District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3744	DATE FILED: January 25, 2021 6:44 PM CASE NUMBER: 2018CV30349
Plaintiffs: **County Commissioners of Boulder County et al.** v. Defendants: **Suncor Energy USA et al.**	**▲ COURT USE ONLY ▲**
Attorneys for Plaintiffs: Kevin Hannon, David Bookbinder, & Michelle Harrison *Attorneys for Defendants:* Hugh Gottschalk & Evan Stephenson	Case Number: 2018CV30349 Division: 2 Courtroom: S

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

This matter comes before the Court on the Suncor Defendants' December 9, 2019 Motion to Dismiss or Transfer Venue to the Denver County District Court. The Board of County Commissioners of Boulder County, the Board of County Commissioners of San Miguel County, and the City of Boulder ("Plaintiffs") timely filed Plaintiffs' Opposition to Suncor Defendants' Motion to Dismiss or Transfer Venue to the Denver County District Court on March 19, 2020. The Suncor Defendants ("Suncor") timely filed a Reply in Support of Motion to Dismiss or Transfer Venue to the Denver County District Court on May 1, 2020. Having carefully considered the pleadings and applicable law, the Court enters the following rulings and order:

I. BACKGROUND

On April 17, 2018, Plaintiffs brought this lawsuit seeking monetary damages from Defendants[1] to remediate the harm caused by their actions that contributed to the alteration of the climate.[2] Plaintiffs do not seek to enjoin any oil and gas operations or sales, do not seek to enforce emissions control, and do not seek damages or abatement relief for injuries occurring on federal lands. (Am. Compl. ¶ 542.) Rather, Plaintiffs seek monetary damages from Defendants to remediate and abate the impacts of climate change, caused by Defendants' tortious conduct, that have occurred and will occur within their geographical boundaries. (Am. Compl. ¶ 532.) Additionally, Plaintiffs seek "remediation and/or abatement of the hazards" caused by Defendants "by any other practical means" and "any other applicable remedies and any other relief as this Court deems just and proper." (Am. Compl. ¶¶ 534, 540.)

[1] This case involves four defendants: Suncor Energy (U.S.A.), Inc.; Suncor Energy Sales, Inc.; Suncor Energy, Inc.; and Exxon Mobil Corporation. The instant Motion only concerns the three Suncor Defendants.
[2] Plaintiffs filed an Amended Complaint and Jury Demand on June 11, 2018.

On June 29, 2018, Defendants filed a Notice of Removal in the United States District Court for the District of Colorado. Plaintiffs filed a Motion to Remand on July 30, 2018. On September 5, 2019, the US District Court granted Plaintiffs' Motion to Remand. Defendants appealed this Order to the United States Court of Appeals for the Tenth Circuit.

On October 29, 2019, the parties filed a Joint Motion to Set Briefing Schedule in Boulder District Court, which the Court granted, in part, on October 30, 2019. Briefings concluded on April 10, 2020.

The parties requested oral arguments on four Motions to Dismiss, including the instant Motion. The Court heard oral arguments on June 1, 2020.

Because this case did not become ripe until June 1, 2020 and because Defendants' Appeal was still being considered by the Tenth Circuit Court of Appeals, this Court concluded it would await a ruling from the Court of Appeals before ruling on this Motion.

On July 7, 2020, the Tenth Circuit Court of Appeals affirmed the US District Court's Order granting Plaintiffs' Motion to Remand.

On September 22, 2020, Defendants filed a Motion to Stay the instant proceedings pending the United States Supreme Court's ruling in *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, 140 S. Ct. 917 (2020) and *Ford Motor Co. v. Bandemer*, 140 S. Ct. 916 (2020) ("*Ford Motor* cases"). The *Ford Motor* cases concern the legal standard for specific personal jurisdiction and whether the "arise out of or relate to" requirement for a state court to exercise specific personal jurisdiction over a nonresident defendant is met when none of the defendant's forum contacts caused the plaintiff's claims. On October 28, 2020, the Court granted Defendants' Motion to Stay with respect to their Motion to Dismiss for Lack of Personal Jurisdiction and Motion to Dismiss for Failure to State a Claim. The Court directed the parties to file additional briefs addressing their positions as to whether the Court could and should decide Defendants' Motion to Dismiss or Transfer Venue to the Denver County District Court prior to the Supreme Court issuing its ruling in the *Ford Motor* cases. On November 18, 2020, both parties submitted briefs arguing the Court could and should decide Defendants' pending Motion to Dismiss or Transfer Venue.

In the present Motion, Suncor argues venue is proper in Denver County District Court because of a forum selection clause in a 2009 sales contract between Suncor USA and San Miguel County. Suncor USA executed a contract with San Miguel County in 2009 for the sale of asphalt products produced at Suncor's Commerce City refinery. (Suncor Ex. 1.) This 2009 contract contains a forum selection clause, identifying Denver as the proper venue "for any actions, suits, or proceedings arising out of or relating to this Agreement or the transactions contemplated thereby." (Suncor Ex. 1 ¶ 13.) This lawsuit, Suncor argues, "relates to" the 2009 contract for asphalt products produced at the Commerce City refinery because Plaintiffs claim in the present action asserts the Commerce City refinery is a nuisance. (Suncor Mot. To Dismiss 3.)

Further, Suncor contends venue is proper in Denver as Suncor USA and San Miguel County executed Confirmation Contracts in 2018 and 2019—after this action was filed—that state, "any and all claims between the parties regarding any and all matters shall be subject to the

exclusive jurisdiction of the state and federal courts located in Denver, Colorado regardless when claimed." (Suncor Ex. 2, 3.)

