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
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SUNCOR DEFENDANTS' MOTION TO DISMISS OR TRANSFER VENUE TO THE DENVER COUNTY DISTRICT COURT

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Defendants Suncor Energy (U.S.A.) Inc. ("Suncor USA"), Suncor Energy Sales Inc., and Suncor Energy Inc.[1] (collectively, "Suncor Defendants") move to dismiss or transfer venue to the Denver County District Court.

INTRODUCTION

The Court should transfer this case to the Denver County District Court because (i) venue/forum selection clauses in three valid and enforceable contracts require dismissal or transfer with respect to Plaintiff San Miguel County's action against Suncor USA, creating good cause to transfer this entire case to Denver, and (ii) venue is improper in Boulder, but proper in Denver, under Colorado Rule of Civil Procedure 98.

For nearly a decade, Plaintiff San Miguel County has purchased petroleum products, namely asphalt products, from Suncor USA produced from the refining of crude oil at its Commerce City refinery—activity Plaintiffs now claim is a "nuisance." Those purchases are governed by a long-term June 2009 master contract with Suncor USA and subsequent confirmation contracts in 2018 and 2019 that prescribe the specific terms of San Miguel County's annual purchases. The 2018 and 2019 confirmation contracts—which San Miguel County executed after filing its two complaints in Boulder—contain venue/forum selection provisions requiring all legal disputes between the parties to be litigated in Denver, regardless as to when asserted. In addition, the 2009 master contract contains a third venue/forum selection clause requiring all disputes "related to" that agreement or the parties' transactions to be brought

[1] By joining this motion, Suncor Energy Inc. does not intend to waive its personal-jurisdiction defense, which is being asserted by separate motion. *See* C.R.C.P. 12(b) ("No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or with any other motion permitted under this Rule or C.R.C.P. 98."). The same is true of Exxon Mobil Corporation's decision to consent to the relief requested here.

exclusively in the federal or state courts in Denver.

In violation of these contracts, San Miguel County has sued Suncor USA in Boulder for global-warming damages allegedly resulting, in part, from activities at its Commerce City refinery, where it refines crude oil to manufacture petroleum products sold to San Miguel County. Under controlling law, the contracts' venue/forum selection clauses require the action between Suncor USA and San Miguel County to be transferred to the Denver County District Court or dismissed altogether. And because the dispute between San Miguel County and Suncor USA must be transferred to Denver or otherwise dismissed, good cause exists under Colorado Rule of Civil Procedure 98(f)(2) to transfer this entire case to Denver, to avoid the waste, inconvenience, burden, and risk of inconsistent outcomes that would result from litigating two materially identical and parallel actions in two different counties.

In addition, the Colorado Rules of Civil Procedure independently require this case to be transferred to Denver or, alternatively, dismissed for improper venue. Under traditional venue rules, venue is improper in Boulder, while proper in Denver—where multiple defendants reside. In light of these considerations, the Court should transfer this case to the Denver County District Court, or, alternatively, dismiss it.

CERTIFICATION OF CONFERRAL

The undersigned has conferred with other counsel regarding the relief requested in this motion. Defendant Exxon Mobil Corporation consents to the relief requested. Plaintiffs oppose.

BACKGROUND

I. SAN MIGUEL COUNTY HAS SIGNED MULTIPLE CONTRACTS WITH SUNCOR USA SELECTING DENVER AS THE EXCLUSIVE VENUE FOR THEIR DISPUTES

On June 3, 2009, San Miguel County entered into a long-term Master Product Purchase

and Sale Agreement ("Master Contract") with Suncor USA to purchase petroleum products from Suncor USA. (Ex. 1, Master Contract Ex. A ¶ 13.) San Miguel County purchases asphalt products under that contract for the county's road-paving projects. Suncor USA manufactures the petroleum products San Miguel County purchases at the Commerce City refinery—the same refinery San Miguel County alleges to be a "nuisance" in the amended complaint. (Am. Compl. ¶¶ 444-71.) The Master Contract contains an exclusive venue/forum selection clause requiring litigation related to it to be filed in Denver:

> Each of the Parties irrevocably and unconditionally consents to the *exclusive* jurisdiction of the courts of the State of Colorado and of the United States of America 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, and each of the Parties further agrees not to commence any action, suit, or proceeding except in such courts.

