apply

The response makes no argument that this action does not come within the plain meaning of the forum selection clauses from the 2018-19 confirmation contracts. (Resp. 1-15.) Instead, Plaintiffs raise rarely seen challenges to those contracts' enforceability. None has merit.

1. The 2018-19 clauses are valid, authorized, and enforceable

Plaintiffs claim that Suncor USA inserted forum-selection language into the confirmation contracts unfairly, and that the contracts are unauthorized because San Miguel's board alone can bindingly enter such a contract. (Resp. 13-14.) Plaintiffs are wrong. Suncor USA followed the express "Confirmation Procedure" from § 2 of the Master Contract, to which San Miguel agreed. The "Confirmation Procedure" states that San Miguel "agrees that it shall be legally bound to

any transaction or agreement agreed to by the Parties . . . for the purchase and sale of any petroleum productions pursuant to the terms set forth in a transaction or agreement confirmation delivered by Suncor to Counterparty [San Miguel] pursuant to Section 3 hereof." (Mot. Ex. 1 § 2.) San Miguel must object within a certain time period; otherwise, "the Confirmation shall be binding." (*Id.*) And if San Miguel accepts or takes delivery of petroleum products, the confirmation is binding for that reason alone. (*Id.*)

Here, Suncor and San Miguel implemented the 2018-19 confirmations according to the Master Contract's "Confirmation Procedure." (Thonen Decl. ¶ 78.) Suncor complied with § 3 of the Master Contract by delivering due notice to the San Miguel-specified email address (phyllis@sanmiguelcounty.org), to the appropriate person designated by San Miguel (Ryan Righetti), without objection from San Miguel, and thereby creating a binding confirmation. (*Id.*) The process worked as designed. Because Suncor followed that appropriate process, the confirmation contracts are fully authorized and binding—including the forum selection clauses.

This is not the only reason Plaintiffs' "authority" argument fails. Plaintiffs argue that Ryan Righetti's lack of actual authority defeats the confirmations, on the basis of *Big Sandy Sch. Dist. No. 100-J, Elbert Cty. v. Carroll*, 433 P.2d 325 (Colo. 1967). But *Big Sandy* was overruled. *Normandy Estates Metro. Rec. Dist. v. Normandy Estates, Ltd.*, 553 P.2d 386, 389 (Colo. 1976).

Further, even if the confirmation contracts were signed without actual authority, they must still be enforced under the rule that a party will not be permitted to repudiate a contract on the basis that it was unauthorized where the party has accepted the benefits of the contract and acquiesced in the other party's performance. *See Perl-Mack Enters. Co. v. City & Cty. of Denver*, 568 P.2d 468, 471 (Colo. 1977). That is what occurred here. San Miguel accepted Suncor USA's performance and the benefits of the 2018-19 confirmation contracts. (Thonen Decl. ¶ 78.) Nor

have Plaintiffs attempted to rebut the legal presumption that contracts duly-executed by a government entity's representative are valid—as they cannot. *Crested Butte S. Metro. Dist. v. Hoffman*, 790 P.2d 327, 329 (Colo. 1990).

2. The 2018-19 clauses apply to pending litigation

Plaintiffs argue that the 2018-19 forum selection clauses cannot apply to already-pending litigation, on the basis that this would be impermissibly "retroactive." (Resp. 10.) They cite no authority involving forum selection clauses (*Id.* at 10-11), and attempt to distinguish *Zink v. Merrill Lynch Pierce Fenner & Smith, Inc*., 13 F.3d 330 (10th Cir. 1993), merely because it involved an arbitration clause. (Resp. 10.)

These arguments fail for several reasons. First, cases such as *Zink* governing arbitrations apply fully here, because an "agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause." *Scherk v. Alberto-Culver Co*., 417 U.S. 506, 519 (1974). Second, courts have not hesitated to apply forum selection clauses to already-filed litigation. *E.g.*, *Marullo v. Apollo Assoc. Servs., LL*C, 515 S.W.3d 902, 904-06 (Tex. App. 2017); *TradeComet.com LLC v. Google, Inc*., 435 Fed. Appx. 31, 34-35 (2d Cir. 2011). Third, ordinary contract-law principles govern forum selection clauses, *Cagle v. Mathers Family Tr*., 295 P.3d 460, 464 (Colo. 2013), and those principles permit such clauses to govern already-filed cases. This is especially true in Colorado, which "has a strong commitment to the freedom of contract." *Bailey v. Lincoln Gen. Ins. Co*., 255 P.3d 1039, 1047 (Colo. 2011). Fourth, because such clauses must be mutually agreed-to, there is no risk of "chaos." (Resp. 11.)