Suncor argues venue is improper in Boulder County under both the nuisance venue statute, § 16-13-307(2), C.R.S., and C.R.C.P. 98. Suncor asserts venue is improper under § 16-13-307(2), C.R.S., because the statute is only applicable to actions to abate nuisances, and here, Plaintiffs only seek to recover monetary damages. (Suncor Mot. To Dismiss 13.) Suncor further contends venue is improper in Boulder County under C.R.C.P 98(c)(5), which provides, "an action for tort may also be tried in the county where the tort was committed." Suncor argues Plaintiffs' Complaint fails to allege any tortious conduct in Boulder. Additionally, Suncor asserts C.R.C.P. 98(c)(5) does not contemplate venue in the location where damages manifest. (Suncor Mot. To Dismiss 14-15.)

Finally, Suncor argues venue is proper in Denver County because Suncor USA and Suncor Energy Sales, Inc. are both residents of Denver County and because all defendants consent to venue in Denver. (Suncor Mot. To Dismiss 15.)

In their Response, Plaintiffs argue the forum selection clause in the 2009 Master Contract does not apply to the allegations set forth in this case. Plaintiffs assert their claims against Suncor related to Suncor's contributions to climate change through its production, promotion, refining, marketing, and sale of fossil fuels do not "relate to" San Miguel County's contract with Suncor USA for the purchase of asphalt products. (Pl.'s Resp. 8.)

Plaintiffs further contend the additional forum selection clauses contained in the 2018 and 2019 Confirmation Contracts are not applicable to the claims raised in their Amended Complaint. Plaintiffs maintain Suncor unilaterally inserted these clauses into the 2018 and 2019 contracts, sandwiched them between boilerplate terms, and did not provide any notice of their insertion to the signor, County Attorney, or Board of County Commissioners. (Pl.'s Resp. 3.) Additionally, Plaintiffs argue these provisions are inapplicable to the present case because the 2018 and 2019 Confirmation Contracts were signed after Plaintiffs filed this case. Plaintiffs assert the 2018 and 2019 contracts expired on December 31, 2018 and December 31, 2019 respectively. (Pl.'s Resp. 10.) Finally, Plaintiffs argue Ryan Righetti, the San Miguel County Director of Roads and Bridges, did not have the authority to sign contracts affecting litigation on behalf of the County. (Pl.'s Resp. 10-14.)

Plaintiffs contend venue is proper in Boulder County under five separate theories. First, Plaintiffs argue venue is proper under C.R.C.P. 98(a) because this action affects real property in Boulder County. (Pl.'s Resp. 4-5.) Second, Plaintiffs argue venue is proper under C.R.C.P. 98(c)(5) under the theory that torts were committed in Boulder County as injuries were suffered in Boulder County. (Pl.'s Resp. 5.) Third, Plaintiffs argue venue is proper under C.R.C.P. 98(c)(5) because Suncor committed the tort of carrying out deceptive trade practices in Boulder County by misleadingly marketing fossil fuels and targeting these deceptive trade practices to Boulder County residents. (Pl.'s Resp. 6.) Fourth, Plaintiffs allege venue is proper under C.R.C.P. 98(c)(5) because Petro-Canada Resources (USA) Inc., a Suncor subsidiary, produced fossil fuels in Boulder County. (*Id.*) And fifth, Plaintiffs argue venue is proper under § 16-13-307(2), C.R.S., since this case is

ultimately an action to abate a public nuisance, and part of the land at issue is located in Boulder County. (Pl.'s Resp. 6-7.)

In the Reply, Suncor argues this action falls within the 2009 Master Contract's forum selection clause, thus it must be enforced. (Suncor Reply 1-4.) Suncor further asserts the 2018 and 2019 forum selection clauses are valid and enforceable. Suncor argues San Miguel County never objected to their insertion into the Confirmation Contracts, Mr. Righetti had authority to sign the Confirmation Contracts pursuant to the 2009 Master Contract's confirmation procedures, the Confirmation Contracts' forum selection clauses apply to pending litigation, and the forum selection clauses can still be enforced even though the Confirmation Contracts have expired. (Suncor Reply 4-6.)

Finally, Suncor argues all of Plaintiffs' venue theories are invalid. First, they maintain venue is improper under C.R.C.P. 98(a) because Plaintiffs did not plead this theory in the Complaint, and Plaintiffs do not identify "specific property." (Suncor Reply 8.) Next, Suncor argues venue is improper under C.R.C.P. 98(c)(5) because no torts were committed in Boulder County, venue is not based on the location where injuries were suffered, and the Complaint fails to describe any deceptive trade practices conducted in Boulder. (*Id*.) Finally, Suncor argues venue is improper under § 16-13-307(2), C.R.S., because Plaintiffs seek only money damages and not abatement or an injunction. (Suncor Reply 9.)

II. LEGAL STANDARD

A. Forum Selection Clauses

A forum selection clause is a "contractual provision agreed to by private parties that constitutes the parties' agreement as to the place of the action where the parties will bring any litigation related to the contract." *Cagle v. Mathers Family Tr.*, 295 P.3d 460, 464 (Colo. 2013) (citing Restatement (Second) of Conflict of Laws § 80 (1971); 14D Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3803.1 (3d ed. 1998)). A forum selection clause is presumptively valid unless it is "unreasonable, fraudulently induced, or against public policy." *Cagle*, 295 P.3d at 465 (following the United States Supreme Court's ruling in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907 (1972)). Forum selection clauses should be enforced unless the resisting party shows enforcement would be unreasonable under the circumstances. *Cagle*, 295 P.3d at 465 (citing *Bremen*, 407 U.S. at 10). Courts analyze forum selection clauses similarly to arbitration provisions because arbitration provisions are "'in effect, a specialized kind of forum-selection clause[.]'" *Cagle*, 295 P.3d at 466 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)).