(Ex. 1, Master Contract Ex. A ¶ 13 (emphasis added).) In 2018 and 2019, San Miguel County signed confirmation contracts with Suncor USA setting forth the specific terms of its purchases and adding additional venue/forum selection terms. (Ex. 2, 2018 Confirmation Contract; Ex. 3, 2019 Confirmation Contract.) In these confirmation contracts, San Miguel agreed that "**any and all claims** between the Parties regarding **any and all matters** shall be subject to the exclusive jurisdiction of the state or federal courts located in Denver, Colorado regardless when claimed." (Ex. 2 §§ 1, 2; Ex. 3 §§ 1, 2) (emphasis added). For avoidance of doubt, San Miguel County and Suncor USA made the confirmation contracts' venue/forum selection provisions "effective as of the date of the" June 3, 2009 Master Contract. (*Id.*)

II. PLAINTIFFS ATTACK AS A "NUISANCE" THE COMMERCE CITY REFINERY WHERE SAN MIGUEL COUNTY'S PRODUCTS ARE MADE

San Miguel County is one of three Plaintiffs that commenced this tort action in Boulder County District Court to recover alleged damages for global warming. Plaintiffs assert six

claims: public nuisance (Am. Compl. ¶¶ 444-56), private nuisance (*id.* ¶¶ 457-71), trespass (*id.* ¶¶ 472-82), unjust enrichment (*id.* ¶¶ 483-88), violation of the Colorado Consumer Protection Act (*id.* ¶¶ 489-500), and civil conspiracy (*id.* ¶¶ 501-30).

Although Plaintiffs have selected Boulder as their venue, they claim that they do not seek to prevent climate change from occurring or affecting property in Boulder or any other place. (*Id*. ¶¶ 6, 542.) Plaintiffs allege that they "do not seek to enjoin any oil and gas operations or sales in the State of Colorado, or elsewhere, or to enforce emissions controls of any kind." (*Id.* ¶ 542.) Instead, Plaintiffs profess to seek only monetary damages. (*Id*. ¶¶ 6, 542.) Plaintiffs request a money judgment to cover costs allegedly necessitated by global warming. (*See id.*) Plaintiffs' claims seek relief from impact of the operation of the Commerce City refinery, the refining and sale of products produced at the Commerce City refinery, and greenhouse gas emissions from its refining and fossil fuel activities. (*See id*. ¶¶ 14, 57, 63, 91, 92.)

Nowhere in the amended complaint's 127 pages have Plaintiffs alleged that any of this conduct occurred in Boulder. (*Id*. ¶¶ 1-544.) Plaintiffs do not allege that any defendant operates in Boulder, has offices in Boulder, sells fossil fuels in Boulder, or that any defendant has a presence in Boulder. (*See id.*) No defendant is alleged to be a resident of Boulder. (*See id.*) Nor could Plaintiffs allege those things, because they are not true. (Ex. 4, Ewing Aff. ¶¶ 5-10.)[2]

LEGAL STANDARD

Determining whether venue is proper is a threshold question for the Court. *Bd. of Cty. Comm'rs of Eagle Cty. v. Dist. Court in & for the City & Cty. of Denver*, 632 P.2d 1017, 1022

[2] Plaintiffs do allege that a nonparty company, Petro-Canada Resources (USA) Inc., "produced fossil fuels in Colorado, including in Boulder County" at an unspecified point in time. (Am. Compl. ¶ 98.) But Plaintiffs cannot establish venue based on the actions of nonparties.

