DISTRICT COURT, BOULDER COUNTY, STATE OF COLORADO Boulder County Combined Court 1777 Sixth Street Boulder, CO 80302	
Plaintiffs: BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY; BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; CITY OF BOULDER, **v.** **Defendants:** SUNCOR ENERGY (U.S.A), INC.; SUNCOR ENERGY SALES, INC.; SUNCOR ENERGY, INC.; EXXON MOBIL CORPORATION.	▲ **COURT USE ONLY** ▲ Case No. 2018CV30349 Division: 2
Attorneys for Plaintiffs: Kevin S. Hannon, #16015 THE HANNON LAW FIRM, LLC 1641 Downing Street Denver, CO 80218 Ph: 303-861-8800 Fax: 303-861-8855 Khannon@hannonlaw.com David Bookbinder, D.C. Bar No. 455525, *pro hac vice* NISKANEN CENTER 820 First Street, NE, Suite 675 Washington, DC 20002 Ph: 301-751-0611 DBookbinder@niskanencenter.org Michelle C. Harrison, *pro hac vice* Marco Simons, *pro hac vice* EARTHRIGHTS INTERNATIONAL 1612 K Street, NW #800 Washington, DC 2006 Ph: 202-466-5188 Fax: 202-466-5189 michelle@earthrights.org marco@earthrights.org	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM PURSUANT TO COLO. R. CIV. P. 12(b)(5)

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I. INTRODUCTION

Defendants – ExxonMobil Corp. ("Exxon") and Suncor Energy (U.S.A.), Inc., Suncor Energy Sales, Inc., and Suncor Energy, Inc. (collectively, "Suncor") – have altered the climate by producing, selling and promoting fossil fuels at levels they knew would bring catastrophic harms in Colorado. They accelerated the pace and exacerbated the consequences of this alteration by concealing and misrepresenting the dangers of unchecked fossil fuel use so that sales of their climate-altering products would continue to grow. The hazards of an altered climate – fires, floods, and myriad others – are occurring here and now in Plaintiffs' jurisdictions.

While Defendants unjustly enriched themselves with hundreds of billions of dollars, they expect Plaintiffs – Boulder County, San Miguel County, and the City of Boulder – and their taxpayers to bear the costs of addressing the harms in their jurisdictions. This suit asks Defendants to pay their share. As in tobacco and opioid litigation brought by state and local governments, Defendants here are liable for selling and promoting fossil fuels they *knew* would and which now are causing severe harm, and Plaintiffs can recover damages and the local costs of abating that harm. That Defendants produced and sold fossil fuels across the globe, and have caused harm across the globe, does not protect them from liability for the harms they have caused here in Colorado. There is no immunity for those who cause too *much* harm or harm too *many* people.

As the federal court in this case found, Defendants argue against a case Plaintiffs did not plead. This case is not an attempt to litigate a policy solution to the climate crisis, limit fossil fuel use or production, or control emitters. Plaintiffs do not ask this Court to weigh the costs and benefits of fossil fuels nor revisit federal government decisions. This case is only about compensating Plaintiffs for harms in their jurisdictions. The only question is whether, under established Colorado law, a jury can consider whether Defendants – who promoted and sold enormous amounts of fossil fuels while

misrepresenting their dangers – bear *any* liability for Plaintiffs' damages. As shown below, they do.

II. BACKGROUND

A. The climate has been altered in Colorado.

The combustion of fossil fuels has increased the atmospheric concentration of greenhouse gases (GHGs) – mostly CO_2 – to levels unseen in human history. Amended Complaint (AC) ¶¶ 127-31. That CO_2 will cause warming for centuries, altering the climate in devastating ways. *Id.* ¶¶ 125-26, 132-37. Temperatures in Colorado have already risen 2°F since 1983 and are projected to rise an additional 2.5 to 5°F by 2050, with "a five- to ten-fold increase in heat waves." *Id.* ¶¶ 145-49.

The altered climate is "already affecting communities . . . ecosystems . . . and public health" with "an increase in prolonged periods of excessively high temperatures, more heavy downpours, and increase in wildfires, [and] more severe droughts." *Id.* ¶ 139. In Colorado, additional impacts include loss of snowpack, precipitation changes and floods, worse air quality, and insect and disease outbreaks. *Id.* ¶¶ 155-67, 183-96. As just one example, the State has already experienced "a five-fold increase over 40 years" in the number of fires burning more than 1,000 acres. *Id.* ¶ 170. In Boulder County, at least "an additional 150 wildfires (over a historic average) . . . are predicted between 2020 and 2049" while at least "300 additional wildfires" are predicted for San Miguel County, with an increased burn area of "nearly 40 percent" in both communities. *Id.* ¶¶ 168-79.

B. Defendants knew their fossil fuel activities were altering the climate and profited from unchecked fossil fuel sales.

By the 1960s, Defendants knew fossil fuel use was increasing GHGs in the atmosphere, *id.* ¶¶ 337-42, and that this would alter the climate, *id.* ¶¶ 344-61. In 1968, the American Petroleum Institute (API) warned that "significant temperature changes are almost certain to occur by the year 2000," *id.* ¶ 345; while API reports from the 1980s forecast a 4.5°F rise by 2038, bringing "major

economic consequences," a 9°F rise by 2067 with "catastrophic effects," *id.* ¶ 350, and "serious consequences for man's comfort and survival since patterns of aridity and rainfall can change," *id.* ¶ 353.[1] Exxon was warned that warming would make the U.S. Midwest "drier," bring "a northward migration of the desert areas," "much more acute" water shortages in the Southwest, and "less of a winter snow pack in the . . . Rockies, necessitating a major increase in storage reservoirs." *Id.* ¶ 356-57 & n.24. Defendants knew adapting to these changes would be costly. *Id.* ¶ 358.

Despite this knowledge, Defendants sold "trillions of cubic feet of natural gas, billions of barrels of oil and millions of tons of coal and petroleum coke." *Id.* ¶¶ 380, 396. When burned by consumers as Defendants intended, their fossil fuels emitted billions of tons of GHGs, altering the climate and exacerbating that alteration. *Id.* ¶¶ 61-62, 381-83, 397-99. Exxon earned hundreds of billions of dollars and Suncor tens of billions of dollars in profits from fossil fuel sales. *Id.* ¶¶ 69, 84.

C. Knowing the dangers of unchecked fossil fuel use, Defendants concealed and misrepresented the truth to their consumers in Colorado and elsewhere.

Defendants did not seriously doubt the dangers associated with unchecked fossil fuel use, adapting their own operations to account for climatic changes. *Id.* ¶¶ 359, 371-75. They knew in the 1980s that "mitigation of the 'greenhouse effect' would require major reductions in fossil fuel combustion," *id.* ¶ 368; and that "there was no leeway" for a transition away from fossil fuels because it would take time for other energy sources to penetrate the market, *id.* ¶ 367. Most prophetically, they were warned that if action to reduce CO_2 emissions was delayed until impacts "are discernible, then it is likely that [it] will occur too late to be effective." *Id.* ¶ 369.

Despite this knowledge, Defendants spent decades concealing and misrepresenting the

[1] Defendants participated and had leadership roles in API; API research on the dangers of fossil fuel use was shared with Defendants; and they participated in, conspired with, and ratified API's efforts to misrepresent the dangers of fossil fuel. AC ¶¶ 71 & n.6, 335-53, 364, 371, 408, 416, 422-23, 426.

dangers of unchecked fossil fuel use from the public and consumers. *Id.* ¶¶ 415-16. While recognizing that "contrarian theories" challenging the causes of climatic change were not credible, Defendants set out to get "a majority of the American public" to "recognize [ ] that uncertainties exist in climate science." *Id.* ¶ 425-27. They did so by running commercial advertisements (including through industry associations) that downplayed the existence of climate change and the role of fossil fuels, and by promoting paid-for sham "experts" with no background in climate science to create the appearance of scientific uncertainty. *Id.* ¶¶ 419-35. These efforts were successful. *Id.* ¶¶ 436-43.

D. Plaintiffs seek monetary relief from Defendants to cover their damages and the cost of mitigating the hazards of an altered climate.