Courts have taken different approaches in determining whether forum selection clauses apply to tort claims. In *Root v. GERS*, the United States District Court of Nebraska outlined how different federal circuits apply forum selection clauses to tort claims. No. 8:01CV326, 2002 WL 809539, at *3 (D. Neb. 2002) (finding plaintiff's claims for fraud and misrepresentation regarding upcoming layoffs were not covered by a forum selection clause that gave San Diego courts jurisdiction over claims "arising out of or related to" an agreement to transfer stock options. The Court found the tort claims were not sufficiently related to the agreement to require deference to

the forum selection clause, resolution of the tort claims did not relate to an interpretation of the agreement, and the tort claims did not involve the same operative facts as a breach of contract claim brought under the agreement). In determining whether tort claims are sufficiently connected to a contract such that a forum selection clause should control the venue, the *Root* Court noted the Third Circuit has examined whether the tort claims "ultimately depend on the existence of a contractual relationship between the parties." *Id*. The Ninth Circuit, on the other hand, considers "whether resolution of the claims relates to interpretation of the contract[,]" and the First Circuit examines "whether the contract-related tort claims involve the same operative facts as a parallel claim for breach of contract." *Id*.

To support its position that its claims are outside the purview of the parties' forum selection clauses, Plaintiffs cite *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988). In *Manetti-Farrow*, the Ninth Circuit held that while forum selection clauses can be equally applicable to contractual and tort claims, whether a forum selection clause applies to tort claims depends on "whether resolution of the claims relates to interpretation of the contract." 858 F.2d 509, 514 (9th Cir. 1988). There, the court held the plaintiff's allegations of the defendant implementing a price squeeze, fraudulently obtaining plaintiffs' customer lists and business information, wrongfully neglecting delivery orders, and abrogating the contract were sufficiently related to the duties in the parties' exclusive dealership contract to be covered by the contract's forum selection clause. *Id*. The court found the claims could not be adjudicated without analyzing whether the parties were in compliance with the contract, and the claims related to the central conflict over the interpretation of the contract. *Id*.

In *United States Welding, Inc. v. Tecsys, Inc.*, the US Magistrate Judge ruled the plaintiff's tort claims for fraudulent inducement and negligent misrepresentation were covered by the parties' forum selection clause because they involved the same operative set of facts as the plaintiff's parallel breach of contract claim. No. 14-CV-00778, 2014 WL 10321666, at *10 (D. Colo. 2014). In its opinion, the Court noted "tort claims come within the purview of [a] contract's forum selection clause" when the claims involve the same operative facts as a parallel breach of contract claim. *Id*. (citing *Adams Reload Co., Inc. v. Int'l Profit Assocs., Inc.*, 143 P.3d 1056, 1061 (Colo. App. 2005) (citing *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 695 (8th Cir. 1997))). In its opinion, the Court also noted that when analyzing a choice of law issue, the Tenth Circuit has made the following observation about forum selection clauses: "'generally speaking, other circuits applying state law have determined a contract forum provision cannot apply to tort claims unless the provision is broad enough to be construed to cover such claims or the tort claims involve the same operative facts as a parallel breach of contract claim.'" *United States Welding*, 2014 WL 10321666, at *10 (quoting *Cobank, ACB v. Reorganized Farmers Co-op Ass'n*, 170 Fed.Appx. 559, 567 (10th Cir. 2006) (citing cases in the First, Second, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits)).

In the context of determining whether forum selection clauses cover tort claims, Colorado and Tenth Circuit courts have broadly interpreted the phrase "relating to." *See City & Cty. of Denver v. Dist. Court*, 939 P.2d 1353, 1366 (Colo. 1997) (finding "related" means "having a relationship or connected by an established or discoverable relation" in the context of alternative dispute resolution clauses); *MPVF Lexington Partners, LLC v. W/P/V/C, LLC*, 148 F.Supp.3d 1169, 1178 (D. Colo. 2015) (finding "concerning" is a synonym for "relating to," and both are "extremely broad language" in the context of determining the scope of forum selection clauses);

Lawson v. Global Payments, Inc., No. 18-CV-03360, 2019 WL 4412271, at *3 (D. Colo. 2019) (finding courts have construed the phrase "relating to" and similar language in forum selection clauses broadly).

While courts broadly interpret the phrase "relating to" when examining forum selection clauses, forum selection clauses are evaluated according to the ordinary principles of contract interpretation. *Lawson*, 2019 WL 4412271, at *3 (citing *Kelvion, Inc. v. PetroChina Canada, Ltd.*, 918 F.3d 1088, 1092 (10th Cir. 2019)). Therefore, courts must examine the plain language of the agreement to determine the parties' intent and must consider what the phrases "relating to" and "arising out of" modify. *Id*. *See also Berrett v. Life Ins. Co. of the Southwest*, 623 F.Supp. 946, 948-49 (D. Utah 1985) ("[w]hether tort claims are to be governed by forum selection provisions depends upon the intention of the parties reflected in the wording of particular clauses and the facts of each case").

To support its position that the forum selection clauses in the 2018 and 2019 Confirmation Contracts should apply to Plaintiffs' claims, Suncor relies on *Zink v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 13 F.3d 330 (10th Cir. 1993). In *Zink*, the plaintiff purchased $126,000 worth of bonds through Merril Lynch and opened a Merril Lynch account in December 1980. *Id*. at 331. In June 1982, Zink and Merril Lynch executed a formal account agreement, which included an arbitration clause requiring the parties to arbitrate any controversy "arising out of" Zink's business with Merril Lynch or the agreement itself. *Id*. Zink filed the lawsuit in December 1983, approximately 18 months after entering into the account agreement. *Id*. The court held the arbitration agreement was sufficiently broad to cover Zink's claims for violation of federal securities laws arising out of bond transactions. *Id*. at 333. Further, the court found Zink's contention that an agreement to arbitrate a dispute must pre-date the actions giving rise to the dispute "misplaced" and "contrary to contract principles which govern arbitration agreements." *Id*. *But cf. Smith v. Swift Transp. Co., Inc.*, No. 13-224-RDR, 2013 WL 5551804, at *2-3 (D. Kan. 2013) (holding an employee's discrimination claims against his employer were not covered by a subsequent arbitration clause covering "any disputes arising out of or relating to the relationship created by this Agreement").