3. The response's "expiration" argument is wrong

Plaintiffs next contend that because the confirmation contracts' terms have ended, the forum selection clauses cannot be enforced at this time. (Resp. 11.) Again, Plaintiffs cite no

authority supporting this theory, and there is none. To the contrary, it is settled that a forum selection or similar clause does not automatically end upon the termination of the agreement. *Nolde Bros., Inc. v. Bakery & Confectionery Workers Union*, 430 U.S. 243, 252 (1977) (arbitration clause). As succinctly explained by one court that enforced a forum selection clause in a terminated contract: "Termination of a contract does not divest parties of rights and duties already accrued." *Advent Elecs., Inc. v. Samsung*, 709 F. Supp. 843, 846 (N.D. Ill. 1989). Moreover, even under Plaintiffs' own "expiration" theory, they would still lose because San Miguel unquestionably breached the 2018-19 clauses before the confirmation contracts expired.

4. The "enforceability" argument conflicts with *ABC Mobile Systems*

Plaintiffs next seek to void the 2018-19 forum selection clauses under *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1 (1972). (Resp. 12-13.) The response, however, does not even claim to meet that very high standard. Plaintiffs must "show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust or unreasonable to hold that party to his bargain." *ABC Mobile Sys., Inc. v. Harvey*, 701 P.2d 137, 139 (Colo. App. 1985). The response nowhere contends that Plaintiffs would be "deprived of [their] day in court" in Denver, because that is not so. Instead, the response cites out-of-state cases that conflict with *ABC Mobile Systems* (Resp. 12-13) and thus deserve no weight.

Plaintiffs also seek to void the confirmation contracts on the basis that San Miguel did not understand that they contained forum selection clauses. (*Id.* at 11-12.) But this argument fails. San Miguel's affiant, Ryan Righetti, admitted that he possessed and read both contracts before signing them. (Righetti Aff. ¶¶ 10-11, 15-16.) San Miguel is therefore "charged with

knowledge of the restrictions" in the contracts. *Pete's Satire, Inc. v. Commercial Union Ins., Co*., 698 P.2d 1388, 1391 (Colo. App. 1985). No Colorado law voids contracts on these facts.

C. The Court Should Transfer the Entire Case to Denver Under C.R.C.P. 98(f)

For the reasons explained in the motion, and not refuted in the response, a transfer of San Miguel's action to Denver supports transferring this entire case to Denver. (Mot. 11-13.)

II. THE RESPONSE OFFERS NO VALID BASIS FOR VENUE IN BOULDER

The response makes meritless arguments in support of venue in Boulder.

A. Venue in Boulder Is Impossible Under C.R.C.P. 98(a)

Plaintiffs begin their response by claiming for the first time that this is an action "affecting real property" that must be brought in Boulder under the exclusive venue rule found in C.R.C.P. 98(a). (Resp. 4-5.) Plaintiffs never pled this. (Am. Compl. ¶¶ 87-88.)

Rule 98(a) does not govern here for many reasons. First, Plaintiffs' Rule 98(a) argument effectively concedes that San Miguel sued in the wrong venue. Under Rule 98(a), a case "affecting real property" in San Miguel must be brought solely and exclusively in San Miguel. Second, "[a]n action for damages alone is not one affecting real property," *Utes Corp. v. Dist. Ct.*, 702 P.2d 262, 266 (Colo. 1985), and that is all Plaintiffs claim they filed here. (Mot. 4.) Third, Rule 98(a) "'has to do with actions affecting specific property,'" *Sanctuary House, Inc. v. Krause*, 177 P.3d 1256, 1259 (Colo. 2008), unlike the present case in which the amended complaint identifies no "specific" property and "does not seek any remedies pertaining directly to the [specific] property," *id.* Fourth, an action affecting real property is one in which "title, lien, injury, quality or possession" is at issue, *Craft v. Stumpf*, 170 P.2d 779, 780 (Colo. 1946), but here there is none.