(Colo. 1981). When venue is improper, a court is "without power to determine other issues before the court." *Id.* When "a party requests a change of venue upon a ground which entitles it to the change as a matter of right the trial court loses all jurisdiction except to order the change." *Denver Air Ctr. v. Dist. Ct.*, 839 P.2d 1182, 1185 (Colo. 1992).

ARGUMENT

I. THE COURT SHOULD TRANSFER THIS CASE TO DENVER UNDER THE VENUE/FORUM SELECTION CLAUSES AND RULE 98(f)

This Court should transfer this case to the Denver County District Court because (i) the venue/forum selection clauses in the confirmation contracts and the Master Contract require the action between San Miguel County and Suncor USA to be dismissed or transferred, and (ii) the Court can and should use its discretion to transfer the remainder of the action to Denver under Colorado Rule of Civil Procedure 98(f)(2) to avoid the waste, inconvenience, burden, and risk of inconsistent outcomes that would result from creating two essentially identical and parallel actions in two different fora.

A. San Miguel County's Action Against Suncor USA Must Be Dismissed or Transferred to Denver Under the Venue/Forum Selection Clauses and C.R.C.P. 98(f)(1)

The enforcement of a venue/forum selection clause is a question of law. *Adams Reload Co. v. Int'l Profit Assocs., Inc*., 143 P.3d 1056, 1058 (Colo. App. 2005) (citing *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992)). "Contract law governs the issues relating to the interpretation and enforcement of a forum selection clause." *Cagle v. Mathers Family Tr*., 295 P.3d 460, 464 (Colo. 2013). A "forum selection clause is presumptively valid unless it is unreasonable, fraudulently induced, or against public policy." *Id.* at 465. Colorado law recognizes that "persuasive public policy reasons exist for enforcing a forum selection clause

in a contract freely entered into by the parties, as the clauses provide a degree of certainty to business contracts." *Adams Reload*, 143 P.3d at 1059. Venue/forum selection clauses may apply to tort actions, including actions brought under the Colorado Consumer Protection Act. *Id.* at 1059. Colorado law recognizes that contractual provisions may require a change of venue from an otherwise proper venue. *City of Cripple Creek v. Johns*, 494 P.2d 823, 825 (Colo. 1972) ("Where the venue is proper in either of two counties, then the change of venue cannot properly be granted from either unless some other [contract] provision requiring the change arises" (emphasis added)).

1. The venue/forum selection clauses in the 2018 and 2019 confirmation contracts unambiguously prevent San Miguel County's action against Suncor USA from proceeding in this Court

The plain language of the venue/forum selection clauses in the 2018 and 2019 confirmation contracts mandates transfer to Denver or dismissal of San Miguel County's action against Suncor USA. (*See supra* Background Section I.) Under these confirmation contracts, executed in successive years and containing identical language, San Miguel County agreed that, "effective as of the date of the Master" Contract from June 3, 2009, "**any and all claims** between the Parties [San Miguel County and Suncor USA] regarding **any and all matters** shall be subject to the exclusive jurisdiction of the state or federal courts located in Denver, Colorado regardless when claimed." (*Id.* (emphasis added).)

San Miguel County's action against Suncor USA unequivocally falls within the scope of this clause for two primary reasons. First, the clause applies to "any and all claims" regarding "any and all matters," and thereby encompasses any subject matter that may arise between San Miguel County and Suncor USA. A contractual provision encompassing "any and all claims" is enforced as written and applies to claims of any description, including tort claims or claims not

enumerated in the contract. *See, e.g., Constable v. Northglenn, LLC*, 248 P.3d 714, 716–17 (Colo. 2011). As a matter of law, "any and all claims" includes the entire breadth of all claims San Miguel County may assert against Suncor USA, including the claims San Miguel County did assert for nuisance, trespass, and statutory violations. Therefore, all of San Miguel County's claims against Suncor USA are subject to the 2018 and 2019 venue/forum selection clauses.