Courts across the country have ruled an agreement's arbitration provision or forum selection clause does not automatically expire upon the termination of the agreement. In *Ferguson-Keller Associates, Inc. v. Plano Molding Company, LLC*, the court granted the defendant's motion to transfer venue based on a forum selection clause in an expired sales-representative agreement. 274 F.Supp.3d 916, 918 (D. Minn. 2017). The court held "the purported expiration of the Agreement does not undermine application of the forum-selection clause." *Id*. at 19 (citing *U.S. Smoke & Fire Curtain, LLC v. Bradley Lomas Electrolok, Ltd.*, 612 Fed.Appx. 671, 672-73 (6th Cir. 2015) (noting the "greater weight of authority" holds that "dispute-resolution provisions, such as forum-selection clauses, are enforceable beyond the expiration of the contract"); *VERSAR, Inc. v. Ball*, No. Civ. A. 01-1302, 2001 WL 818354, at *2 (E.D. Pa. 2001) ("Unless otherwise expressed, a choice of forum clause does not expire upon termination of the contract from which it derives.")). In *Weingard v. Telepathy, Inc*, the court similarly held "parties to a contract are bound by the contract's forum selection clause even after the contract has expired, where, as here, the plaintiff's claims involve rights arising out of the contract and the entire business relationship between the parties stems from the contract." No. 05 Civ.2024(MBM), 2005

WL 2990645, at *3 (S.D.N.Y. 2005) (citing *AGR Fin., LLC v. Ready Staffing, Inc.*, 99 F.Supp.2d 399, 402 (S.D.N.Y. 2000) (holding a forum selection clause in an expired agreement governed claims arising out of that contract); *Young Women's Christian Ass'n of the United States of Am. Nat'l Bd. v. HMC Entm't, Inc.*, No. 91 civ. 7943, 1992 WL 279361 (S.D.N.Y. 1992) (holding that a non-contractual claim was subject to a forum selection clause in an expired contract between plaintiff and defendant because plaintiff's claims for unfair competition, trademark infringement, misappropriation, and implied contract involved rights arising out of the contract, and plaintiff and defendant would not have had dealings but for the contract between the two parties)). *See also Texas Source Group, Inc. v. CCH, Inc.*, 967 F.Supp. 234, 238 (S.D. Tex. 1997) (holding a forum selection clause from an expired contract controls because resolution of the plaintiff's claims is dependent, in part, on an evaluation of the parties' rights and obligations arising under the agreement).

Absent plain language indicating the parties' intention that dispute resolution provisions expire upon the termination of a contract, "[d]ispute resolution provisions such as forum-selection clauses typically apply to post-contractual disputes[.]" *Weatherford International, LLC. v. Binstock*, H-19-4258, 2020 WL 1692543, at *3 (S.D. Tex. 2020) (citing *Strata Heights International Corp. v. Petroleo Brasilerio, S.A.*, 67 Fed.Appx. 247, 2003 WL 21145663, at *7 (5th Cir. 2003) ("When a clause purports to cover all disputes relating to the contract, that clause covers all disputes relating to the contract regardless of when th[e] dispute arises")). *See also Brady v. Sperian Energy Corporation*, 18 C 6968, 2019 WL 2141968, at *3 (N.D. Ill. 2019) (holding a forum selection clause applies even if the parties' customer agreement expired); *but cf. Raima, Inc. v. Myriad France, SAS*, No. C12-1166JLR, 2012 WL 6201709, at *6 (W.D. Wash. 2012) ("Although forum selection clauses are presumptively valid . . . they do not generally survive a contract's expiration").

In *Russell v. Citigroup, Inc.*, Russell filed a class action against his former employer for failing to compensate employees for time spent logging in and out of their computers at the beginning and end of each workday. 748 F.3d 677, 679 (6th Cir. 2014). Russell's initial employment agreement with Citicorp contained a standard arbitration agreement that did not cover class action suits. *Id*. About a year after commencing this action, Russell re-applied to work for Citicorp. *Id*. Russell was rehired, and his new contract contained an updated arbitration clause that covered class actions. *Id*. The lawyers for Citigroup did not know Russell had reapplied for a position, and Russell signed his employment contract without consulting his lawyers. *Id*. Once Citigroup's lawyers learned of the new employment contract, they sought to compel Russell to arbitrate the previously-filed class action, which was then in discovery. *Id*. The district court ruled the new arbitration agreement did not cover lawsuits that were filed before the agreement was signed. *Id*. The Sixth Circuit affirmed this ruling, holding the new arbitration agreement did not apply to the previously-filed class action lawsuit. *Id*. In reaching this conclusion, the court held the use of present-tense language in the agreement suggested the agreement did "not evict pending lawsuits." *Id*. Further, the court held Citicorp's behavior indicated it did not intend the employment contract to govern pending lawsuits. *Id*. at 680. Specifically, the court found it relevant that Citicorp did not consult their lawyers or communicate with Russell's lawyers before presenting Russell with the contract. *Id*. Noting that one party's lawyer may not communicate about a pending case with an opposing litigant with representation, the court found the fact that Citicorp presented the contract to Russell without consulting either party's lawyers demonstrative

of Citigroup's intent for this contract to not cover the pending class action. *Id*. The court noted "[i]f Citicorp's in-house counsel prepared a contract, expecting it to be given to a represented litigant but also expecting it to govern existing cases, they might find themselves near the edge of" the rules of professional responsibility, regardless of who handed Russell the arbitration agreement. *Id*.