As with other national crises – such as tobacco, opioids, and lead paint – Plaintiffs' communities are suffering from discrete and local injuries. Plaintiffs' property has been damaged by fires, floods, extreme precipitation, drought, pest infestations, and other climate impacts. *Id.* ¶¶ 222-23. Plaintiffs currently face enormous expenses to lessen these hazards and will pay more to harden their public property and build resilience as the climate worsens, including added costs for transportation infrastructure, *id.* ¶¶ 243-48; to preserving water resources, ecosystems and forest health, *id.* ¶¶ 250-55, 267-75; for fire mitigation services, *id.* ¶¶ 256-66; for public health services, *id.* ¶¶ 300-17; and for maintaining open space and agricultural lands, *id.* ¶¶ 276-92.

Plaintiffs filed this case under Colorado's common law – of nuisance, trespass, unjust enrichment and conspiracy – and its Consumer Protection Act, seeking monetary relief to compensate for their damages and abatement efforts. They seek this relief *only* from the Defendants and *only* for their specific tortious acts. As the remanding federal court found, Plaintiffs "do not ask the Court to stop or regulate Defendants' emissions of fossil fuels," *Bd. of Cty. Comm'rs v. Suncor Energy (U.S.A.) Inc.* ("*Suncor Energy*"), 405 F. Supp. 3d 947, 955 (D. Colo. 2019), *appeal pending*

(internal citation omitted); they "do not allege that any federal regulation or decision is unlawful," nor do they ask "the Court to consider whether the government's decisions to permit fossil fuel use and sale are appropriate," *id.* at 966; they "do not challenge or seek to impose federal emissions regulations, and do not seek to impose liability on emitters" directly or indirectly, *id.* at 969-71.

III. STANDARD

While a complaint must state "a plausible claim for relief," *Warne v. Hall*, 373 P.3d 588, 591-95 (Colo. 2016), Rule 12(b)(5) motions are viewed with disfavor, and the court must accept the factual allegations as true and view them "in the light most favorable to the plaintiff." *Hirsch Tr. v. Ireson*, 399 P.3d 777, 779 (Colo. App. 2017). Defendants cannot prevail on their motion by disputing facts; "ambiguities are resolved in favor of the [plaintiffs]" and "should be presented to a fact-finder for resolution." *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 915 (Colo. 1996); *accord Andres Trucking Co. v. United Fire & Cas. Co.*, 2018 Colo. App. LEXIS 1327, at *11-12 (Colo. App. Sept. 20, 2018).

IV. ARGUMENT

Defendants' scattershot motion attempts to raise over a dozen issues, leaving Plaintiffs little room to respond to each. While Plaintiffs believe that this Response is sufficient to demonstrate that each objection fails, they are happy to provide more detail on any issue the Court desires. To the extent that the Court finds any of Plaintiffs' allegations insufficient, Plaintiffs seek leave to amend.[2]

A. Plaintiffs' claims are not preempted by federal common law.

Federal common law does not preempt these state law claims. First, no recognized federal common law governs Plaintiffs' claims. Second, Defendants do not meet the high bar required to justify the creation of new preemptive federal common law. The monetary relief sought from private

[2] Leave to amend a pleading "shall be freely given when justice so requires." *Civil Serv. Comm'n v. Carney*, 97 P.3d 961, 966 (Colo. 2004); *see also Doe v. Heitler*, 26 P.3d 539, 545 (Colo. App. 2001).

defendants for these specific tortious acts does not implicate any uniquely federal interests. Third, if Defendants are correct that federal statutes displace federal common law, then federal common law cannot preempt state law. The Supreme Court has left no doubt here.

1. This case is not governed by existing federal common law.

Defendants invoke the federal common law of interstate pollution, but their argument – rejected by the remanding federal court, *supra* Part II.D – rests on a mischaracterization of this case as an attempt to control emitters and emissions. Moreover, the federal common law of interstate pollution covers only suits "brought by one State to abate pollution emanating from another State." *Am. Elec. Power Co. v. Conn.* ("*AEP II*"), 564 U.S. 410, 421 (2011); *accord* Ex. A at 58-60 (Exxon brief arguing Plaintiffs' position in *Native Village of Kivalina v. ExxonMobil Corp. ("Kivalina II")*, 696 F.3d 849 (9th Cir. 2012)). In these "true interstate [pollution] disputes," *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1205 (9th Cir. 1988), States have conflicting interests in applying their law where one seeks to enjoin conduct authorized by another. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 104-07 (1972) (cataloging need for federal common law to avoid states warring over pollution); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) (federal common law exists where "conflict was between states as quasi-sovereign bodies over shared resources").

No federal case, including *AEP II*, holds that all "state law claims *relating* to global warming are superseded by federal common law." *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018), *appeal pending* (emphasis added).[3] Indeed, the federal common law of interstate pollution has not been recognized to cover municipal claims against private companies for damages.

[3] In *AEP*, *States* sued under federal and state common law for an *injunction* capping *emissions* at their *source*. 564 U.S. at 415. In this "true" interstate case, the Court did not preclude resorting to state law. It held only that federal common law was displaced by the Clean Air Act, while noting that unless state law was preempted by the Act, it remained open on remand. *Id.* at 423-29. So too in *Kivalina II*, 696 F.3d at 866-67 (Pro J., concurring).

See AEP II, 564 U.S. at 422; *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21 (1981). Nor has any federal court of appeal applied it to liability for selling harmful products. *See also infra* Part IV.A.2. Here, Plaintiffs are not States, and do not seek to control or enjoin out-of-state emitters; instead they "sue for harms caused by Defendants' sale of fossil fuels." *Suncor Energy*, 405 F. Supp. 3d at 969-70. No established federal common law applies to that conduct.

There are good reasons why the recognized federal common law of interstate pollution has been limited to cases where States seek injunctions against emitters, *see AEP II*, 564 U.S. at 421, and why this case seeking damages against sellers does not require a federal common law rule. First, "ensuring the availability of compensation for injured plaintiffs is predominately a matter of state concern." *Jackson*, 750 F.2d at 1325. Second, the injunctions sought in *Milwaukee* and *AEP* would give one State a veto over out-of-state activity. Plaintiffs, however, do not seek to prevent Defendants from doing anything. Monetary remedies against an interstate product seller only present the risk that the Defendants might compensate victims in some but not all states – even if the affected State's law applies. This is true in every interstate damages case. Third, as *Suncor Energy* held, Plaintiffs are not "attempting to do indirectly what they could not do directly, *i.e.*, 'regulate the conduct of out-of-state sources.'" 405 F. Supp. 3d at 971. That Defendants' customers were intended and consequential steps in the causal chain does not mean this case regulates those out-of-state non-party emitters; liability attaches only to Defendants' behavior, under ordinary state law. *See, e.g., City of N.Y. v. Bob Moates' Sport Shop, Inc.*, 253 F.R.D. 237, 242-43 (E.D.N.Y. 2008) (case against gun distributors "is not about an individual right to keep and bear arms," it is about "follow[ing] … [the] law applicable to the sale and marketing of firearms, the violation of which causes a public nuisance"). This is akin to governments seeking damages against tobacco and opioid companies; such cases were not efforts to regulate *smokers* or opioid *users*.

2. There is no basis for recognizing new federal common law.

Because recognized federal common law does not govern, this Court would need to create new preemptive federal common law; but the "[d]isplacement of state law is primarily a decision for Congress," not courts creating common law. *Jackson*, 750 F.2d at 1327. This is simply not among the "extraordinary cases" where the "judicial creation of a federal [common law] rule of decision is warranted." *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 89 (1994). Here Defendants do not show the required "uniquely federal interest" nor a "significant conflict" between that interest and "the application of state law." *Northrop Corp. v. AIL Sys., Inc.*, 959 F.2d 1424, 1426-27 (7th Cir. 1992).[4]

a. Defendants have not shown a uniquely federal interest in this dispute. As Exxon previously told the Ninth Circuit in *Kivalina II* – arguing *against* the application of federal common law – even if "global climate change is *predominately* a matter of federal concern," it "has nothing to do with whether private damages claims raise *uniquely* federal interests of the type that justify applying federal common law." Ex. A at 57 n.23 (emphasis added). Here, Defendants do not meet their own test and do not show how uniquely federal interests are implicated in this *dispute*.