Second, the venue/forum selection clause specifically contemplates already-pending lawsuits or claims such as this lawsuit. In the 2018 and 2019 confirmation contracts, San Miguel County and Suncor USA agreed that the venue/forum selection clause governed all matters, "regardless when claimed," thereby including already-pending lawsuits such as this action. (*See supra* Background Section I.) Further, the parties expressly made the venue/forum selection clause "effective as of the date of the Master [Contract]," or as of June 3, 2009. (*Id.*) Therefore, even though San Miguel County originally brought this action against Suncor USA in April 2018, the 2018 and 2019 confirmation contracts require that the venue/forum selection clause applies to this lawsuit. *Zink v. Merrill Lynch Pierce Fenner & Smith, Inc*., 13 F.3d 330, 332 (10th Cir. 1993) (applying arbitration agreement to dispute even though transactions occurred prior to execution of agreement).

2. The venue/forum selection clause in the 2009 Master Contract also precludes San Miguel County's action against Suncor USA from proceeding in this Court

The venue/forum selection clause in the 2009 Master Contract independently requires the same result. The 2009 clause mandates that Denver shall be the "exclusive" venue and that each party shall "not [ ] commence any action, suit, or proceeding except in such courts." (*See supra* Background Section I.) The 2009 clause applies to "any actions, suits, or proceedings arising out of or **relating to** [the Master Contract] or the transactions contemplated thereby . . . ." (*Id.*

(emphasis added).) The 2009 clause applies to this action because it unambiguously relates to the Master Contract and the transactions contemplated thereby, which include those under the 2018 and 2019 confirmation contracts. (*Id.*)

Courts interpret the phrase "relating to" extremely broadly, noting that "relating to" means "having a relationship or connected by an established or discoverable relation." *City & Cty. of Denver v. Dist. Court*, 939 P.2d 1353, 1366 (Colo. 1997). Courts give a broad meaning to "relating to" in the specific context of forum selection clauses. *See MPVF Lexington Partners, LLC v. W/P/V/C, LLC*, 148 F. Supp. 3d 1169, 1178 (D. Colo. 2015). In *MPVF*, the court applied Colorado law to a forum selection clause that was materially identical to the 2009 clause. *Id.* The *MPVF* clause covered "any dispute or legal action arising from or concerning this agreement . . . and/or the Quitclaim Deed." *Id.* The court reasoned that "concerning" "is a synonym for 'relating to,'" and characterized both terms as "extremely broad." *Id.* "Courts have routinely interpreted such language as broader than the concept of a causal connection, and to mean simply connected by reason of an established or discoverable relation." *Id.* (internal quotation marks omitted). The *MPVF* court held that "if there is any 'discoverable relation' between" the litigation and the subjects covered by the forum selection clause, the clause must be enforced. *Id.*

Here, the 2009 clause uses operative terms—"relating to"—that are precisely equivalent to the "extremely broad" terms in *MPVF*. That "extremely broad" language mandates transfer or dismissal if any "discoverable relation" exists between this action and the Master Contract. *MPVF*, 148 F. Supp. 3d at 1178. The "discoverable relation" here is obvious. The amended complaint alleges that the operation of the Commerce City and its refining of crude oil to produce products is a "nuisance." (Am. Compl. ¶¶ 91-92, 444-71.) Specifically, Plaintiffs attack the refining of crude oil required to produce products, including those purchased by San Miguel

County, and the greenhouse gas emissions "directly emitted" from such refining activities. (*Id.* ¶¶ 16, 49, 66 & n.4, 91, 92.) Moreover, the transactions contemplated by the Master Contract include those governed by the 2018 and 2019 confirmation contracts, which, as discussed above, apply to any and all claims against Suncor USA. These are clearly "discoverable relation[s]," subjecting San Miguel County's action to the 2009 clause and requiring venue in Denver.

