DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 Sixth Street Boulder, CO 80302	
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	

DEFENDANT SUNCOR ENERGY INC.'S
MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

CERTIFICATE OF CONFERRAL 3

BACKGROUND 3

ARGUMENT 4

I. LEGAL STANDARDS GOVERNING GENERAL AND SPECIFIC PERSONAL JURISDICTION 4

II. THE COURT LACKS GENERAL JURISDICTION OVER SUNCOR CANADA 5

III. THE COURT LACKS SPECIFIC JURISDICTION OVER SUNCOR CANADA 9

A. Suncor Canada Did Not Purposefully Avail Itself of the Privilege of Conducting Business in the Forum State 9

B. Plaintiffs' Case Does Not "Arise out of" Suncor Canada's Forum-Related Contacts 11

IV. PLAINTIFFS CANNOT IMPUTE THE SUBSIDIARY COMPANIES' FORUM-RELATED CONTACTS TO SUNCOR CANADA 14

A. The Colorado Supreme Court Has Rejected Plaintiffs' "Agency" Theory of Specific Jurisdiction 14

B. Plaintiffs' Allegations Do Not Satisfy the *Griffith* Veil-Piercing Test 16

1. The Subsidiary Companies are not mere alter egos of Suncor Canada 17

2. The corporate form is not a fiction used to perpetuate a wrong 18

3. Disregarding the corporate form would not achieve an "equitable result" 18

V. FAIR PLAY AND SUBSTANTIAL JUSTICE FAVOR DISMISSAL 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Archangel Diamond Corp. v. Lukoil,
123 P.3d 1187 (Colo. 2005) ..... passim

Asahi Metal Indus. Co. v. Sup. Ct. of Calif.,
480 U.S. 102 (1987) 19

Bristol-Myers Squibb Co. v. Superior Court of California,
137 S. Ct. 1773 (2017) 11, 12, 13

Burger King v. Rudzewicz,
471 U.S. 462 (1985) 5, 9

City of New York v. BP P.L.C. et al.,
325 F. Supp. 3d 466 (S.D. N.Y. 2018),
appeal pending, No. 18-2188 (2d Cir.) 1

Daimler AG v. Bauman,
571 U.S. 117 (2014) ..... passim

Far West Capital, Inc. v. Towne,
46 F.3d 1071 (10th Cir. 1995) 9, 10

Firstar Bank, N.A. v. Faul Chevrolet, Inc.,
249 F. Supp. 2d 1029 (N.D. Ill. 2003) 16

Giduck v. Niblett,
408 P.3d 856 (Colo. App. 2014) 7

Goodyear Dunlop Tires Operations, S.A. v. Brown,
564 U.S. 915 (2011) 11

Griffith v. SSC Pueblo Belmont Operating Co. LLC,
381 P.3d 308 (Colo. 2016) ..... passim

Harrison v. NBD Inc.,
990 F. Supp. 179 (E.D. N.Y. 1998) 16

In re Phillips,
139 P.3d 639 (Colo. 2006) 17

Keefe v. Kirschenbaum & Kirschenbaum, P.C.,
40 P.3d 1267 (Colo. 2002) 5, 9, 11, 12

Keeton v. Hustler Magazine, Inc.,
465 U.S. 770 (1984) 5

Magill v. Ford Motor Co.,
379 P.3d 1033 (Colo. 2016) ..... passim

McVeigh v. UnumProvident Corp.,
300 F. Supp. 2d 731 (W.D. Wis. 2002) 16

Meeks v. SSC Colo. Springs Colonial Columns Operating Co.,
380 P.3d 126 (Colo. 2016) 14, 15

Perkins v. Benguet Consol. Mining Co.,
342 U.S. 437 (1952) 7

Team Cent., Inc. v. Teamco, Inc.,
271 N.W.2d 914 (Iowa 1978) 16

Tomaselli v. Transamerica Insurance Co.,
31 Cal. Rptr. 2d 433 (Cal. Ct. App. 1994) 15, 16

United States v. First Nat'l City Bank,
379 U.S. 378 (1965) 19

Univ. Med. Assocs. of Med. Univ. of S.C. v. UnumProvident Corp.,
335 F. Supp. 2d 702 (D. S.C. 2004) 16

Walden v. Fiore,
571 U.S. 277 (2014) 5, 11, 13

STATUTES

C.R.S. § 13-1-124 ..... 4, 9

RULES

C.A.R. 21 15

C.R.C.P. 12 1

OTHER AUTHORITIES

Colo. Const. art. 2, § 25 4

U.S. Const. amend. XIV 4

Pursuant to Colorado Rule of Civil Procedure 12(b)(2), Defendant Suncor Energy Inc. ("Suncor Canada") moves to dismiss for lack of personal jurisdiction.