B. The Nuisance Venue Statute Cannot Apply to Actions for Money Damages

No other ground for venue in Boulder exists. The motion showed that the nuisance venue statute, C.R.S. § 16-13-307, does not permit venue in Boulder because Plaintiffs do not seek to abate anything but instead purport to seek only money damages. (Mot. 13-14.) Plaintiffs respond that the term "abate" in the statute is "circular" and can include damages as "costs." (Resp. 7.)

These counter-arguments fail. In fact, "the only remedy is injunctive relief" in a civil action for abatement of a public nuisance. *People v. Cory*, 514 P.2d 310, 311 (Colo. 1973) (interpreting an earlier version of the statute). Consistent with *Cory*, the term "action to abate nuisance," as defined in the nuisance venue statute, nowhere includes any damages remedy. (Mot. 13.) The statute's use of "abate" within that definition does not expand it to include monetary damages, as Plaintiffs would have it. The plain meaning of "abatement," when applied to a nuisance, is "[t]he act of eliminating or nullifying," which does not include compensating for injury. Black's Law Dictionary 3 (8th ed. 2004). No reasonable reading of the nuisance venue statute could expand "abate" to include damages for injury caused by a nuisance.

Plaintiffs' authorities cited in the response are not to the contrary. Plaintiffs cite two cases and a statute acknowledging that a person guilty of disobeying a government resolution of summary nuisance abatement can be required to reimburse the government for removing the nuisance. *See Munn v. Corbin*, 44 P. 783, 788 (Colo. App. 1896) (misdemeanor conviction permits costs); *Price v. City of Lakewood*, 818 P.2d 763, 765 (Colo. 1991) (offender "guilty" and owed costs); C.R.S. § 25-1-518(3). These authorities are irrelevant here, since Plaintiffs have not brought any action under them, they say nothing about venue, and they also say nothing about the meaning of "abate" under C.R.S. § 16-13-307 or otherwise.

C. Plaintiffs' Argument That a Tort Was "Committed" in Boulder Misrepresents *Magill v. Ford* and the Pertinent Facts

The motion also showed that venue is not proper in Boulder under C.R.C.P. 98(c)(5) because the place of injury is not where a tort is "committed." (Mot. 14-15.) In response, Plaintiffs nowhere dispute that none of Defendants has ever operated in Boulder. Instead, they misrepresent *Magill v. Ford Motor Co.*, 379 P.3d 1033 (Colo. 2016), claiming it held "venue would have been proper" where "the accident occurred and injuries were suffered." (Resp. 5.) That is wrong. *Magill* never determined that any venue was proper or where a tort was "committed" under Rule 98(c)(5). *See* 379 P.3d at 1035-41. After misrepresenting *Magill*, Plaintiffs claim that they alleged the "carrying out of deceptive trade practices" in Boulder. (Resp. 6 (citing Am. Compl. ¶ 87).) But in fact, neither Paragraph 87 of the amended complaint nor the response describes any identifiable conduct in Boulder.

Finally, Plaintiffs contend that alleged "production" of fossil fuels in Boulder County by a nonparty, Petro-Canada Resources (USA) Inc. ("PCRUSA"), permits venue. (Resp. 6.) This argument also fails. No authority permits Plaintiffs to establish venue based on the actions of nonparties. That is because "[v]enue requirements are imposed in order to insure that a trial is fair and convenient for the parties." *Spencer v. Sytsma*, 67 P.3d 1, 7 (Colo. 2003) (emphasis added). Moreover, Plaintiffs provide no competent evidence to support their veil-piercing theory of venue, and Suncor has clearly established that no basis exists to pierce PCRUSA's corporate veil. (Thonen Decl. ¶¶ 30-49.) Venue is not proper in Boulder under Rule 98(c)(5).