A "uniquely federal" interest must "relate to an articulated congressional policy or directly implicate the authority and duties of the United States as sovereign." *Jackson*, 750 F.2d at 1325. Defendants invoke no "articulated congressional policy." Likewise, sovereign federal duties exist only in "narrow areas" concerning "the rights and obligations of the United States, [and] interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations." *Tex. Indus., Inc. v. Radcliff Materials*, 451 U.S. 630, 641 (1981). Defendants do not show how this case implicates those concerns; like countless other ordinary tort cases – where companies sold

[4] As private parties, Defendants have a high burden when invoking federal common law. *Cf. Miree v. De Kalb Cty.*, 433 U.S. 25, 30-31 (1977); *Woodward Governor Co. v. Curtiss-Wright Flight Sys.*, 164 F.3d 123, 127 (2d Cir. 1999); *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987, 993 (2d Cir. 1980).

and marketed products causing downstream injuries across the country – it does not. Courts have rejected similar arguments that federal common law governs interstate product sellers, even when national security is involved. *See e.g.*, *Agent Orange*, 635 F.2d at 990-95.

It is also not enough to name "highly abstract" federal interests, such as national energy and security policy. Mot. at 8-9. Defendants must specify a *concrete* interest and explain *how* it is implicated by *this* case. *See Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 71 (1966); *see also Miree*, 433 U.S. at 31-33. Similarly, Defendants invoke uniformity, but do not "prove its need." *Atherton v. F.D.I.C.*, 519 U.S. 213, 220 (1997). There is "no federal interest in uniformity for its own sake." *Agent Orange*, 635 F.2d at 993. Unlike *International Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987), where a detailed federal permitting scheme would be disrupted if an affected State's law applied to a single discharge, here there is no comprehensive federal scheme governing the level of Defendants' fossil fuel sales or promotional activities, and thus no identifiable federal interest in uniformity. The possibility of 50 States' rules applying to private actors faces every producer who causes harm in different States; it does not justify judicial imposition of a single federal tort standard. *See Jackson*, 750 F.2d at 1324; *O'Melveny & Myers*, 512 U.S. at 88. Nor do Plaintiffs' claims call for a determination of what is a reasonable level of emissions globally; nuisance law considers only whether it is reasonable to allow *Defendants* to continue their tortious acts *without compensating Plaintiffs* for the severe damage they cause. *See* Restatement (Second) of Torts ("Restatement") § 821B cmt. i; *accord* §§ 826(b), 829A.

b. Defendants have not shown a significant conflict between any federal interests and Colorado law. "[S]uch a conflict [is] a precondition for recognition of a federal rule" and determines "the scope of judicial displacement of state rules." *O'Melveny & Myers*, 512 U.S. at 87-88 (internal citations omitted). It cannot be "speculative" or "remote," *Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29, 33-34 (1956); rather, "state law must pose a threat to an identifiable federal policy." *Agent Orange*, 635

F.2d at 995. Defendants have not identified a specific federal rule governing their conduct or conflicting with the state law applicable here. *Infra* Part IV.B. They have not shown that the federal government dictated levels of fossil fuel use or Defendants' enterprise-wide sales, or that it balanced the benefits of Defendants' conduct against Plaintiffs' injuries. The government has "not determined what the federal policy is" regarding Defendants' liability. *Agent Orange*, 635 F.2d at 994-95.

3. Displaced federal common law cannot preempt Plaintiffs' state law claims.

Defendants assert that federal common law is displaced by statute, Mot. at 9-12, but if true, that would just be another reason federal common law does not apply; their assertion – that statutorily displaced federal common law bars Plaintiffs' state claims – is foreclosed by Supreme Court authority. *AEP II* makes clear that if federal statutes "displace[ ] federal common law, the availability *vel non* of a state lawsuit depends . . . on the preemptive effect of [those] federal [statutes]." 564 U.S. at 429. "Once federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law." *Kivalina II*, 696 F.3d at 866 (Pro J., concurring). When Congress displaces federal common law, such federal common law does not live on to preempt state law; only those statutes can preempt (and here, they do not).[5]

B. Plaintiffs' claims are not preempted by any federal statute.

Defendants fail to show that federal statutes preempt Colorado law. While they rely on arguments that certain statutes displace federal common law, Mot. at 15-16, the "[l]egislative

[5] Because statutory displacement of federal common law means such federal common law *cannot* preempt state common law, Plaintiffs need not address Defendants' displacement arguments. To the extent Defendants use them as statutory preemption arguments, they are addressed below. *Infra* Part IV.B. The assertion that Plaintiffs do not plead viable federal common law claims, Mot. at 12-14, is also irrelevant; Plaintiffs do not plead a federal claim at all. Defendants' arguments are not obstacles to Plaintiffs' state law claims. *See e.g. infra* Part IV.D.4 (no full authorization); *id.* (lack of need to balance utility of fossil fuels against climate crisis); Part IV.C.1 (no interference with foreign policy).

displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law." *AEP II*, 564 U.S. at 423 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981)) (alteration in original). Defendants do not attempt to meet this higher standard and cannot overcome the strong presumption against federal preemption. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

Whatever its form, preemption should not be found – particularly, as here, "in a field traditionally occupied by the States" – unless Congress clearly and manifestly intends it. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008).[6] Defendants invoke field preemption and conflict preemption, *see id.* at 76-77; *People ex rel. D.M.*, 444 P.3d 834, 836 (Colo. App. 2019); but none of the statutes cited demonstrates a "clear and manifest" congressional intent to displace state law.

1. The Clean Air Act does not occupy the field.

The Colorado law applicable here does not fall within "the pertinent regulatory field" of the Clean Air Act (CAA) nor does "the density and detail of federal regulation" in that field show that Congress intended to occupy it. *Nat'l Fed'n of the Blind v. United Airlines, Inc.*, 813 F.3d 718, 734 (9th Cir. 2016). First, the CAA allows the federal government to regulate emission *sources*, *e.g.*, cars and power plants that directly emit pollutants. *See, e.g.*, 42 U.S.C. § 7411. The CAA does not regulate Defendants' levels of enterprise-wide fossil fuel production, sale and promotion. Thus, this case falls outside its regulatory field. Second, the CAA preserves state regulatory and common law authority, even regarding emission sources. *See* 42 U.S.C. §§ 7401(a)(3), 7416, 7604(e). Congress "may say that the federal law does not preempt state law." *People ex rel. D.M.*, 444 P.3d at 836; *see also Cipollone v.*

[6] This case involves areas of traditional state authority: "Ensuring the availability of compensation," *Jackson*, 750 F.2d at 1325; and mitigation "relat[ing] to public health and safety," *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.* ("*MTBE I*"), 457 F. Supp. 2d 324, 329 (S.D.N.Y. 2006). States' police powers also include "combatting the adverse effects of climate change on their residents." *Am. Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018).

Liggett Grp., 505 U.S. 504, 517 (1992). The CAA's plain text shows that Congress did not intend it to preempt all common law causes of action, much less occupy the entire field of climate law.

2. Colorado law is not an obstacle to the achievement of federal statutory goals.

Defendants invoke "obstacle" preemption, where "state law stands as an obstacle to the accomplishment" of Congressional objectives, *Silkwood v. Kerr-Mcgee Corp.*, 464 U.S. 238, 248 (1984), but they cannot meet their "heavy" burden, *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig. ("MTBE II")*, 725 F.3d 65, 101 (2d Cir. 2013). Defendants must first "ascertain [Congress's] objectives"; then show that "the repugnance or conflict is so direct and positive that [federal and state law] cannot be reconciled or consistently stand together." *Id.* at 102 (quotation marks omitted).

a. Plaintiffs' claims are not an obstacle to emissions regulation. Defendants say that Congress has addressed fossil fuel emissions, but do not show a conflict. They do not argue this case is inconsistent with the CAA's goal, "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." 42 U.S.C. § 7401(b)(1). The CAA regulates *emitters*; and Defendants do not argue that it actually regulates *their* conduct, nor explain how this case would interfere with the CAA's regulation of source emissions. "[R]egulating an upstream activity . . . is not preempted simply because a downstream activity falls within a federally occupied field." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1914-15 (2019) (Ginsburg, J., three justice opinion).

b. Plaintiffs' claims are not an obstacle to federal interests in reducing dependence on foreign oil. Defendants cite a handful of laws relating to federal lands and leasing to suggest a preemptive federal interest in promoting domestic oil production. Mot. at 10-11. Broadly invoking a federal interest, however, "should never be enough to win preemption of a state law." *Va. Uranium, Inc.*, 139 S. Ct. at 1901 (Gorsuch, J., three justice opinion). These laws contain no "[e]vidence of pre-emptive purpose . . . in the[ir] text and structure," much less with respect to these claims. *Id.* at 1907 (alteration in original,

quotation marks omitted). Like the interest in promoting nuclear power in *Silkwood*, any vague federal interest in promoting domestic oil production does not mean "at all costs," and does not prohibit States from remedying harms arising from those activities. 464 U.S. at 257. Congress, in fact, announced its contrary intent that oil production should *not* compromise the environment or harm local communities. *See* 42 U.S.C. §§ 13401, 15927(b)(2)-(3).