In 2016, the Tenth Circuit ruled on a similar case and recognized the "common sense" ruling in *Russell* but reached a different conclusion based on the facts of the case. *In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litigation*, 835 F.3d 1195, 1203 (10th Cir. 2016). *Cox* involved multiple class actions on behalf of Cox subscribers alleging Cox illegally tied their premium cable services to the rental of set-top boxes. *Id*. at 1200. In the relevant case, two plaintiffs filed lawsuits on behalf of the New Orleans and Arizona markets approximately five months after signing subscriber agreements requiring arbitration of "claims or disputes between us . . . that arise out of or in any way relate to" the agreement or goods or services provided by Cox. *Id*. at 1199. In this case, Cox answered two complaints, and three days after the plaintiffs submitted interrogatories and requests for production, Cox, which had not sought discovery, moved to compel arbitration. *Id*. at 1200. The district court granted Cox's motion and held the arbitration clauses covered the present litigation and Cox had not waived arbitration. *Id*. In line with its holding in *Zink*, the Tenth Circuit affirmed the district court's ruling, holding the arbitration clause was sufficiently broad to cover the disputes even though the conduct at issue predated the agreement. *Id*. at 1202. In reaching this conclusion, the court distinguished this case from *Russell*, in part, because *Russell* featured "a single employee and a single employer who were already actively engaged in litigation when the arbitration agreement was executed." *Id*. at 1203.[3]

After the *Russell* and *Cox* decisions, the Eleventh Circuit ruled on a similar issue in 2018. *Dasher v. RBC Bank (USA)*, 882 F.3d 1017 (11th Cir. 2018). In *Dasher*, a class of plaintiffs sued RBC for failing to warn bank account holders of overdrafts at points of sale when using debit cards and for rearranging the order of debit card transactions in an attempt to quickly drive their balances to zero, which allowed RBC to issue more overdraft charges. *Id*. at 1019. RBC sought to invoke an arbitration provision in a 2008 customer agreement, but the district court denied the motion. *Id*. While this decision was pending appeal, the US Supreme Court decided a case the parties thought might be applicable, so they moved to vacate and remand for reconsideration. *Id*. The district court directed the parties to conduct limited discovery related to arbitration and found PNC, which had subsequently acquired RBC, issued an updated customer-account agreement in 2012 which did not contain an arbitration provision. *Id*. at 1019-20. The district court ruled the 2012 agreement superseded the 2008 agreement and denied PNC's motion to compel arbitration. *Id*. at 1020. Days after appealing this decision, PNC sent account holders an amended agreement with a new arbitration provision, containing language "suggesting it might have retroactive effect upon existing claims[,]" purporting to take immediate effect. *Id*. The agreement "deem[ed] account holders to accept the amendment if the account holders fail[ed] to opt out and continue[d] their accounts." *Id*. PNC moved to compel arbitration based on the updated agreement, and the district court denied its motion. *Id*. In reviewing the district court's decision, the Eleventh Circuit denied

[3] The Tenth Circuit distinguished *Russell* for a variety of reasons, including the differences in the language in the forum selection clauses, the extrinsic evidence in *Russell* that neither party consulted their attorneys before signing the agreement despite being engaged in active litigation, and the fact that the plaintiffs were not parties to a 2009 class action against Cox. *Cox*, 835 F.3d at 1202-03.

PNC's motion to compel arbitration for two reasons: (1) "PNC distributed the proposed, purportedly retroactive and litigation-ending amendment directly to Dasher, even though PNC knew Dasher was an adverse litigant actively represented by counsel as to the very issues raised in the [arbitration] amendment[,]" and (2) "at the time Dasher failed to opt out of the proposed amendment, he was forcefully and consistently resisting arbitration of the pending litigation." *Id.* at 1021. In reaching this conclusion, the court relied on *Russell* "to the extent it considered the failure to communicate through litigation counsel material to the existence of a retroactive and court-evicting agreement to arbitrate." *Id.* at 1022.[4]

AT&T Corp. v. Care Medical Equipment featured another retroactive forum selection clause issue. No. CV. 03-1590-AS, 2006 WL 1371651 (D. Or. 2006). In *AT&T*, Care contracted with AT&T for telephone services. *Id.* at 1. Care's telephone server was hacked, $75,000 in calls were placed, Care refused to pay for the calls, and AT&T sued. *Id.* Care filed a third-party complaint against AnswerNet, its answering service company, for negligence. *Id.* AnswerNet filed a Motion for Summary Judgment, which was denied on March 15, 2005, in part because of the absence of a written contract between the parties. *Id.* After this ruling, AnswerNet forwarded Care's President a service agreement, which AnswerNet advised was "intended to set out modifications to the charges for the services" it was providing to Care. *Id.* The President signed the agreement on April 15, 2005. *Id.* Unbeknownst to Care's President, the agreement contained a forum selection clause providing "all actions with respect to this contract shall be brought only in a court in New Jersey, or in the Federal District Court having jurisdiction." *Id.* Pointing to a "sold date" and a "start date" in the agreement, AnswerNet argued the agreement was effective as of January 12, 1999 and applied retroactively to Care's claims. *Id.* The court ruled the forum selection clause did not apply to the pending litigation because application would be "unreasonable." *Id.* at 2. In reaching this decision, the court noted "the stage of the litigation" and "the circumstances surrounding execution of the [a]greement." *Id.* at 3. The court found AnswerNet was attempting to enforce the forum selection clause "at this stage of the litigation as a means of discouraging Care from continuing to pursue its claim." *Id.* at 2. Additionally, the court found AnswerNet obtained Care's President's signature by means of bad faith: "AnswerNet presented the [a]greement to Care to set out modifications to the charges for services Care was already receiving under an oral agreement[, t]here was no discussion of any other changes to the existing oral agreement . . .[,] there was no indication in the [a]greement that the forum selection would be retroactive[,] and AnswerNet did not advise [Care's President] that it intended to rely on that provision of the [a]greement in this action[.]" *Id.*