CONCLUSION

Venue is improper in Boulder. The Court should grant a transfer to Denver.

Date: May 1, 2020

s/ Evan Stephenson

Hugh Q. Gottschalk (#9750)
Evan Stephenson (#37183)
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202-5647
Telephone: 303.244.1800
Facsimile: 303.244.1879
Email: gottschalk@wtotrial.com
stephenson@wtotrial.com

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **SUNCOR DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS OR TRANSFER VENUE TO THE DENVER COUNTY DISTRICT COURT** was filed and served via the manner indicated below this 1st day May, 2020, to the following:

Kevin S. Hannon, #16015 THE HANNON LAW FIRM, LLC 1641 Downing Street Denver, CO 80218 Telephone: (303) 861-8800 Email: khannon@hannonlaw.com	( ) First Class Mail ( ) Hand Delivery ( ) Facsimile ( ) Overnight Delivery (X) Colorado Courts E-Filing ( ) E-Mail

Attorney for Plaintiffs

Marco Simons, Admitted *Pro Hac Vice* D.C. Bar No. 492713 Alison Borochoff-Porte, Admitted *Pro Hac Vice* NY Bar No. 5482468 Michelle C. Harrison, Admitted *Pro Hac Vice* D.C. Bar No. 1026582 EarthRights International 1612 K Street NW, #401 Washington, DC 20006 Telephone: (202) 466-5188 Email: marco@earthrights.org alison@earthrights.org michelle@earthrights.org	( ) First Class Mail ( ) Hand Delivery ( ) Facsimile ( ) Overnight Delivery ( ) Colorado Courts E-Filing (X) E-Mail

Attorney for Plaintiffs

David Bookbinder, Admitted *Pro Hac Vice* D.C. Bar No. 455525 Niskanen Center 820 First Street, NE, Suite 675 Washington, DC 20002 Email: dbookbinder@niskanencenter.org	( ) First Class Mail ( ) Hand Delivery ( ) Facsimile ( ) Overnight Delivery ( ) Colorado Courts E-Filing (X) E-Mail

Attorney for Plaintiffs

Colin G. Harris, #18215 Matthew D. Clark, #44704 Faegre Drinker Biddle & Reath, LLP 1470 Walnut Street, Suite 300 Boulder, CO 80302 Telephone: 303-447-7700 Facsimile: 303-447-7800 Email: Colin.harris@FaegreDrinker.com matthew.clark@FaegreDrinker.com	( ) First Class Mail ( ) Hand Delivery ( ) Facsimile ( ) Overnight Delivery (X) Colorado Courts E-Filing ( ) E-Mail

Attorneys for Defendant Exxon Mobil Corporation

Justin Anderson (Admitted *pro hac vice)* PAUL WEISS, RIFKIND, WHARTON & GARRISON LLP 2001 K Street, NW Washington, DC 20006-1047 Telephone: (202) 223-7321 Facsimile: (202) 204-7393 Email: janderson@paulweiss.com	( ) First Class Mail ( ) Hand Delivery ( ) Facsimile ( ) Overnight Delivery ( ) Colorado Courts E-Filing (X) E-Mail

Attorneys for Defendant Exxon Mobil Corporation

Jaren Janghorbani (Admitted *pro hac vice*) Kannon Shanmugam (Admitted *pro hac vice*) Daniel J. Toal (Admitted *pro hac vice*) Theodore V. Wells, Jr. (Admitted *pro hac vice*) Yahonnes Cleary (Admitted *pro hac vice*) Caitlin E. Grusauskas (Admitted *pro hac vice*) PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP 1285 Avenue of the Americas New York, NY 10019-6064 Telephone: (212) 373-3573 Facsimile: (212) 492-0573 Email: jjanghorbani@paulweiss.com kshanmugam@paulweiss.com dtoal@paulweiss.com twells@paulweiss.com ycleary@paulweiss.com cgrusauskas@paulweiss.com	( ) First Class Mail ( ) Hand Delivery ( ) Facsimile ( ) Overnight Delivery ( ) Colorado Courts E-Filing (X) E-Mail

Attorneys for Defendant Exxon Mobil Corporation

s/ Ben Marquez