Regardless, Defendants do not show how a damages action against producers of fossil fuels, much of it from foreign sources, would increase reliance on foreign production. The laws they cite also say nothing about Defendants' *concealment* or *misrepresentation* of known dangers in their fossil fuel activities. *See MTBE II*, 725 F.3d at 101-104 (finding that although CAA encouraged use of MTBE, state law contamination claims for water contamination involving "additional tortious conduct" beyond "the mere use of MTBE" were not preempted). At most, Congress intended that, to the extent a responsible amount of oil production is necessary, domestic sources should be encouraged; there is no conflict here with that policy.

c. There is no conflict with federal regulation of advertising. Even if federal law *can* regulate deceptive communications, Mot. at 12, Defendants show no conflict. Their "arguments mistake regulatory overlap for regulatory conflict." *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 695 (6th Cir. 2015).

C. Plaintiffs' claims are not barred by any "other federal doctrines."

1. No identified foreign policy has the force of law or preempts these claims.

"Foreign affairs preemption" does not apply. Defendants cite no cases preempting state tort law claims for domestic injuries. *Cf. Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 579 (5th Cir. 2010).[7]

[7] *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024-28 (N.D. Cal. 2018) and *City of New York v. B.P. P.L.C.*, 325 F. Supp. 3d 466, 475-76 (S.D.N.Y. 2018), did not address the preemption of state law; but whether foreign affairs concerns counseled against recognizing a *federal* common law claim. Preemption of state law requires a more exacting inquiry, *supra* Part IV.B. Both cases are on appeal.

Instead, they incorrectly suggest that effects on foreign policy are sufficient for preemption. Where States are "addressing a traditional state responsibility," *supra* Part IV.B & n.6, preemption requires a conflict with a federal act that is "fit to preempt" state law. *Am. Ins. Assn. v. Garamendi*, 539 U.S. 396, 416, 418-20 & n.11 (2003). Foreign policy lacking the force of law cannot preempt, even where state law has serious foreign policy implications. *See Medellin v. Texas*, 552 U.S. 491, 523-32 (2008).

Defendants have not shown a conflict with foreign policy interests, let alone federal law. They do not show how the claims here – charging Defendants, rather than local taxpayers, for domestic harms – constrain the President's ability to engage internationally; nor how they conflict with current international obligations or creates new ones. Under Defendants' view, any State effort affecting CO_2 output would fall; this is not the law. *See Clark v. Allen*, 331 U.S. 503, 517 (1947).

2. An adjudication of tortious private behavior does not raise political questions.

Defendants' "separation of powers" argument invokes the federal political question doctrine, but it does not apply to state courts. *See Goldwater v. Carter*, 444 U.S. 996, 1005 n.2 (1979) (Powell, J., concurring). The Colorado Supreme Court has rejected its application, because Colorado courts have a "more accepted and established role in promulgating common law" and "broader jurisdiction than their federal counterparts." *Lobato v. People*, 218 P.3d 358, 70 (Colo. 2009).

Even if the federal doctrine applied, Defendants do not meet the factors of *Baker v. Carr,* 369 U.S. 186 (1962), and omit the only two federal court of appeals decisions to apply them in climate change tort cases; both soundly rejected the doctrine's application. *Conn. v. Am. Elec. Power Co.* ("*AEP I*"), 582 F.3d 309, 321-32 (2d Cir. 2009), *rev'd on other grounds, AEP II*; *Comer v. Murphy Oil USA*, 585 F.3d 855, 869-79 (5th Cir. 2009), *vacated* 598 F.3d 208 (5th Cir. 2010).[8] Defendants rely

[8] In *Comer*, the panel opinion was vacated when the court agreed to re-hear the case *en banc*, but there was no *en banc* decision, since a quorum was subsequently lost. 607 F.3d 1049 (5th Cir. 2010).

instead on four district court cases, none of which has been affirmed on appeal,[9] and whose arguments are thoroughly refuted by *AEP I* and *Comer*. Indeed, *AEP I* and *Comer* are consistent with the general federal approach, which does not preclude tort cases. *E.g.*, *McKay v. United States*, 703 F.2d 464, 470 (10th Cir. 1983); *Gordon v. Texas*, 153 F.3d 190, 194-96 (5th Cir. 1998); *see also Lobato*, 218 P.3d at 368 (federal political question doctrine means only that "certain constitutional provisions may be interpreted and enforced only through the political process").[10]

Even if Plaintiffs' nuisance claims (but *not* their other claims) may require some degree of balancing, Mot. at 17-18, that balancing does not involve policy issues committed to the political branches; at most the inquiry is "whether it is unreasonable [for Defendants] to engage in [their] conduct without paying for the harm done"; the same balancing in any nuisance case. Restatement § 821B cmt. i; *accord id.* §§ 826, 829A; *Cook v. Rockwell Int'l Corp.*, C.A. No. 90-cv-00181, 2006 U.S. Dist. LEXIS 89515, at *51-54 (D. Colo. Dec. 7, 2006). Tort law provides the standards in this case. *See AEP I*, 582 F.3d at 326-29; *Comer*, 585 F.3d at 875.

The Ninth Circuit's recent decision in *Juliana v. United States*, __ F.3d __, 2020 U.S. App. LEXIS 1579 (9th Cir. Jan. 17, 2020), which found no problem with assigning percentages of emissions in assessing standing, eviscerates Defendants' suggestion that the sources of greenhouse

[9] Defendants' suggestion that the Ninth Circuit "affirmed" the *Kivalina* district court's political question ruling, Mot. at 18, is false; it did not address that issue. *See Kivalina II*, 696 F.3d 849. In a recent climate suit, the Ninth Circuit made clear that "we do not find this to be a political question." *Juliana v. United States*, __ F.3d __, 2020 U.S. App. LEXIS 1579, at *32 n.9 (9th Cir. Jan. 17, 2020).

[10] Defendants' invocation of pre-*Lobato* Colorado cases is misleading. They claim that courts "should refrain 'from reviewing controversies concerning policy choices and value determinations,'" Mot. at 17, omitting the next phrase: "that are constitutionally committed for resolution to the legislative or executive branch." *Busse v. City of Golden*, 73 P.3d 660, 664 (Colo. 2003) (rejecting political question argument). In arguing that fossil fuel activity is so committed, they cite only *Moss v. Board of County Commissioners*, 411 P.3d 918 (Colo. App. 2015), which is about whether bows are firearms. "[I]n this common law [climate] nuisance case, the department to whom this issue has been constitutionally committed is . . . the Judiciary." *AEP I*, 582 F.3d at 324-25 (internal quotations omitted).

gas emissions cannot be determined. *Id.* at *18. Plaintiffs will present evidence on this, and evaluating evidence is what courts do; it is not a political question.

3. Plaintiffs' claims do not violate the dormant Commerce Clause.

Defendants say this case violates the dormant Commerce Clause's "extraterritoriality" doctrine because liability would *implicitly* regulate conduct outside Colorado. Mot. at 18-19. The Commerce Clause does not "prevent individual states from protecting those within the state from tortious action by those engaged in commerce whose products or activities put the state's citizens at risk." *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 464 (E.D.N.Y. 2003). Liability may involve out-of-state conduct, so long as the injuries from that conduct are in Colorado. *Id.*

Defendants cite a hodgepodge of cases. Only one, *Healy v. Beer Institute*, 491 U.S. 324 (1989), is a dormant Commerce Clause decision and it does not apply here. As then-Judge Gorsuch noted, extraterritoriality is "the most dormant" dormant Commerce Clause doctrine; the *Healy* line of cases is limited to statutes "'tying the price of . . . in-state products to out-of-state prices.'" *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1172, 1174-75 (10th Cir. 2015) (quoting *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003) (omission in original)). These are cases of discrimination against out-of-state products, *id.* at 1173, and the *Healy* quote Defendants use was *dicta*. *Id.* at 1175.