B. Venue

i. General

Venue refers to the place of trial or "'the locality where an action may be properly brought.'" *Hagan v. Farmers Insurance Exchange*, 342 P.3d 427, 432 (Colo. 2015) (quoting *State*

[4] The Eleventh Circuit noted PNC unilaterally proposed the arbitration amendment and invited its account holders to opt out. *Dasher*, 882 F.3d at 1023. The court highlighted the difference between Dasher's uncounseled response (silence) and his counseled actions (ongoing resistance to arbitration). *Id.* Like the *Russell* Court, here, the court noted "the risks of communicating directly with the opposing party as to a purportedly court-evicting amendment outside the presence of opposing counsel are manifest." *Id.*

v. Borquez, 751 P.2d 639, 641 (Colo. 1988)). "Generally, a plaintiff is entitled to choose the place of trial when venue in more than one county would be proper." *Hagan*, 342 P.3d at 432 (citing *7 Utes Corp. v. Dist. Court*, 702 P.2d 262, 266 (Colo. 1985)). A court may change the place of trial "(1) [w]hen the county designated in the complaint is not the proper county . . . [or] (2) [w]hen the convenience of witnesses and the ends of justice would be promoted by the change." C.R.C.P. 98(f). The party seeking a venue change "bears the burden of proving the right to change." *Hagan*, 342 P.3d at 432 (citing *Cliff v. Gleason*, 351 P.2d 394, 396 (Colo. 1960) (citing *Fletcher v. Stowell*, 28 P. 326, 327 (Colo. 1891))). When a case involves "the substantial right of a defendant to have a case against him tried in the county in which he resides, the party denying such right must at least balance the showing made by the moving party." *Cliff v. Gleason*, 351 P.2d 394, 396 (Colo. 1960).

Once venue has been challenged, "the burden shifts to the plaintiff to prove that it is proper by presenting specific facts to support the allegations." *Biad Chili, Ltd., Co. v. Cimarron Agriculture, Ltd.* No. CV-08-967, 2009 WL 10698485, at *2 (D.N.M. 2009) (citing *Concesionaria DHM, S.A. v. International Finance Corp.*, 307 F.Supp.2d 553, 558 (S.D.N.Y. 2004); *Troupe v. O'Neill*, No. 02-4157, 2003 WL 21289977 (D. Kan. 2003); *Gwynn v. TransCor America, Inc.*, 26 F.Supp.2d 1256, 1261 (D. Colo. 1998)). *See also Gwynn v. TransCor America, Inc.*, 26 F.Supp.2d 1256, 1261 (D. Colo. 1998) ("Once venue is challenged, plaintiff must prove that [venue] is proper by presenting specific facts to support the allegations[, and p]laintiff has the burden of establishing that venue is proper as to each claim and as to each defendant").

"It is clear under numerous decisions" of the Colorado Supreme Court that when a defendant properly applies for a change of venue from an improper county, the trial court is left "with no alternative but to grant such application." *Board of County Commissioners of Eagle County v. District Court*, 632 P.2d 1017, 1020 (Colo. 1981) (citing *Denver v. Glendale*, 380 P.2d 553 (Colo. 1963)).

ii. Section 16-13-307(2), C.R.S.

"An action to abate a public nuisance shall be brought in the county in which the subject matter of the action, or some part thereof, is located or found or in the county where the public nuisance act, or any portion thereof, was committed." § 16-13-307(2), C.R.S. An "action to abate a public nuisance" is "any action . . . to restrain, remove, terminate, prevent, abate, or perpetually enjoin a public nuisance." § 16-13-301(1), C.R.S. Public nuisance suits may be either criminal or civil in nature, but "[w]here a civil action is brought . . . the only remedy is injunctive relief." *People v. Cory*, 514 P.2d 310, 311 (Colo. 1973). The Colorado Supreme Court has held when an individual is found to be in violation of a city's anti-nuisance ordinance and has been given notice to abate pursuant to a municipal court judgment, the city is authorized to abate the nuisance and make the individual responsible for the reasonable costs of abatement. *Price v. City of Lakewood*, 818 P.2d 763, 765 (Colo. 1991); *see also Oberst v. Mays*, 365 P.2d 902, 904-05 (Colo. 1961) (holding a city's assessment against a landowner for the costs of a state contractor's work to abate a nuisance was not void when dust blowing from the land constituted a nuisance per se, subject to summary abatement, and the landowner was given notice of his duty to abate, and he failed to do so); *Munn v. Corbin*, 44 P. 783, 788 (Colo. App. 1896) (after a nuisance has been found to exist by a court and a landowner has been given notice of his duty to abate it, and he has failed to do so,

the City Public Health Commissioner is authorized to abate the nuisance and collect the cost thereof with interest and damages).

iii. C.R.C.P. 98(a)

"All actions affecting real property, franchises, or utilities shall be tried in the county in which the subject of the action, or a substantial part thereof, is situated." C.R.C.P. 98(a). "Affect," as used in C.R.C.P. 98(a), "is as broad a term as '[to determine] a right or interest in.'" *Jameson v. District Court of City and County of Denver*, 172 P.2d 449, 450 (Colo. 1946) (finding an action to rescind a contract was, in substance, an action to determine title to timber located on land in Grand County, and therefore, venue was proper in Grand County). *See generally* SHEILA K. HYATT & STEPHEN A. HESS, WEST'S COLORADO PRACTICE SERIES: CIVIL RULES ANNOTATED Ch. 11 (5th ed. Feb. 2020 Update) (C.R.C.P. 98(a) has limited application because courts narrowly interpret the word "affecting," finding it has applied in actions to determine a right or interest, in a lawsuit affecting the construction and operation of a utility, in an action to quiet title to property rights, and in an action to determine county boundaries).