INTRODUCTION

Dissatisfied with international and U.S. government policy related to the use of fossil fuels in our modern society, Plaintiffs Board of Commissioners of Boulder County, Board of Commissioners of San Miguel County, and the City of Boulder (collectively, "Plaintiffs") ask this Court to exercise essentially unlimited personal jurisdiction in asserting claims, not recognized by any court in the U.S., in Colorado based principally on *foreign* conduct regarding a *global* climate phenomenon developed "over the last 800,000 years." (Am. Compl. ¶ 131.)[1]

In furtherance of their novel legal theories, Plaintiffs improperly attempt to assert jurisdiction over a foreign entity—Suncor Canada—in violation of the U.S. Constitution and Colorado law. Suncor Canada should be dismissed from this lawsuit. The Court lacks both general and specific personal jurisdiction over Suncor Canada under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and Colorado's long-arm statute. The Court lacks general jurisdiction because Suncor Canada, a Canadian corporation with its principal place of business in Canada, is not domiciled in or otherwise "at home" in Colorado. The Court lacks specific jurisdiction because Suncor Canada, which is not registered to do (and does not

[1] As set forth in Defendants' separately filed Rule 12(b)(5) motion, and as two federal courts have recently held, Plaintiffs' claims and the amended complaint should be dismissed in their entirety, as they fail to state a plausible claim for relief. *See, e.g.*, *City of New York v. BP P.L.C. et al.*, 325 F. Supp. 3d 466, 470 (S.D. N.Y. 2018), *appeal pending*, No. 18-2188 (2d Cir.); Defs.' Mot. to Dismiss for Failure to State a Claim, Dec. 9, 2019.

conduct) any business in Colorado, did not purposefully direct its activities at Colorado, and Plaintiffs' injuries do not arise out of any contacts between Suncor Canada and Colorado.

Indeed, in the amended complaint, Plaintiffs do not allege that Suncor Canada itself has the minimum suit-related contacts with this forum necessary to establish personal jurisdiction. Instead, Plaintiffs argue that Suncor Canada's subsidiary companies are its "agents," and that the contacts of these entities should be imputed to Suncor Canada to establish jurisdiction over it. However, the Colorado Supreme Court has rejected Plaintiffs' "agency" theory of personal jurisdiction, only permitting imputation of subsidiaries' contacts to a parent company in the narrow circumstance where subsidiaries are alter egos of the parent, which Plaintiffs do not even allege here.

Moreover, traditional notions of fair play and substantial justice require the dismissal of Suncor Canada. The burden on Suncor Canada, a Canadian corporation with no substantive contacts with Colorado, litigating in a foreign jurisdiction the issue of global climate change far outweighs any interest of Plaintiffs or the State of Colorado in asserting jurisdiction. This is particularly true where two U.S. Suncor defendants with assets in Colorado, Suncor Energy (U.S.A.) Inc. and Suncor Energy Sales Inc., will remain defendants until venue and the merits are decided. Accordingly, this Court lacks personal jurisdiction over Suncor Canada and should dismiss it from this action.[2]

[2] Further, Suncor Canada incorporates by reference all of the arguments made by Defendant Exxon Mobil Corporation in support of its motion to dismiss for lack of personal jurisdiction.

CERTIFICATE OF CONFERRAL

Suncor Canada's counsel has conferred with opposing counsel regarding the relief requested in this motion. This motion is opposed.

BACKGROUND

Plaintiffs allege that Suncor Canada is a Canadian corporation with its corporate headquarters in Calgary, Alberta. (Am. Compl. ¶¶ 47, 89.) Although Plaintiffs allege that Suncor Canada "has substantial contacts with Colorado" and is "essentially at home in the state" of Colorado (*id.* ¶ 89), they allege no actual facts in support of those conclusions. In particular, Plaintiffs have not alleged, and cannot allege, that Suncor Canada has its principal place of business in Colorado, is registered to do business in Colorado, has any offices in Colorado, has any operations in Colorado, has produced or refined any fossil fuels in Colorado, or has marketed or sold any fossil fuels to customers in Colorado. (*See* Ex. A, Affidavit of Greg Freidin ("Freidin Aff.") ¶¶ 6, 8, 11, 15-16.)