Defendants also cite *BMW of North America v. Gore*, 517 U.S 559 (1996), which did not address the Commerce Clause. In holding that States "may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States," *id.* at 572, the Court was considering whether disproportionate *punitive* damages could be used to punish out-of-state conduct. It did not suggest that state law cannot provide *compensatory* damages for out-of-state conduct causing in-state injuries. *BMW* is thus only relevant to this Court's later decision

whether to award punitive damages, and not this motion to dismiss.[11]

4. Plaintiffs' claims do not violate the Due Process Clause.

Defendants insist that Plaintiffs' claims violate due process because (1) their conduct was "lawful where it occurred," and (2) liability would be "retroactive" because Defendants "could not have anticipated" that they would be held liable for their acts. Mot. at 19-20. Defendants' cases deal solely with measures of punitive damages, not liability. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW*, 517 U.S. at 572. Their arguments were rejected in analogous lead paint cases addressing bad acts from decades earlier: "There is no 'hindsight' or 'retroactive liability' involved in requiring those who knowingly engage in hazardous conduct to remediate the consequences of their conduct." *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 599 (Cal. Ct. App. 2017). Defendants' conduct may have been "lawful" in that it was not *criminal*, but selling, marketing, and lying about fossil fuels while knowing they would cause global catastrophe has always been *tortious*. Just as companies "lawfully" produced and marketed asbestos and tobacco but were liable, *see, e.g*, *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986 (2019); *Bullock v. Philip Morris USA, Inc.*, 131 Cal. Rptr. 3d 382, 395-96 (Cal. Ct. App. 2011), the Due Process Clause is no bar here.

5. The First Amendment does not bar liability for the harms created by the intended use of Defendants' fossil fuels or their deceptive promotion.

The First Amendment cannot immunize Defendants' non-speech and non-petitioning activities, such as causing nuisances and trespasses by selling fossil fuels; they make no contrary argument, and challenge only a handful of Plaintiffs' allegations and their "consumer fraud claim." Mot. at 20. Their argument fails and would effectively render the Colorado Consumer Protection

[11] As to punitive damages, *BMW* limited only the size and purpose of the punitive damage award, not punitive damages *per se*. Indeed, it recognized that punitive damages "supported by the State's interest in protecting its own consumers and its own economy" are acceptable. 517 U.S. at 572.

Act (and similar state efforts) unconstitutional whenever applied to commercial promotions.

Plaintiffs' allegations concededly address "commercial speech." Mot. at 29. That speech is not protected because it was not only misleading, but knowingly false. *Supra* Part II.C. The First Amendment "accords a lesser protection to commercial speech." *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980). To even be eligible for protection, it "must concern lawful activity and not be misleading." *Id.* at 566.[12] The First Amendment did not bar nuisance liability for promoting lead paint knowing that its use would create a public health hazard, *ConAgra*, 227 Cal. Rptr. 3d at 536; nor opioid companies' liability where they knew "marketing opioids on their abuse potential was dangerous" and that "the studies they were citing were incomplete, unsound, or fraught with misrepresentations." *State ex rel. Hunter*, No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486, at *42 (Okla. D. Ct. Aug. 26, 2019). It does not protect Defendants here.

Even if the speech at issue were non-commercial or considered petitioning activity under the *Noerr-Pennington* doctrine, it is still unprotected because it involved "fraud, or some other legally cognizable harm associated with a false statement." *United States v. Alvarez*, 567 U.S. 709, 718-19 (2012); *see also United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009) (noting that "the First Amendment does not protect fraud" and *Noerr-Pennington* "does not protect deliberately false or misleading statements").[13] *Noerr-Pennington* also does not apply because it "does not cover activity that was not genuinely intended to influence government action," *Philip Morris*, 566 F.3d at 1123. The notion that all criticism of the International Panel on Climate Change is

[12] Defendants' cases do not suggest misleading commercial speech is protected. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482-43 (1995) (affirming *Central Hudson*, speech involved "nonmisleading factual information"); *Lakewood v. Colfax Unlimited Ass'n.*, 634 P.2d 52, 64 (Colo. 1981) (same).

[13] *See also Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982) ("There is no first amendment protection for furnishing with predatory intent false information to" the government.); 18 U.S.C. §1001 (crime to make false statements to government).

necessarily petitioning activity is specious. Moreover, Plaintiffs' allegations are broader, and they disclaimed relief based on petitioning. AC ¶ 542. If there is a factual dispute as to the purpose or audience for Defendants' advertisements, it cannot be decided on a motion to dismiss. *See Protect Our Mountain Env't, Inc. v. Dist. Court of Cty. of Jefferson*, 677 P.2d 1361, 1368-69 (Colo. 1984).

If the Court finds *some* of Defendants' conduct protected, those parts can be excluded from trial; but since their argument that *all* their promotion is protected fails, their motion must be denied.

D. Plaintiffs have stated claims under Colorado law.

1. Plaintiffs have standing under Colorado law.

Plaintiffs have standing if they have "suffered an injury-in-fact to a legally protected interest," a test that is "relatively easy to satisfy." *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004). Plaintiffs have alleged "[p]resent or threatened economic harm," which is a sufficient "injury in fact." *City of Northglenn v. Bd. of Cty. Comm'rs*, 411 P.3d 1139, 1143 (Colo. App. 2016).

Causation does not pose a standing problem. Whether an injury resulted from Defendants' acts is a "merits" question, "reserved for the trier of fact." *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). That consumers burned Defendants' fuels – as intended – does not cut the chain of causation-in-fact; indeed, it does not even limit proximate cause. The "general tort rule" is that "a third part[y's act] is not a superseding cause immunizing the defendant from liability, if it is reasonably foreseeable." *Ekberg v. Greene*, 588 P.2d 375, 376 (Colo. 1978).[14] Defendants knew consumers would use their fossil fuels – at dangerously elevated levels – and this would substantially contribute to warming and result in harm, including to Plaintiffs. *E.g.* AC ¶¶ 327-30, 337-75 & n.24.

[14] *See also, e.g.*, *Bradford v. Bendix--Westinghouse Auto. Air Brake Co.,* 517 P.2d 406, 414 (Colo. 1973) (noting that intervening causes provide a defense only where they were not "reasonably foreseeable"); *accord Albo v. Shamrock Oil & Gas Corp.*, 415 P.2d 536, 537 (Colo. 1966).

This establishes causation for liability purposes, *infra* Part IV.D.3, and is sufficient for standing.[15]

Plaintiffs' claims are also not speculative; Plaintiffs allege that they have *already* incurred damage on account of an altered climate, *supra* Part II.D, and are *presently* "expending considerable taxpayer dollars" to protect residents from "current and future anticipated climate impacts." *Id.* ¶ 227; *see also id.* ¶¶ 221-320, 454. Moreover, courts routinely allow claims for "threatened injury," *Syfrett v. Pullen*, 209 P.3d 1167, 1170 (Colo. App. 2008), such as loss of future sales. *Colorado Manufactured Hous. Ass'n v. Pueblo Cty.*, 857 P.2d 507, 511 (Colo. App. 1993).[16] Here, Plaintiffs' future injuries are "certain to occur because of the consequences, based on the laws of physics and chemistry, of the documented increased carbon dioxide in the atmosphere." *AEP I*, 582 F.3d at 344.

2. Plaintiffs' claims are timely.

Defendants fail to show that Plaintiffs knew, or should have known, "all material facts essential to show the elements" of their claims before filing this suit. *Miller v. Armstrong World Indus., Inc.*, 817 P.2d 111, 113 (Colo. 1991). Generalized "suspicion" of Defendants' role in altering the climate is not sufficient to put Plaintiffs "on notice of the nature, extent, and cause of" their injuries. *Salazar v. Am. Sterilizer Co.*, 5 P.3d 357, 363 (Colo. App. 2000). When Plaintiffs knew of Defendants' tortious conduct, and knew the injuries that the altered climate was causing and would

[15] Defendants propose a causation doctrine that would effectively destroy standing in countless tort cases, by citing inapposite "competitor standing doctrine" cases. Mot. at 22. These cases address only a narrow circumstance where standing does not exist for injuries solely from "the grant of an economic benefit to a competitor." *1405 Hotel, L.L.C. v. Colo. Econ. Dev. Comm'n*, 370 P.3d 309, 315, 318 (Colo. App. 2015) (discussing *Wimberly v. Ettenberg*, 570 P.2d 535 (Colo. 1977) and *Cloverleaf Kennel Club, Inc. v. Colorado Racing Comm'n,* 620 P.2d 1051 (Colo. 1980)). In *this* tort case, the analysis is the same as *MTBE II*, where Exxon was liable for nuisance even though the pollution source was independent gas stations. 725 F.3d at 105-06.