C.R.C.P. 98(a) combines two former code sections and "has to do with actions affecting specific property and does not control in an action where there is no issue as to title, lien, injury, quality or possession, but which is concerned only with recovery of the purchase price." *Craft v. Stumpf*, 170 P.2d 779, 780 (Colo. 1946) (finding C.R.C.P. 98(a) did not apply to an action to recover the value of furniture, fixtures, and equipment of a business sold to Mr. Craft and located in a different county, and therefore transfer of the case to the jurisdiction in which the business was located was unnecessary); *see also 7 Utes Corp. v. District Court of Eighth Judicial Dist.*, 702 P.2d 262, 266 (Colo. 1985) (finding 7 Utes' action against the State Board of Land Commissioners to enforce a lease negotiation provision in a special use permit was not an action affecting real property within the meaning of C.R.C.P. 98(a) but was principally an *in personam* suit against the board subject to C.R.C.P. 98(b)(2)).

In *Sanctuary House, Inc. v. Krause*, the Colorado Supreme Court outlined its past applications of C.R.C.P. 98(a). 177 P.3d 1256, 1259 (Colo. 2008). The court noted "an action to terminate a real estate lease is . . . one to recover possession and therefore 'affects property.'" *Id.* (citing *Gordon Inv. Co. v. Jones*, 227 P.2d 336, 339 (1951)). Similarly, an action "seeking a declaration of parties' rights to real property was one 'affecting real property[.]'" *Sanctuary House*, 177 P.3d at 1259 (citing *Colo. Nat'l Bank v. Dist. Court*, 542 P.2d 853, 856 (1975)). In *Sanctuary House*, the Court found the plaintiff's action for breach of a purchase agreement for failure to convey foreign real property was not an action "affecting real property" within the meaning of C.R.C.P. 98(a). *Sanctuary House*, 177 P.3d at 1257. In reaching this decision, the court noted the defendants failed to show that ownership of the land was disputed and needed to be resolved by the trial court, and the plaintiff did not seek any remedies "pertaining directly to the property[,]" such as a declaratory judgement regarding ownership or an injunction "to dispossess another of the property[.]" *Id.* at 1260.

In *Denver Board of Water Commissioners v. Board of County Commissioners of Arapahoe County*, the Colorado Supreme Court addressed whether an action to compel the Board of Water Commissioners to supply additional water to surrounding counties constituted an action affecting

real property within the meaning of C.R.C.P. 98(a). 528 P.2d 1305, 1305-06 (Colo. 1974). The court found this case was controlled by C.R.C.P. 98(b), which governs venue for actions against public officers, and therefore, C.R.C.P. 98(a) did not apply. *Id*. at 1306. The plaintiff-surrounding counties argued venue was proper in Arapahoe County because the lands alleged to be damaged by the Board of Water Commissioners' refusal to sell water were located in Arapahoe, Adams, and Jefferson Counties. *Id*. The court rejected this argument, holding "the water which Denver owns . . . is the subject of this suit and not the property of the named plaintiffs." *Id*. Further, the court noted "it is not even the specific property of the named plaintiffs for which the decree is sought, but for all citizens and representatives of the counties of Arapahoe, Jefferson and Adams. . . . [An injunction] would operate upon the Board of Water Commissioners of Denver and compel it to take actions in Denver dealing with Denver's interests in the water supply which it owns[; therefore, i]t is not an action dealing with property within the contemplation of C.R.C.P. 98(a)." *Id*.

In an action for trespass, a private landowner sued a water storage and canal company, arguing a tunnel the company built for irrigation resulted in flooding to his land in Lake County. *Twin Lakes Reservoir & Canal Co. v. Sill*, 89 P.2d 1012, 1013 (Colo. 1939). The Colorado Supreme Court upheld the lower court's denial of the defendant's motion for a change of venue. *Id*. Citing a prior version of C.R.C.P. 98(a) that provided that "actions 'for injuries to real property' shall be tried in the county 'in which the subject of the action . . . is situated[,]" the court found venue was proper in Lake County because "[t]he cause was tried in the county where the injury to real estate is alleged to have taken place." *Id*. at 1014.

Similarly, in *North Sterling Irrigation District v. Dickman*, the Colorado Supreme Court ruled venue was proper in Morgan County in an action to recover damages against a quasi-municipal corporation for injuries to land in Morgan County caused by seepage from the defendant's inlet ditch. 178 P. 559, 560 (Colo. 1919). Applying a prior version of C.R.C.P. 98(a), the court held "[t]he action is one in which the venue is definitely determined by the subject matter, which was to recover for damages to land located in Morgan County." *Id*.