Unable to make these allegations, Plaintiffs instead allege that this Court has personal jurisdiction over Suncor Canada based on the Colorado contacts of six of its subsidiary companies (collectively, "Subsidiary Companies"). (Am. Compl. ¶¶ 89-93; *see also id.* ¶¶ 48-58, 94-104.)[3] Plaintiffs allege that these subsidiaries are Suncor Canada's "agents" and that Suncor Canada is a "single enterprise." (*Id*. ¶¶ 50, 51.) Plaintiffs further allege that Suncor Canada "directs the operations of its subsidiaries" through a "common design." (*Id*. ¶¶ 52, 90.) Specifically, Plaintiffs allege that Suncor Canada, through the Subsidiary Companies, promotes

[3] The six subsidiary companies named in the amended complaint are: Defendant Suncor Energy (U.S.A.) Inc., Defendant Suncor Energy Sales Inc., non-party Suncor Energy (U.S.A.) Pipeline Company, non-party Suncor Energy (U.S.A.) Marketing Inc., non-party Petro-Canada Resources (USA) Inc., and non-party Suncor Energy Services Inc. (Am Compl. ¶¶ 94-104.)

fossil fuel use in Colorado, sells fossil fuels in Colorado, operates a petroleum refinery in Colorado, and operates pipeline systems that transport crude oil to a refinery in Colorado. (*Id.* ¶ 91.) Plaintiffs also allege that Suncor Canada, through the Subsidiary Companies, emitted greenhouse gases through the subsidiaries' transportation, production, and refinery activities. (*Id.* ¶ 92.) Plaintiffs' amended complaint nowhere alleges that the six Subsidiary Companies are alter egos of Suncor Canada or otherwise challenges the separate legal existences of Suncor Canada and the Subsidiary Companies. (*See* Am. Compl. ¶¶ 94-104.)

ARGUMENT

I. LEGAL STANDARDS GOVERNING GENERAL AND SPECIFIC PERSONAL JURISDICTION

"Whether a court may exercise personal jurisdiction over a defendant is a question of law . . . ." *Griffith v. SSC Pueblo Belmont Operating Co. LLC*, 381 P.3d 308, 312 (Colo. 2016). Plaintiffs bear the burden of establishing personal jurisdiction over each defendant. *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1193 (Colo. 2005). "Whether a state has personal jurisdiction over an entity turns on the entity's relationship with the state." *Griffith*, 381 P.3d at 314. "To exercise jurisdiction over a nonresident defendant, a Colorado court must comply with Colorado's long-arm statute and constitutional due process." *Magill v. Ford Motor Co*., 379 P.3d 1033, 1037 (Colo. 2016); *see also* U.S. Const. amend. XIV; *Daimler AG v. Bauman*, 571 U.S. 117, 136-40 (2014); Colo. Const. art. 2, § 25; C.R.S. § 13-1-124. A court must "engage in a constitutional due process analysis to determine whether" it has personal "jurisdiction over an out-of-state defendant." *Magill*, 379 P.3d at 1037. "This relationship-based approach to personal jurisdiction gave rise to two distinct categories of jurisdiction: general jurisdiction and specific jurisdiction." *Id.*

"General jurisdiction, or all-purpose jurisdiction, permits a court to exercise jurisdiction over a defendant for any and all causes of action arising from any of the defendant's activities, even if those activities occurred outside the forum state." *Id*. "Because of the significant consequences of finding that a nonresident defendant is subject to general jurisdiction, a company is subject to general jurisdiction only where it is incorporated, has its principal place of business, or is 'essentially at home.'" *Griffith*, 381 P.3d at 314; *Daimler*, 571 U.S. at 136-40. "A nonresident defendant's contacts with the state will rarely justify exercising general jurisdiction." *Magill*, 379 P.3d at 1037 (citing *Daimler*, 571 U.S. at 132-33).

When general jurisdiction does not exist, a state may still exercise specific jurisdiction over a nonresident corporate defendant "if the cause of action arises out of the defendant's in-state activities." *Magill*, 379 P.3d at 1039. Specific jurisdiction exists where the injuries triggering litigation "arise out of and are related to 'activities that are significantly and purposefully directed by the defendant at residents of the forum.'" *Archangel*, 123 P.3d at 1194 (quoting *Keefe v. Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1270-71 (Colo. 2002) (citing *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985)). The "defendant's suit-related conduct must create a substantial connection with the forum State." *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984)).

II. THE COURT LACKS GENERAL JURISDICTION OVER SUNCOR CANADA

Plaintiffs' conclusory allegation that Suncor Canada is "at home" in Colorado is directly contradicted by the U.S. Supreme Court's decision in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), and the Colorado Supreme Court's decision in *Magill v. Ford Motor Co.*, 379 P.3d 1033

(Colo. 2016), since Suncor Canada's place of incorporation and its principal place of business, are both located in Canada. (Freidin Aff. ¶¶ 5-6; Am. Compl., ¶ 47).

The consequences of finding general jurisdiction in Colorado over Suncor Canada would be stark: this Canadian company could be sued in Colorado on every dispute of every nature, including employment disputes with Canadian employees, Canadian business disputes, and every other legal controversy, without limitation. *Magill*, 379 P.3d at 1037. These drastic consequences explain why "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." *Id.* (quoting *Daimler*, 571 U.S. at 137). Under both *Magill* and *Daimler*, "the paradigmatic fora for general jurisdiction are the corporation's place of incorporation and principal place of business" because these "places have the benefit of being unique and easily ascertainable, and a corporation may reasonably anticipate being haled into court in either place." *Magill*, 379 P.3d at 1037; *Daimler*, 571 U.S. at 137. These places "afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." *Id.*; *Magill*, 379 P.3d at 1037-39.