[16] Defendants cite *Olson v. City of Golden,* but there it would "not be known until a remote time" whether there would be injury *at all.* 53 P.3d 747, 752 (Colo. App. 2002). Here, Plaintiffs allege that it is *scientific fact* that they *will* continue to be injured. AC ¶¶ 135-38, 234-317.

cause in their communities, is a matter of proof. This is why accrual is typically "a question of fact for the jury." *Keller Cattle Co. v. Allison*, 55 P.3d 257, 261 (Colo. App. 2002). *See also Bell v. Land Title Guar. Co.*, 422 P.3d 613, 617 (Colo. App. 2018).

Alternatively, Plaintiffs' claims are timely because Defendants' torts are continuing torts. AC ¶¶ 379, 406, 446, 467, 505, 515, 525. *Hoery v. United States*, 64 P.3d 214 (Colo. 2003), held that where pollution was both still present, and still migrating onto plaintiff's property, it was a continuing trespass and nuisance even "where the cause of the contamination has ceased." *Id.* at 221-22. Plaintiffs' claims thus would not accrue as long as the GHGs that are altering the climate persist, as they do. And here, Defendants' "tortious conduct" has not yet "ceased," *id.* at 218; *see, e.g.*, AC ¶¶ 380-406 (Defendants continue to add to the problem).

3. Plaintiffs have pled causation.

Causation is "a question of fact that is properly decided by a fact finder." *Brown v. Silvern,* 45 P.3d 749, 751 (Colo. App. 2001). Plaintiffs have sufficiently pled causation, alleging: that by selling and promoting fossil fuels that were burned (as intended) by consumers, Defendants caused billions of tons of GHGs to be released into the atmosphere, *supra* Part II.B; that this pollution altered and is continuing to alter the climate, causing and exacerbating the harms in Plaintiffs' communities, *supra* Parts II.A & II.D; and that Defendants foresaw all this decades ago, *supra* Parts II.B-C.

a. Plaintiffs have plausibly alleged that Defendants are a cause-in-fact of their injuries. Defendants erroneously argue that no one is legally responsible for harm caused by multiple actors. Mot. at 24. More than one person may be responsible for causing damages, and it is not a defense that another person might have also contributed to them. COLJI-Civ 9:19 (2019). Where defendants "contribute[] to a nuisance to a relatively slight extent" such "that [their] contribution taken by itself would not be an unreasonable one," they may be liable if "the contributions of all is a substantial

interference, which becomes an unreasonable one." Restatement § 840E cmt b.[17] By virtue of their fossil fuel sales, Defendants are two of the largest sources of GHGs globally and historically, AC ¶¶ 383, 399, responsible for "billions of tons," *id.* ¶ 15; *see also id.* ¶¶ 62, 82 & n.8. As in recent opioid lawsuits, where a manufacturer was responsible for "less than one percent" of the market, it is "for the jury to decide" whether Defendants are liable. *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804, 2019 U.S. Dist. LEXIS 150565, at *64-65 (N.D. Ohio Sept. 4, 2019).[18] Colo. Rev. Stat. § 13-21-111.5 (2019) provides the mechanism for allocating fault and is routinely applied by this Court.

Defendants argue that Plaintiffs cannot state "which emissions" caused their injuries or "trac[e] any particular alleged effect" to Defendants. Mot. at 24. Not so. Plaintiffs' injuries result from and are exacerbated by the overall increase in atmospheric GHGs. Defendants do not dispute that emissions (traced to their fossil fuels) are in the atmosphere and contribute to the alteration of the climate. In a multiple contributor tort case, there is no need to trace specific injurious molecules to them. *See Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1219 (Cal. 1997) (causation shown where defendant "was a substantial factor in contributing to the aggregate *dose* of asbestos the plaintiff or decedent inhaled or ingested") (emphasis in original); AC ¶¶ 382, 399.

Defendants cite the district court's standing decision in *Kivalina*, *see* Mot. at 24, but it was not affirmed on those grounds, *see Kivalina II*, 696 F.3d 849, and its reasoning was thoroughly rejected in

[17] Colorado courts have followed the Restatement in the nuisance context. *Hoery*, 64 P.3d at 217-18, 222. *See also Wilmore v. Chain O'Mines, Inc.*, 44 P.2d 1024, 1028 (Colo. 1934) (where acts of multiple persons "taken together operated to produce the damaging results," each is responsible even if "separate act or neglect alone might not have caused it."); Restatement § 881 cmt. d ("It is also immaterial that the act of one them by itself would not … " cause harm if the actor knows of "contributing acts"); *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 696-97 (7th Cir. 2008).

[18] Defendants cite *Smith v. State Comp. Ins. Fund,* 749 P.2d 462, 464 (Colo. App. 1987), involving "an independent, intervening cause . . . which could not have reasonably been foreseen to occur"; it did not involve the multiple intended and foreseeable contributing causes at issue here.

AEP I, 582 F.3d at 347 (holding that defendants' argument "that many others contribute to global warming in a variety of ways . . . does not defeat the causation requirement"). Another standing case Defendants cite – *Amigos Bravos v. United States BLM* – also *rejected* their argument that Plaintiffs must "trace their injuries directly to Defendants' emissions"; rather they need only show a "meaningful contribution" to altering the climate. 816 F. Supp. 2d 1118, 1135 (D.N.M. 2011).[19]

Plaintiffs have additionally alleged cause in fact by virtue of Defendants' promotional acts – concealing and misrepresenting the dangers of fossil fuels – which substantially contributed to unchecked fossil fuel use and the alteration of the climate. AC ¶¶ 323-24, 407-443. In lead paint litigation, manufacturers similarly complained that their paint was not used in the homes that had to be remediated; Defendants here are likewise liable because their "promotions were a substantial factor in leading to the [unchecked] use of [fossil fuel]." *See, e.g.*, *ConAgra*, 227 Cal. Rptr. 3d at 548.

b. Plaintiffs allege Defendants knew their fossil fuel activities would cause Plaintiffs' harms, and thus allege proximate causation. The "touchstone" of legal (proximate) cause is foreseeability. *Boulders at Escalante L.L.C. v. Otten Johnson Robinson Neff & Ragonetti PC,* 412 P.3d 751, 762 (Colo. App. 2015). For decades, Defendants knew: that their fossil fuels, when used as they intended and at the levels they promoted, were substantially certain to *significantly* contribute to climate alteration; that fossil fuel use needed to be curtailed; and that delay was not an option. *Supra* Parts II.B-C; AC ¶¶ 363-69. They also knew of other fossil fuel companies' similar conduct; indeed, they worked in coordination. *E.g., id.* ¶¶ 408, 412-14. Plaintiffs' injuries are thus a reasonably foreseeable consequence of Defendants' tortious acts. Defendants need not foresee "the exact nature and extent" of or "precise manner" in

[19] *Amigos Bravos* involved challenges to federal leases for failure to address the risks of climate change. The leases would result in at most "0.0009% of global GHG emissions" and the court only held that this "relatively small amount" was insufficient, while recognizing it "is not clear" where the line should be drawn. 816 F. Supp. 2d at 1136. Here, Defendants' contributions are far greater.

which injuries occur, "but only that *some* injury will likely result in some manner." *Build It & They Will Drink, Inc. v. Strauch*, 253 P.3d 302, 306 (Colo. 2011) (citations omitted). In fact, Defendants *actually foresaw* the climate crisis. That is enough. *Cf. City of N.Y. v. A-1 Jewelry & Pawn, Inc.*, 501 F. Supp. 2d 369, 423 (E.D.N.Y. 2007) (finding liability "[w]here multiple actors contribute to a nuisance and have knowledge of the others' conduct and of the effect of their actions in the aggregate," even if acting independently).