3. Because the venue/forum selection clauses are enforceable, the Court must transfer or dismiss the action between San Miguel County and Suncor USA

Because the venue/forum selection clauses are valid and enforceable, Boulder is "not the proper county" for San Miguel County's action against Suncor USA. *See* C.R.C.P. 98(f)(1). This Court cannot hear the action between those two parties. "A trial court abuses its discretion when it proceeds to hear a case where venue is improper." *Magill v. Ford Motor Co*., 379 P.3d 1033, 1036 (Colo. 2016). Instead of hearing the action between San Miguel County and Suncor USA, the Court must dismiss it or else transfer it under Rule 98(f)(1) to the venue specified in the clauses—Denver.

Rule 98(f)(1) provides that the "court may, on good cause shown, change the place of trial . . . [w]hen the county designated in the complaint is not the proper county." C.R.C.P. 98(f)(1). When applying a similarly-worded federal venue statute, 28 U.S.C. § 1404(a), the U.S. Supreme Court has required cases to be transferred to the venue selected by a venue/forum clause. *See Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 62-68 (2013).[3]

[3] Although *Atlantic Marine* elsewhere held that "a forum-selection clause does not render venue in a court 'wrong' or 'improper' within the meaning of [28 U.S.C.] § 1406(a) or [Federal]

In *Atlantic Marine*, the federal venue statue provided as follows: "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division . . . ." *Id.* at 59 (quoting 28 U.S.C. § 1404(a)). Applying that statute, the U.S. Supreme Court held that a valid venue/forum selection clause conclusively satisfies all of the statutory criteria for transfer, that trial courts should therefore not examine any transfer criteria save "public-interest factors only," and that, as a consequence, transfer may only be denied in the face of such a clause in the "uncommon" cases where the "public interest" compels that result. *Id.* at 62-65. *Atlantic Marine* concluded that "a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases." *Id.* at 63 (internal quotation marks omitted). Absent such exceptional circumstances, transfer is mandatory, unless dismissed.

Here, the relevant principles of Colorado and federal law are the same, and the result should be dismissal or a transfer to the Denver County District Court of the action between San Miguel County and Suncor USA. Both Rule 98(f) and the federal venue statute provide that trial courts "may" transfer venue when certain factors are met. *Compare* C.R.C.P. 98(f)(1) & (2), *with* 28 U.S.C. § 1404(a); *Atl. Marine*, 571 U.S. at 59. Under both Colorado and federal law, venue/forum selection clauses are enforceable as written except in the most uncommon circumstances. *Compare Cagle*, 295 P.3d at 464, *with Atl. Marine*, 571 U.S. at 59-60. Under both Colorado and federal law, enforceable venue/forum selection clauses mandate either dismissal or a venue transfer under the applicable venue rule, even when the transferring court is an otherwise proper venue. *Compare id.* at 59-60, *with Cripple Creek*, 494 P.2d at 825.

Rule [of Civil Procedure] 12(b)(3)," *id.* at 59, Colorado law has no equivalents to those federal rules or statutes, so that part of *Atlantic Marine* is inapposite here.

These principles require dismissal or a transfer to Denver of the action between San Miguel County and Suncor USA. The venue/forum selection clauses expressly require a change of venue, satisfy all transfer criteria, and preclude venue in Boulder. (*See supra* Argument Sections I.A.1-2.) No reason exists to refuse enforcement of the clauses. The action between San Miguel County and Suncor USA should be dismissed or transferred, and, for the reasons explained in this motion a transfer is preferable.

B. Because the Court Must Dismiss or Transfer to Denver San Miguel County's Action Against Suncor USA, This Entire Action Should Be Transferred Under C.R.C.P. 98(f)(2)

The transfer of a portion of this case—namely, the dispute between San Miguel County and Suncor USA—to the Denver County District Court supplies good cause under Rule 98(f)(2) to transfer this entire case to that court. Under Rule 98(f)(2), the "court may, on good cause shown, change the place of trial . . . [w]hen the convenience of witnesses and the ends of justice would be promoted by the change." C.R.C.P. 98(f)(2); *see Hagan v. Farmers Ins. Exch.*, 342 P.3d 427, 435 (Colo. 2015).