Here, the "paradigmatic" test from *Magill* and *Daimler* precludes this Court from exercising general jurisdiction over Suncor Canada. Suncor Canada's place of incorporation and principal place of business are both in Canada. (Freidin Aff. ¶¶ 5, 6.) Neither place is in Colorado. (*Id.*) Specifically, Suncor Canada was incorporated under the federal laws of Canada, and its principal place of business is in Calgary, Alberta, Canada. (*Id.*) As such, Alberta, Canada is the only province where Suncor Canada is "essentially at home," *Magill*, 379 P.3d at 1037, and that is the only province where Suncor Canada is subject to general personal jurisdiction.

The Court's inquiry into general jurisdiction can end there. No other basis exists to assert general jurisdiction over Suncor Canada in Colorado. *Magill* and *Daimler* held that general jurisdiction may be exercised over a corporation outside of its principal place of business, or its place of incorporation, only in an "exceptional case."[4] *Magill*, 379 P.3d at 1039; *Daimler*, 571 U.S at 139 n.19. In this case, there are no exceptional facts that render Suncor Canada "at home" in Colorado, and Plaintiffs do not allege any. For example, Plaintiffs do not assert that Suncor Canada itself has "conducted continuous and systematic activities of a general business nature in Colorado." *Giduck v. Niblett*, 408 P.3d 856, 863 (Colo. App. 2014). Moreover, the facts directly contradict any such position. As explained more fully below, Suncor Canada does not have any direct contacts with Colorado. (Freidin Aff. ¶¶ 7-16.) Even the *Daimler* and *Magill* defendants' forum activities were vastly more significant than Suncor Canada's (nonexistent) contacts with Colorado, but general jurisdiction was rejected in both cases. *Daimler*, 571 U.S. at 136-37; *Magill*, 379 P.3d at 1037-39.

For example, in *Daimler* the defendant's imputed forum-state contacts included "a regional office and other facilities in the state." *Id.* at 1038 (discussing *Daimler*, 571 U.S. at 123). For argument's sake, the *Daimler* Court accepted that Daimler AG was the "largest supplier of luxury vehicles in California." *Id. Daimler* accepted as true that "2.4% of Daimler's worldwide sales were attributable to California." *Id.* (internal quotation marks omitted). Those

[4] As an example of such an "exceptional" case, the *Daimler* Court pointed to *Perkins v. Benguet Consol. Mining Co*., 342 U.S. 437 (1952), where a Philippine company had temporarily made Ohio its principal place of business. In contrast, here, Suncor Canada has never attempted to make Colorado its principal place of business (Freiden Aff. ¶ 6), and Plaintiffs make no such allegation.

contacts did not qualify as "continuous and systematic" and failed to establish general jurisdiction. *Id.* at 1037-39.

Likewise, in *Magill*, the Colorado contacts of Ford Motor Company ("Ford") fell short of the "continuous and systematic" activity necessary to create general jurisdiction, even though Ford's forum-state connections were far deeper and more significant than those of Suncor Canada. The following contacts of Ford were found to be insufficient: (i) Ford had a registered agent in Colorado, *id.* at 1038; (ii) Ford conducted "aggressive" marketing and sales programs in Colorado, and sold cars through over 30 franchised Colorado dealerships, *id.* at 1035-36, 1038; (iii) Ford maintained "several offices and businesses in the state, including the Ford Motor Company Service School and an office for Ford Motor Credit Co., LLC," *id.* at 1036; (iv) Ford "train[ed] and certifie[d] mechanics to work with Colorado consumers," *id.* at 1038; and (v) Ford had "actively litigated, as both a plaintiff and defendant[,] in cases in Colorado," *id.* These forum-state contacts were too scanty to establish general jurisdiction in *Magill*. *Id.* at 1038-39.

Here, Suncor Canada itself has no Colorado contacts. (Freidin Aff. ¶¶ 7-16.) Unlike *Daimler*, in which 2.4% of the defendant's global sales were deemed to occur in California, Suncor Canada does not sell anything in Colorado. (*Id.*) Unlike Ford, which maintained a regional office and facilities in Colorado, Suncor Canada has no offices or registered agents in this state. (*Id.*) Also, unlike Ford, which did business in Colorado and had a Colorado training program, Suncor Canada is not registered to do business in Colorado, has no employees located in Colorado, and does not do business in Colorado. (*Id.*) Suncor Canada does not keep its corporate records in Colorado, and does not pay Colorado taxes. (*Id.*) In short, Suncor Canada

lacks even those few forum-state contacts that existed in *Magill* and *Daimler*, which were found to be insufficient to support a finding of general jurisdiction.