Defendants argue that fossil fuel use is widespread, Mot. at 24-25, but do not challenge the linchpin of proximate cause – that Plaintiffs' injuries were reasonably foreseeable. *Cf. Boulders at Escalante*, 412 P.3d at 762, 765-66 (no causation where defendant could not be expected to foresee a real estate market collapse). The causal chain here is not too "attenuated" or removed "in space and time" from Defendants' misconduct. Mot. at 25. Much of their conduct is recent and ongoing. *See, e.g.*, AC ¶¶ 379, 392, 397, 401. Moreover, where "the influence of the actor's negligence is still a substantial factor, mere lapse of time, no matter how long, is not sufficient to prevent it from being the legal cause of the other's harm." Restatement § 433 cmt. f. Here, Defendants not only knew that harm would result, but knew decades ago that "time lags" would mask "much more significant effects" in the future. AC ¶¶ 347, 360-61. Courts regularly reject arguments like Defendants', particularly where defendants acted intentionally and with knowledge of the dangers. *See ConAgra*, 227 Cal. Rptr. 3d at 546 (lead paint companies liable for promotions from decades earlier "even [where] the actions of others in response to those promotions and the passive neglect of owners also played a causal role"); *see also MTBE II*, 725 F.3d at 122 n.43 (concerns about "proximity" really turn on "whether the defendant knew that its product would endanger public health").[20]

[20] Defendants again rely on the standing discussion in *Kivalina*, *see* Mot. at 24 (quoting 663 F. Supp.2d at 881), which *AEP I* rejected, *see* 582 F.3d at 344. They also cite *Comer v. Murphy Oil USA Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012), where plaintiffs sought to attribute a *single* hurricane to

4. Plaintiffs have stated claims for public and private nuisance.

A public nuisance is a condition that "injuriously affects the safety, health, or morals of the public or works some [other] . . . injury to the public." *Dep't of Health v. Mill*, 887 P.2d 993, 1002 (Colo. 1994). A private nuisance is a "substantial invasion of a plaintiff's interest in the use and enjoyment of his property." *Pub. Serv. Co. v. Van Wyk,* 27 P.3d 377, 391 (Colo. 2001). It is undisputed that the altered climate is injuring public rights and interfering with Plaintiffs' property; Defendants are liable if they intentionally or negligently contributed to these invasions. *Hoery*, 64 P.3d at 218. Defendants knew their activities were altering the climate, and thus interfering with public rights and property. *Supra* Part II.B. Like the manufacturers that sold and misleadingly promoted opioids, Defendants are liable for intentionally and negligently contributing to nuisances in Plaintiffs' communities. *See Hunter,* 2019 Okla. Dist. LEXIS 3486 at *37-38.

Defendants suggest that Plaintiffs' claims require balancing the costs and benefits of fossil fuels, Mot. at 25, but they are wrong. As noted above, the only question is whether it is unreasonable *for Defendants* to knowingly cause severe harm in Plaintiffs' communities but *not compensate* them.[21] *See* Restatement § 821B cmt. i, *accord* §§ 826, 829A. It clearly would be. Plaintiffs have alleged serious harm to public health and property; and Defendants have earned hundreds of billions of dollars in profits by contributing to that harm. Supra Parts II.B, II.D. [22] Moreover, Defendants produced, sold and promoted fossil fuels at levels they knew would cause harm, and misrepresented the dangers.

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defendants. *Comer* did not address the allegations here, establishing a causal link between Defendants and the inevitable increase in hazards that Plaintiffs must mitigate and adapt to. *Comer* was affirmed on *res judicata* grounds, not on the merits of its causation analysis. 718 F.3d 460 (5th Cir. 2013).

[21] Reasonableness is generally "an issue of fact and should [ ] be left to the determination of the trier of fact." *Van Wyk,* 27 P.3d at 391; *see also* Restatement § 826 cmt. b.

[22] Given these astronomical profits, there is no basis to find that Defendants cannot continue their fossil fuel activities if forced to compensate Plaintiffs or others.

There are no social benefits from Defendants' concealment and deception. *See* Restatement § 829(b) & cmt. d; *Hunter,* 2019 Okla. Dist. LEXIS 3486, at *36-38 (finding nuisance liability for misleading marketing of opioids); *ConAgra*, 227 Cal. Rptr. 3d at 529 (finding nuisance liability for promotion of "lead paint for interior use with knowledge of the hazard that such use would create").

No "authorized by statute" defense applies. Colorado courts only apply this rule to limit enjoining public nuisances permitted by zoning regulations, *Green v. Castle Concrete Co.*, 509 P.2d 588, 590 (Colo. 1973); it does not limit damages claims, *Hobbs v. Smith*, 493 P.2d 1352, 1354 (Colo. 1972), nor private nuisance claims. *Allison v. Smith*, 695 P.2d 791, 794 (Colo. App. 1984). Even so, Defendants' conduct was *not* "authorized." "Legislation prohibiting some but not other conduct is not ordinarily construed as authorizing the latter," Restatement § 821B, cmt. f, and Defendants cite only statutes prohibiting and regulating some practices in the sale of motor fuels. Colo. Rev. Stat. §§ 8-20-204, -232.5, -233 (2019). Nothing in these statutes authorizes Defendants' enterprise-wide sales at levels that threaten the climate, nor their deceptive marketing practices. Even a "comprehensive regulatory scheme" does not bar nuisance liability where "the law does not regulate the . . . practices alleged in the complaint." *Cincinnati v. Beretta U.S.A. Corp.,* 768 N.E.2d 1136, 1143 (Ohio 2002).

Last, Defendants argue that they did not have control over their fuels when they were burned. Mot. at 26-27. *Hoery*, however, adopted the Restatement's guidance that "a nuisance can include indirect or physical conditions created by defendant that cause harm," and that creating such a condition leads to continuing liability. 64 P.3d at 218. This is consistent with the modern rule, which does not depend on control of the instrumentality. *See* Restatement § 834 ("One is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on."); *MTBE II*, 725 F.3d at 121-22 & n.43 (finding liability for selling MTBE-laden gasoline even where it was spilled by independent third

parties); *Maryland v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 468 (D. Md. 2019) ("[A] defendant who created or substantially participated in the creation of the nuisance may be held liable even though he (or it) no longer has control over the nuisance-causing instrumentality.").

5. Plaintiffs have stated a claim for trespass.

Trespass is an uninvited physical intrusion upon real property. *Hoery,* 64 P.3d at 217. Defendants do not dispute that their climate alteration has brought fires, floods, storms, and pests to Plaintiffs' property. *See supra* Part II.D. Defendants are liable for "set[ting] in motion a force which, in the usual course of events, will damage" Plaintiffs' property. *Hoery*, 64 P.3d at 217.

Defendants need not have "intended to cause" the hazards ravaging Plaintiffs' lands. Mot. at 27. They only need intend the acts that *cause* the intrusion; while they must *know* that the intrusion will likely result, they need not intend it. *Id.* (citing *Burt v. Beautiful Savior Lutheran Church,* 809 P.2d 1064, 1067 (Colo. App. 1990)). Defendants do not dispute that they intended to sell and promote fossil fuel, nor that they knew unchecked fossil fuel use would bring these hazards to Colorado.

Contrary to what Defendants suggest, Mot. at 27, the magnitude of their conduct – and the resulting harms – does not immunize them. *Cf. MTBE II*, 725 F.3d at 119-20 (Exxon sold MTBE-laden gasoline everywhere; it was liable for trespass under New York law knowing it would be used and spilled there). Plaintiffs' claims do not reach everyone who combusted fossil fuels – only those who, like Defendants, engaged in substantial fossil fuel production, promotion, and sales while knowing of the climate impacts and misleading the public. Individuals' contributions are negligible, and they do not foreclose liability for the entities that are far more responsible for the harm.[23]

[23] The same objection could be leveled in secondhand smoke cases – that tobacco companies should bear no liability because everyone who smoked, knowing the risk, is also liable for contributing to the exposure. *Cf. Philip Morris, Inc. v. French*, 897 So. 2d 480 (Fla. Ct. App. 2004).

Plaintiffs have not implicitly consented to trespasses by using fossil fuels. Mot. at 28. Colorado courts do not easily find implied consent. *See, e.g., Rucker v. Fannie Mae*, 410 P.3d 675, 679 (Colo. App. 2016). "'Consent' is an 'agreement, approval, or permission as to some act or purpose' . . . [and] '[p]ermission' is defined as 'conduct that justified the other in believing that the possessor of property is willing to have them enter.'" *Corder v. Folds,* 292 P.3d 1177, 1180 (Colo. App. 2012) (quoting *Black's Law Dictionary* at 346 (9th ed. 2009)). Nothing in *Corder* suggests that Plaintiffs – who, unlike Defendants, did not appreciably alter the climate or misrepresent the dangers of unchecked fossil fuel use – consented to endure fires, floods, and pestilence. At best, this is a factual dispute, *id.* at 1181, which cannot be resolved on a motion to dismiss.