In this case, the ends of justice and the convenience of witnesses supply good cause to keep all the claims, actions, and parties together by transferring this entire case to Denver. Sending one portion of the case to Denver—the dispute between San Miguel County and Suncor USA—while keeping the remainder in Boulder would be inconvenient and waste resources.

First, the ends of justice strongly favor transferring the entire case to Denver, as opposed to splitting the case into two parallel and materially identical cases. Litigating all the same claims in two different venues creates a needless risk of inconsistent rulings on the merits and any procedural or discovery issues that may arise. In *Black v. Sprouts Farmers Market, Inc*., the court transferred the entire case when only some claims were subject to a venue/forum selection

clause because "allowing this case to proceed in two separate courts would . . . create a very real prospect of inconsistent rulings and judgments." No. 15-CV-01297-REB-MJW, 2015 WL 7351511, at *3 (D. Colo. Nov. 19, 2015). For similar reasons, courts have transferred entire cases when one plaintiff's claims fell within a venue/forum selection clause but other plaintiffs' claims did not. *See, e.g., Nemo Assocs., Inc. v. Homeowners Mktg. Servs. Intern., Inc*., 942 F. Supp. 1025, 1029 (E.D. Pa. 1996).

Here, the risk of inconsistent rulings is not theoretical. Defendants have submitted motions to dismiss addressing whether Plaintiffs have failed to state a claim and whether personal jurisdiction exists. Splitting this action into two materially identical cases in Denver and Boulder invites inconsistency on these issues. Other inconsistencies will be difficult to avoid as the cases progress. For instance, this Court may make different rulings on the necessity or scope of discovery than the Denver court, requiring the parties to take action in both courts to reconcile the orders. Both courts could also enter inconsistent protective orders. And both courts could issue other contradictory substantive rulings on the merits or even reach inconsistent verdicts, creating complex problems only resolved through extensive, but needless and expensive appeals.

Second, splitting the case into duplicative parallel actions would substantially inconvenience witnesses of all descriptions, no matter where they reside. Any required discovery or hearing burdens on witnesses would double. It is difficult to imagine anything more needlessly inconvenient to witnesses than being subject to duplicative litigation in two different fora. *See, e.g., Liber v. Flor*, 415 P.2d 332, 335 (Colo. 1966) (requiring change of venue).

Third, transferring the entire case would reduce the burden on the judicial system. In *Pendleton Enterprises, Inc. v. Iams Co*., the court transferred an entire case by a distributor against a manufacturer to the forum specified in the venue/forum selection clause applicable to

only some of the claims. 851 F. Supp. 1503, 1506 (D. Utah 1994). The *Pendleton* court held that "judicial economy would best be served by transferring the entire case." *Id.*; *Nemo*, 942 F. Supp. at 1029. The same is true here. The Court should transfer the entire case to Denver.

II. VENUE IS IMPROPER IN BOULDER COUNTY UNDER C.R.C.P. 98

In addition to the requirement to dismiss or transfer this action pursuant to the applicable venue/forum selection clauses discussed above, the Court should also transfer venue to Denver because venue is improper in Boulder but proper in Denver.

A. Neither the Nuisance Venue Statute Nor Rule 98 Authorizes Venue in Boulder

In their amended complaint, Plaintiffs allege that venue is proper in Boulder under a nuisance venue statute, C.R.S. § 16-13-307(2), and under Rule 98 because the "nuisance and trespass which Defendants caused and contributed to exist in Boulder County, because the subject matter of the action is located in Boulder County, and because Defendants have committed a tort in Boulder County . . . ." (Am. Compl. ¶ 87.) As explained below, venue is not proper in Boulder County under any of these grounds.

1. The nuisance venue statute does not apply because Plaintiffs have disclaimed any abatement remedy and seek only money

First, Plaintiffs cite a nuisance venue statute, C.R.S. § 16-13-307, that plainly does not and cannot apply here. By its express terms, that statute applies only to "an action to abate" a nuisance. C.R.S. § 16-13-307(2). The same statutory scheme defines "action to abate a nuisance" to exclude actions solely to recover money. "'Action to abate a public nuisance' means any action authorized by this part to restrain, remove, terminate, prevent, abate, or perpetually enjoin a public nuisance." C.R.S. § 16-13-301(1).