Because Suncor Canada itself has no connections with Colorado, *Daimler* and *Magill* compel the conclusion that Suncor Canada is not "at home" in this state. General jurisdiction over Suncor Canada does not exist.

III. THE COURT LACKS SPECIFIC JURISDICTION OVER SUNCOR CANADA

Specific jurisdiction is also lacking because Suncor Canada did not purposefully avail itself of the privilege of conducting business in Colorado, Plaintiffs' claims do not "arise out of" Suncor Canada's (nonexistent) forum-related contacts, Plaintiffs cannot impute to Suncor Canada the Subsidiary Companies' forum-related contacts, and traditional notions of fair play and substantial justice do not permit specific jurisdiction in these circumstances.

A. Suncor Canada Did Not Purposefully Avail Itself of the Privilege of Conducting Business in the Forum State

A court cannot exercise specific jurisdiction over a defendant if the defendant did not "purposefully avail" itself of the privilege of conducting business in the forum state. *Keefe*, 40 P.3d at 1271; *see also Burger King*, 471 U.S. at 472. Where, as here, plaintiffs allege specific jurisdiction based on a purported tort, C.R.S. § 13-1-124(1)(b), plaintiffs must satisfy the purposeful-availment requirement by proving that the forum-state "was the focal point" of the tort. *See Archangel*, 123 P.3d at 1198-1200 (citing with approval *Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1080 (10th Cir. 1995)). The only activities that can satisfy this requirement are those "that are significant and purposefully directed by the defendant at residents of the forum." *Id.* at 1194 (internal quotation marks omitted). The purposeful-availment requirement is

not met where the forum state has merely a fortuitous role in the parties' dealings. *See id.* at 1200.

A plaintiff's failure to satisfy the purposeful-availment requirement is fatal to specific jurisdiction. Specific jurisdiction did not exist in *Archangel* for that reason. *Archangel* involved a business dispute between the plaintiff and a Russian company with its principal place of business, employees, sales, and activities all located in Russia. *Id.* at 1196. The Russian corporate defendant was not authorized to conduct business in Colorado, had no agent designated to accept service in Colorado, had no property interests in Colorado, had not conducted any financial transactions in Colorado, and had no assets here. *Id.* The *Archangel* defendant's contacts with Colorado consisted of over 70 communications with the plaintiff, who had moved to Colorado after the operative underlying transactions had occurred. *Id.* at 1197-98. The Colorado Supreme Court characterized those contacts with Colorado as "fortuitous" and found them insufficient to meet the purposeful-availment requirement. *Id.* at 1197.

The same facts that prompted the Colorado Supreme Court to reject specific jurisdiction in *Archangel* exist here. In both *Archangel* and the present case, the moving defendant was a corporation organized under a foreign nation's laws with its principal place of business located abroad. *Compare id.* at 1196, *with* Freidin Aff. ¶¶ 5, 6. In both cases, the defendants' employees, sales, and operations were outside Colorado. *Compare Archangel*, 123 P.3d at 1196, *with* Freidin Aff. ¶¶ 12, 14-16. In both cases, the defendants were not authorized to do business in Colorado, had no registered agent in Colorado, had no facilities in Colorado, and had no operations in Colorado. *Compare Archangel*, 123 P.3d at 1196, *with* Freidin Aff. ¶¶ 8, 13, 10-11, 15.

In short, no basis exists to conclude that Suncor Canada has purposefully availed itself of the privilege of conducting business in Colorado. The amended complaint nowhere makes a single specific allegation that Suncor Canada itself engaged in any activities connected to Colorado. Plaintiffs' sole basis for specific jurisdiction rests on its agency argument attempting to impute the Colorado contacts of the Subsidiary Companies. As explained more fully in Section IV below, that argument fails as a matter of law. The purposeful-availment requirement is simply not met.

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

Even if the purposeful-availment requirement were met (which it is not), there also "must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.'" *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1780 (2017) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). Not only must Plaintiffs prove an activity or occurrence by Suncor Canada "in" Colorado, they must also show that its suit-related activities "are significant and purposefully directed by the defendant at residents" in Colorado. *Keefe*, 40 P.3d at 1271. This "arising out of" prong of the specific jurisdiction test requires that "the actions of the defendant giving rise to the litigation must have created a 'substantial connection' with the forum state." *Archangel*, 123 P.3d at 1194. Stated simply, the test is whether "the defendant's suit-related conduct . . . create[s] a substantial connection with the forum." *Walden*, 571 U.S. at 284. Mere "injury to a forum resident is not a sufficient connection to the forum." *Id.* at 290. If the plaintiff's suit does not arise out of or relate to the defendant's purposeful contacts with the forum state, then "specific jurisdiction is lacking

regardless of the extent of [the] defendant's unconnected activities in the State." *Bristol-Myers*, 137 S. Ct. at 1781.