6. Plaintiffs have stated a claim under Colorado's Consumer Protection Act.

Plaintiffs have pled their Colorado Consumer Protection Act (CCPA) claims with particularity.[24] Plaintiffs have sufficiently "state[d] the main facts constituting the fraud," *Heller v. Lexton-Ancira Real Estate Fund, Ltd.*, 809 P.2d 1016, 1022 (Colo. App. 1990), specifically: that Defendants knew fossil fuel use alters the climate and concealed and misrepresented the dangers. *See, e.g.,* AC ¶¶ 408, 410, 415. Defendants have not identified any pleading deficiencies.

Plaintiffs' allegations meet the elements of the CCPA, which provides relief from deceptive business practices that "significantly impact the public as actual or potential consumers" and cause injury to a plaintiff's "legally protected interest." *Hall v. Walter*, 969 P.2d 224, 234-35 (Colo. 1998); C.R.S. §§ 6-1-105, -113. First, it is enough that the "misrepresentations were directed to the market generally." *Hall*, 969 P.2d at 235. Plaintiffs allege Defendants' advertisements – broadly sowing doubt about fossil fuel and the dangers of climate change; and concealing the same in branded

[24] Colorado courts have not decided whether pleading with particularity is required. *State ex rel. Suthers v. Mandatory Poster Agency, Inc.*, 260 P.3d 9, 13 (Colo. App. 2009).

marketing – were directed at consumers to preserve fossil fuel demand. AC ¶¶ 93, 111, 323, 410-13, 416, 421, 433, 492, 498.[25] Defendants cannot prevail by suggesting their misrepresentations were solely directed at policymakers; that is a factual dispute, which cannot be resolved on this motion. *See One Creative Place, L.L.C. v. Jet Ctr. Partners, L.L.C.*, 259 P.3d 1287, 1289 (Colo. App. 2011).

Second, Defendants' misrepresentations were about the "characteristics" of their fossil fuels and fossil fuels generally, specifically the safety of their continued unchecked use. *Cf. Philip Morris*, 566 F.3d at 1144 (finding misrepresentations were commercial where statements were by "Defendants as a group joined in advertising their common product, discuss cigarettes generically . . . or link cigarettes to an issue of public debate"). In *Warner v. Ford Motor Co.*, the court *denied* summary judgment where the defendant concealed known safety risks. No. 06-cv-02443, 2008 U.S. Dist. LEXIS 82858, at *31-36 (D. Colo. Sept. 30, 2008). The language Defendants cite referred to inapposite false statements made to the *federal government*, not the public, about safety test results, not the vehicle itself. *Id.* at *24. Third, Plaintiffs plausibly attribute industry group statements to Defendants, who were members and leaders in these groups, AC ¶¶ 71, 340, funded these efforts, *id.* ¶¶ 335, 430, and knew of and participated in the misinformation campaigns, *id.* ¶¶ 412-13. Fourth, Defendants' commercial speech is not First Amendment protected. *Supra* Part III.E.

7. Plaintiffs have plausibly alleged a civil conspiracy.

A civil conspiracy requires: (1) two or more persons; (2) a goal; (3) a meeting of the minds; (4) an unlawful overt act; and (5) resulting damages. *Nelson v. Elway,* 908 P.2d 102, 106 (Colo. 1995).[26] Plaintiffs plausibly allege a conspiracy between Defendants and others, including API, to

[25] Plaintiffs have CCPA standing for misrepresentations to third parties. *Hall*, 969 P.2d at 230-32.
[26] Colorado permits liability for civil conspiracy where "only lawful acts were performed if the purpose or goal is unlawful." *Magin v. DVCO Fuel Sys. Inc.,* 981 P.2d 673, 675 (Colo. App. 1999).

promote and sustain unchecked fossil fuel sales. Defendants' objections are meritless. First, the deception and unchecked fossil fuel sales, "the underlying wrong[s]," support causes of action under the CCPA, trespass, and nuisance, and are therefore sufficient. *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140, 146 (Colo. App. 2003). Second, Plaintiffs' conspiracy claim is not limited to fraud and their non-fraud allegations need not be pled with particularity; regardless, the allegations sufficiently show that Defendants produce, promote, and sell fossil fuels together, AC ¶¶ 49, 51, 74-75, 91, 326; have been part of associations for decades where information about the dangers of fossil fuel use was shared, *id.* ¶¶ 71, 80, 335-42, 349; and created a specific plan to sow doubt in the public's mind, *id.* ¶¶ 93, 4-8, 412-14. *See also supra* Part II.C. These facts plausibly allege a conspiracy. *See Cty. of Summit v. Purdue Pharma L.P.*, No. MDL 2804, 2018 U.S. Dist. LEXIS 213657, at *86-89 (N.D. Ohio Dec. 19, 2018). Finally, Plaintiffs have alleged unlawful overt acts, specifically spreading deliberately misleading statements to the public and their consumers.

8. Defendants do not successfully challenge Plaintiffs' unjust enrichment claim.

Defendants make no specific challenge to unjust enrichment, which requires that they benefit at Plaintiffs' expense and that it be "unjust [ ] to retain the benefit without paying." *Salzman v. Bachrach,* 996 P.2d 1263, 1265-66 (Colo. 2000). The equity of transactions between Defendants and their customers is irrelevant. Mot. at 23 n.9. The injustice is that *Plaintiffs* have to pay for harms Defendants predicted, while they profit. *See Cty. of Summit*, 2018 U.S. Dist. LEXIS 213657, at *111-13 (unjust to externalize cost of epidemic; claim does not depend on transaction with defendant).

V. CONCLUSION

Defendants' motion fails to establish any of the objections they raise. They fail to show as a matter of law that the local harms of climate change must fall on Colorado taxpayers. Plaintiffs have plausibly pled Defendants' liability and the extent of that contribution is for a jury to decide.

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Respectfully submitted,

s/ Kevin S. Hannon
Kevin S. Hannon, #16015
THE HANNON LAW FIRM, LLC
1641 Downing Street
Denver, CO 80218
Ph: 303-861-8800
Fax: 303-861-8855
Khannon@hannonlaw.com

David Bookbinder, D.C. Bar No. 455525, *pro hac vice*
NISKANEN CENTER
820 First Street, NE, Suite 675
Washington, DC 20002
Ph: 301-751-0611
DBookbinder@niskanencenter.org

Michelle C. Harrison, *pro hac vice*
Marco Simons, *pro hac vice*
EARTHRIGHTS INTERNATIONAL
1612 K Street, NW #800
Washington, DC 2006
Ph: 202-466-5188
Fax: 202-466-5189
michelle@earthrights.org
marco@earthrights.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of February 2020, a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM PURSUANT TO COLO. R. CIV. P. 12(b)(5)** was electronically filed with the court through CCE and served on the following counsel of record through CCE:

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.

Colin G. Harris (#18215)
Matthew D. Clark (#44704)
Faegre Baker Daniels LLP
1470 Walnut Street, Suite 300
Boulder, CO 80302
Telephone: (303) 447-7700
Facsimile: (303) 447-7800
Email: colin.harris@faegrebd.com
matthew.clark@faegrebd.com

Theodore V. Wells, J., *PHV*
Daniel J. Toal, *PHV*
Jaren Janghorbani, *PHV*
Yahonnes Cleary, *PHV*
Caitlin E. Grusaukas, *PHV*
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019
Telephone: (212) 373-3089
Facsimile: (212) 757-3990
Email: twells@paulweiss.com
dtoal@paulweiss.com
jjanghorbani@paulweiss.com

ycleary@paulweiss.com
cgrusauskas@paulweiss.com

Kannon K. Shanmugam, *PHV*
Paul, Weiss, Rifkind, Wharton & Garrison LLP
2001 K Street, N.W.
Washington, DC 20006
Telephone: (202) 233-7300
Facsimile: (202) 223-7420
Email: kshanmugam@paulweiss.com

Attorneys for Defendant Exxon Mobil Corporation

/s/ Kevin S. Hannon
Kevin S. Hannon

Attorney for Plaintiffs