But Plaintiffs allege that they are not seeking abatement within the meaning of section

16-13-301(1). Their amended complaint alleges that "Plaintiffs do not seek to enjoin any oil and gas operations or sales in the State of Colorado, or elsewhere, or to enforce emissions controls of any kind." (Am. Compl. ¶ 542.) Instead, Plaintiffs have repeatedly alleged that they solely seek money damages. (*See supra* Background Section II.) The nuisance statute is thus inapplicable.

2. C.R.C.P. 98(c)(5) does not permit venue in Boulder because the alleged tort was not committed in Boulder

Plaintiffs next assert that venue lies in Boulder because the alleged tort was committed there.[4] That assertion cannot be squared with the facts. Colorado Rule of Civil Procedure 98(c)(5) states, "An action for tort may also be tried in the county where the tort was committed." C.R.C.P. 98(c)(5). Plaintiffs, however, do not allege that any of the tortious conduct—such as the production and sale of fossil fuels—occurred in Boulder. Nor could they. None of Defendants sells fossil fuels in Boulder. (Ex. 4, Ewing Aff. ¶¶ 1-5.) Instead, the amended complaint alleges that such sales occurred in Denver. (Am. Compl. ¶¶ 58, 94, 95, 97, 101, 103, 107, 114, 122.)

Unable to place any of Defendants' alleged tortious conduct in Boulder, Plaintiffs resort to the notion that a tort was "committed" in Boulder on the sole basis that their alleged damages manifested there. That argument fails for two reasons. First, it runs contrary to the plain language of Rule 98(c)(5). A tort is "committed" where the tortious activity occurs, not where the damages manifest. The "locus of damage to a plaintiff has not been found to be the basis for setting venue." *Fodor v. Hartman*, No. 05-CV-02539-PSF-BNB, 2006 WL 1488894, at *4 (D. Colo. May 30, 2006) (interpreting a venue statute permitting venue where a "substantial part of the

[4] As demonstrated in Defendants' concurrently filed Rule 12(b)(5) motion, in fact no tort has been committed as a matter of law.

events or omissions giving rise to the claim occurred"). For instance, in *Deichl v. Savage*, 216 P.3d 749 (Mont. 2009), the court applied a venue rule identical to Colorado Rule of Civil Procedure 98(c)(5). *Id.* at 751-54. The court held that a tort had been "committed" for venue purposes where the defendants were located when they made misrepresentations (in Yellowstone County), not where damages manifested (in Silver Bow County). *Id.* at 752-53.

Second, Plaintiff's injury-based theory would swallow venue limitations. If permitted, every tort would be "committed" wherever the plaintiff claimed its injuries manifested, thereby effectively ending any reasonable limits on venue in tort cases. Under such a rule, plaintiffs would be empowered to sue literally anywhere—an absurd result that runs contrary to Rule 98.

No other basis for venue has been pled, and there is none. Venue is improper in Boulder.

B. Venue Is Proper in Denver County

The Court should transfer this case to Denver because venue is proper there for this entire case. Venue properly lies in Denver for two reasons. First, venue is proper in any county in which any defendant is a resident, and Defendants Suncor USA and Suncor Energy Sales Inc. are both residents of Denver County. (Am. Compl. ¶¶ 94-95.) C.R.C.P. 98(c)(1); *City of Cripple Creek v. Johns*, 494 P.2d 823, 825 (Colo. 1972). Second, all defendants consent to venue in Denver. Venue, therefore, is proper in Denver. This case should be transferred to Denver.

CONCLUSION

The Court should transfer this entire action to the Denver County District Court, or, alternatively, dismiss this action for improper venue.

Date: December 9, 2019

s/Evan Stephenson

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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:

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