In the amended complaint, Plaintiffs plead no facts describing any such in-forum activities by Suncor Canada. They do not claim Suncor Canada engaged in any activities "in the forum State" that were "purposefully directed" at Colorado residents, and they do not identify such activities from which the litigation "arises." (*See* Am. Compl. ¶¶ 1-544.) This is because none exist. The amended complaint's allegations regarding Suncor Canada itself merely describe how the company "began," changed its name, emerged from several corporate transactions, and sold and marketed energy products broadly. (*Id.* ¶¶ 47-51.) Plaintiffs nowhere allege that Suncor Canada itself – as opposed to the separate Subsidiary Companies—did anything "in the forum State" to "purposefully direct" global warming at Colorado residents. *Bristol-Myers*, 137 S. Ct. at 1781; *Keefe*, 40 P.3d at 1271.

As Suncor Canada did not conduct any activities directed specifically at Colorado, Plaintiffs rely upon their broad global warming allegations in attempting to connect Suncor Canada with this forum. These sweeping allegations of global harm, however, cannot satisfy the "arising out of" requirement. According to Plaintiffs, this litigation arises from the combustion of fossil fuels and worldwide global warming in Earth's atmosphere. (*See* Am. Compl. ¶¶ 7-9, 15-17, 123-38.) Given that Suncor Canada did not conduct any fossil fuels activities in Colorado, Suncor Canada cannot have "purposefully directed" the worldwide phenomenon of global warming "at" Colorado residents. *Keefe*, 40 P.3d at 1271. Suncor Canada's alleged contribution to warming in the atmosphere, for that reason, has no more "substantial connection" to Colorado than to any other place on Earth. And this litigation, as a consequence, does not and cannot "arise

out of" a "substantial connection" between Suncor Canada and Colorado. *Archangel*, 123 P.3d at 1194.

Unable to identify any activities that Suncor Canada itself purposefully directed at Colorado residents, much less any that are suit-related, Plaintiffs claim that specific jurisdiction lies in Colorado because this is where Plaintiffs are located and suffered injury from global warming. (Am. Compl. ¶ 89.) This argument also fails. In *Walden*, the U.S. Supreme Court explained, "the mere fact that [the defendant's] conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction." 571 U.S. at 291. As a matter of law, an "injury to a forum resident is not a sufficient connection to the forum." *Id.* at 278. As such, Plaintiffs' allegations that they suffered an injury in Colorado from global climate change are insufficient to establish personal jurisdiction over Suncor Canada.

Plaintiffs' injury-based theory of personal jurisdiction also fails because it would effectively eliminate the "territorial limitations on the power of the respective States" required by the law of personal jurisdiction. *Bristol-Myers*, 137 S. Ct. at 1780. In the amended complaint, Plaintiffs allege that their injury in Colorado derives from excessive concentrations of atmospheric greenhouse gases to which virtually every person or entity on earth has contributed for centuries. (*See* Am. Compl. ¶¶ 123-31.) Given the worldwide sources of these emissions, Plaintiffs' injury-based theory of specific jurisdiction, if accepted, would enable every court to exercise limitless, universal personal jurisdiction over every living person and entity that generates emissions anywhere in the world. This theory is wrong, and must be rejected.

For the foregoing reasons, Plaintiffs fail to satisfy the "arising out of" requirement with respect to Suncor Canada.

IV. PLAINTIFFS CANNOT IMPUTE THE SUBSIDIARY COMPANIES' FORUM-RELATED CONTACTS TO SUNCOR CANADA

Recognizing that specific jurisdiction over Suncor Canada cannot be established based on its own contacts with Colorado, Plaintiffs resort to asserting that the six Subsidiary Companies' Colorado-related contacts can be imputed to Suncor Canada, on the basis that the Subsidiary Companies are its "agents" within a "single enterprise." (*See supra* Background Section.) The Colorado Supreme Court, however, has rejected Plaintiffs' "agency" theory of corporate jurisdiction in multiple recent decisions. Under those decisions, Plaintiffs may not impute any contacts of the Subsidiary Companies unless they meet their heavy burden and prove that the corporate veils of the six Subsidiary Companies must be pierced. *See Griffith v. SSC Pueblo Belmont Operating Co.*, 381 P.3d 308, 310-11 (Colo. 2016); *Meeks v. SSC Colo. Springs Colonial Columns Operating Co.*, 380 P.3d 126, 128 (Colo. 2016).

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

The Colorado Supreme Court has held that to impute the contacts of a subsidiary entity to a parent in order to establish jurisdiction, the corporate veil of the subsidiary must be pierced—parental control or operating as a single enterprise is insufficient for imputation. *Griffith*, 381 P.3d at 310-11. 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." *Id.* at 311.

In *Griffith*, despite the presence of facts supporting agency, the Colorado Supreme Court refused to permit the assertion of personal jurisdiction based on the contacts of a parent's subsidiaries. For example, the trial court found that the parents and their in-state affiliate

operated "as one business," *id.* at 314, and that the non-resident affiliated companies "collectively controlled the operations, planning management, and budget" of the in-state resident defendant affiliate company, *id.* The trial court also found that the non-resident companies received direct or indirect financial benefit from the resident affiliate. *Id.* The Colorado Supreme Court found these trial-court findings inadequate as a matter of law, and subsequently confirmed in a subsequent opinion that trial courts "must apply the test announced in *Griffith* . . . to determine whether nonresident parent companies may be haled into court in Colorado based on the actions of their resident subsidiaries." *Meeks*, 380 P.3d at 128.

Here, Plaintiffs have not even attempted to meet the *Griffith* and *Meeks* veil-piercing test, and instead attempt to rely on their allegations that Suncor Canada's Colorado-connected subsidiaries are its "agents" within a "single enterprise." (Am. Compl. ¶¶ 50, 51.) In *Griffith*, however, the Colorado Supreme Court rejected an agency-based test jurisdiction test. 381 P.3d at 312. ("The Nonresident Defendants petitioned this court for relief under C.A.R. 21, arguing that the trial court failed to apply an agency or alter-ego test to determine whether they were subject to personal jurisdiction." (emphasis added)).[5]

Consistent with *Griffith*, courts outside Colorado have widely held that the types of superficial branding and corporate-family connections that Plaintiffs allege in the amended complaint do not permit veil-piercing. In *Tomaselli v. Transamerica Insurance Co*., the sharing among multiple companies of the same financial statements, internal manuals, forms and letterhead, office space, and "some common personnel" fell "woefully short of" justifying veil-

[5] Moreover, Plaintiffs have not alleged or shown facts establishing that the Subsidiary Companies are authorized agents of Suncor Canada for relevant purposes.

piercing. 31 Cal. Rptr. 2d 433, 443 (Cal. Ct. App. 1994). In *Firstar Bank, N.A. v. Faul Chevrolet, Inc*., the court rejected a veil-piercing claim even though one entity "was actively involved in the management of" another entity. 249 F. Supp. 2d 1029, 1039-40 nn. 3-4 (N.D. Ill. 2003). Identity of stock ownership, identity of corporate management, identity of agents and employees, use of the parent's letterhead, and "administrative overlap" have all been found insufficient. *See, e.g.*, *Team Cent., Inc. v. Teamco, Inc*., 271 N.W.2d 914, 923 (Iowa 1978); *Harrison v. NBD Inc*., 990 F. Supp. 179, 183-84 (E.D. N.Y. 1998); *McVeigh v. UnumProvident Corp*., 300 F. Supp. 2d 731, 740-42 (W.D. Wis. 2002); *Univ. Med. Assocs. of Med. Univ. of S.C. v. UnumProvident Corp*., 335 F. Supp. 2d 702, 707 (D. S.C. 2004).

B. Plaintiffs' Allegations Do Not Satisfy the *Griffith* Veil-Piercing Test

Ignoring *Griffith* and *Meeks*, the amended complaint makes vague and irrelevant allegations relating to Plaintiffs' legally deficient "agency" theory—that Suncor Canada generally exercised "control" of its "corporate family." For example, Plaintiffs note that a 2017 Suncor Canada annual report used the word "we" and "Suncor" to refer to Suncor Canada and its affiliates. (Am. Compl. ¶ 51.) Similarly, Plaintiffs allege that Suncor Canada announced plans for maintenance of two refineries run by separate affiliates (*id.* ¶ 52), that Suncor Canada "controls and directs fossil fuel activities . . . across its corporate family . . ." (*id.* ¶ 50), that Suncor Canada "prepares consolidated financial statements that include its subsidiaries" (*id.* ¶ 53), that the 2017 annual report calls the Commerce City refinery "our" refinery (*id.* ¶ 56), that Suncor Canada backs the businesses of its direct and indirect subsidiaries (*id.* ¶ 56), that members of Suncor Canada's corporate "family" "cannot refuse" to participate in fossil-fuel commerce (*id.* ¶ 60).

These "agency" allegations are simply not relevant to the *Griffith* veil-piercing test, which requires a plaintiff to allege and prove three elements: "(1) the entity is 'merely the alter ego' of the member [or shareholder], (2) the LLC [or corporate] form is used to perpetuate a wrong, and (3) disregarding the legal entity would achieve an equitable result." *Griffith*, 381 P.3d at 313 (emphasis added).

1. The Subsidiary Companies are not mere alter egos of Suncor Canada

First, Plaintiffs have no basis to meet *Griffith*'s alter-ego element. *See* 381 P.3d at 313. A business corporation or limited liability company is a mere "alter ego" when it "is a mere instrumentality for the transaction of the shareholders' own affairs, and there is such unity of interest in the ownership that the separate personalities of the corporation and the owners no longer exist." *Id.* (quoting *In re Phillips*, 139 P.3d 639, 644 (Colo. 2006)). In the context of piercing the corporate veil to reach a parent company, a court should examine several factors that may weigh in favor of the alter-ego element:

> (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. In the amended complaint, Plaintiffs fail to make any allegation relating to any of these 11 alter-ego factors. (Am. Compl. ¶¶ 1-544.) The amended complaint, also, alleges no facts that could establish them. (*See id.*) Plaintiffs, therefore, have failed to meet their burden as to the alter-ego element.

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

Second, Plaintiffs cannot meet their burden to prove that the Subsidiary Companies' corporate veils are "merely a fiction 'used to perpetrate a fraud or defeat a rightful claim.'" *Griffith*, 381 P.3d at 313. Plaintiffs have made no allegations of this nature, as they would be untrue. To the contrary, in the amended complaint, Plaintiffs have alleged that the Subsidiary Companies were properly incorporated, registered to conduct business, and transacted business for significant periods of time. (Am. Compl. ¶¶ 94-104.)

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

Third, Plaintiffs make no attempt to meet their burden to prove that piercing the Subsidiary Companies' corporate veils would achieve an equitable result. *Griffith*, 381 P.3d at 313. Plaintiffs nowhere even claim that recognizing the separate legal existences of Suncor Canada and the Subsidiary Companies would promote inequity. Because Plaintiffs lack any basis to pierce the veils of any of the Subsidiary Companies, their forum-related contacts may not be imputed to Suncor Canada. This Court lacks specific jurisdiction over Suncor Canada.

V. FAIR PLAY AND SUBSTANTIAL JUSTICE FAVOR DISMISSAL

Even if the Court were to conclude that Suncor Canada has sufficient minimum contacts with Colorado (which it does not), the Court would still have to inquire whether exercising personal jurisdiction would offend traditional notions of fair play and substantial justice. *Archangel*, 123 P.3d at 1194-95. "A court may consider several factors in determining whether the exercise of jurisdiction is proper, including [i] the burden on the defendant, [ii] the forum state's interest in resolving the controversy, and [iii] the plaintiff's interest in attaining effective

and convenient relief." *Id.* at 1195. "Where a defendant's minimum contacts with Colorado are weak, the less a defendant need show in terms of unreasonableness to defeat jurisdiction." *Id.*

Each of these three factors supports the dismissal of Suncor Canada from this action. And given the weakness of Suncor Canada's (nonexistent) contacts with Colorado, each of these factors supports dismissal with especially great force. *See id.*

First, the burden on Suncor Canada of litigating across an international border weighs powerfully against exercising jurisdiction. "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi Metal Indus. Co. v. Sup. Ct. of Calif.*, 480 U.S. 102, 114 (1987). "'Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'" *Id.* at 115 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)). This factor inherently and heavily weighs against personal jurisdiction.

Second, as for Colorado's interest in haling Suncor Canada into this Court as the third Suncor defendant, it is minimal. Two other U.S. affiliates of Suncor Canada, with assets in Colorado, will remain defendants until the merits are decided: (1) Defendants Suncor Energy (U.S.A.) Inc., which Plaintiffs allege operates the Commerce City refinery (Am. Compl. ¶ 57), and (2) Suncor Energy Sales Inc., which Plaintiffs allege operates more than 40 retail gas stations in Colorado (Am. Compl. ¶ 58). Colorado's incremental interest in adding a third Suncor entity and fourth defendant that has no operations, property, personnel, or suit-related connections in Colorado is minimal at best.

Third and finally, as for Plaintiffs' interest, it can be pursued fully on the merits in Colorado against the remaining Defendants who are not seeking dismissal on personal-jurisdiction grounds—Suncor Energy (U.S.A.) Inc. and Suncor Energy Sales Inc. The continued participation in the litigation of these two U.S. defendants will enable Plaintiffs to pursue "effective and convenient relief," which is all that fair play and substantial justice require. Keeping an additional defendant involved would thus not increase the effectiveness or convenience of any relief. Instead, it would do the opposite. It would complicate the action with the participation of a non-essential international party, with no operations, property, personnel, or suit-related connections in Colorado. For all the foregoing reasons, traditional notions of fair play and substantial justice forcefully favor dismissing Suncor Canada from this action.

CONCLUSION

The Court should enter an order dismissing Suncor Energy Inc. from this action for lack of personal jurisdiction.

Date: December 9, 2019

s/Hugh Q. Gottschalk

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 was filed and served via the manner indicated below this 9th day of December, 2019, 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

s/ Claudia Jones