In *Combined Communications Corp., Inc. v. Public Service Co. of Colorado*, a helicopter owner and the widows of a pilot and passenger killed in a collision with electrical transmission lines brought a wrongful death action and an action for property damage against the electric company. 865 P.2d 893, 895-96 (Colo. App. 1993). The electric company argued C.R.C.P. 98(a) has been interpreted to require the trial of any action affecting a utility's property or operations to be conducted in the county in which that property or the utility itself is located; thus, the trial was required to take place in Park County where the transmission lines were located. *Id*. at 896. On this issue, the Court of Appeals ruled against the electric company, holding "a suit to obtain a money judgment against a utility is not one that affects its property or operations within the meaning of C.R.C.P. 98(a)[.]" *Id*. The court held the subject of the action in this case "did not affect either [the electric company's] property or its utility operations. It was a simple action for money damages from an alleged tort." *Id*. Therefore, under C.R.C.P. 98(c)[,] venue was proper in Denver, "the county in which [the electric company] ha[d] its principal place of business and in which it was served with process." *Id*.

In *City of Cripple Creek v. Johns*, the City of Cripple Creek sought a change of venue from Denver County to Teller County. 494 P.2d 823, 824 (Colo. 1972). In this case, a Denver-based concrete products company sued the City of Cripple Creek and other defendants for failure to make payments required by a contract involving the construction of a water system and a sanitary sewer system in Cripple Creek. *Id*. Cripple Creek argued venue should be changed to Teller County for a variety of reasons, including the fact that the contract in dispute involved agreements relating to construction of municipal utilities in Teller County, and therefore, venue was proper in Teller County under C.R.C.P. 98(a). *Id*. The court held that while the sanitation and water systems of Cripple Creek were utilities, this action did not "affect" the utilities within the meaning of C.R.C.P. 98(a). *Id*. The court held venue might be proper in Teller County if this case was an action affecting the construction or operation of the utility itself, but a venue transfer was not proper because this lawsuit was "for money damages arising out of alleged breach of contract, fraud, conspiracy, misrepresentation and failure to pay for goods and services delivered . . . [that] in no way affect[ed] the construction or operation of the utility." *Id*. Because the defendants were being sued in their "proprietary or quasiprivate capacities as parties to a contract" and not as a utility, the defendants were not entitled to relief under C.R.C.P. 98(a). *Id*.

iv. C.R.C.P. 98(c)(5)

An action for tort may be tried in the county where the tort was committed. C.R.C.P. 98(c)(5). C.R.C.P. 98(c) applies only if C.R.C.P. 98(a) and C.R.C.P. 98(b) do not apply. *Denver Bd. Of Water Com'rs v. Board of County Com'rs of Arapahoe County*, 528 P.2d 1305, 1307 (Colo. 1974). "The purpose of venue requirements is to impose a territorial limitation on the forum in which an action may be commenced . . .[, and t]he general rule is that personal actions may be tried in either the county in which the defendant resides, or any of them reside, or in the county where the plaintiff resides when service is made on the defendants in such county." *Denver Air Center v. District Court for Twentieth Judicial Dist. of State of Colo.*, 839 P.2d 1182, 1184 (Colo. 1992) (citing *People ex rel. Lackey v. District Court*, 69 P. 597, 598 (1902); *Lamar Alfalfa Milling Co. v. Bishop*, 250 P. 689, 690 (Colo. 1926)).

In 2016, the Colorado Supreme Court reviewed the Denver District Court's denial of an out-of-state corporation's motion to change venue on the basis that the defendant maintained a registered agent in Denver County. *Magill v. Ford Motor Company*, 379 P.3d 1033, 1035 (Colo. 2016). In *Magill*, the plaintiff suffered severe injuries in a car accident and sued Ford Motor Company, claiming the car had defective seat and restraint systems. *Id*. While Ford maintained a registered agent in Denver County and marketed and sold cars throughout Colorado, Ford never manufactured cars in Colorado. *Id*. at 1035-36. In reversing the district court's ruling, the Supreme Court held venue would be proper in El Paso County, where another defendant resided, or in Douglas County, where the accident central to the case occurred. *Id*. at 1041. *See also Classic Auto Sales, Inc. v. Schocket*, 832 P.2d 233 (Colo. 1992) (noting the court has held Colorado's long arm statute is satisfied "when only the resulting injury" occurs in Colorado and not "both the tortious conduct constituting the cause and the injury constituting the effect").

In analyzing a similar federal venue statute, the United States District Court for the District of Colorado ruled "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.

2006) (citing *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995)). In *Fodor*, the plaintiff sued the defendant under several tort theories, including fraudulent misrepresentation, concealment, negligent misrepresentation, breach of fiduciary duty, conversion, and civil theft, after losing thousands of dollars in a business deal. *Id*. at 2. Venue in this action was based solely on a federal statute that provides for venue in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred[.]" *Id*. at 3. In transferring the case to Pennsylvania, the court noted the plaintiff's complaint did not "generally set forth where these events [related to the details of the parties' business arrangement] occurred [and did not provide] any explanation as to the basis for plaintiffs' allegation that venue [in Colorado] . . . is proper[.]" *Id*.

In 2015, the United States District Court for the District of Kansas heard a similar case to *Fodor* and analyzed the same federal venue statute. *Advisors Excel, LLC v. Zagula Kaye Consulting, LLC*, No. 15-4010-DDC-KGS, 2015 WL 11089657, at *4 (D. Kan. 2015). In *Zagula*, the plaintiff sued the defendant for breach of contract and tortious interference for contacting his producers in violation of their contract's non-solicitation clause. *Id*. at 1-2. The court outlined the Tenth Circuit's two-part test for reviewing venue challenges under 28 U.S.C. § 1391(b)(2): first, the court examines the nature of plaintiff's claims and the acts or omissions underlying the claims, and second, the court determines whether substantial events material to those claims occurred in the forum district. *Id*. at 2. To satisfy this test, a plaintiff must show acts and omissions that have a close nexus to the allegations. *Id*. The defendant, a West Virginia resident, argued the contract at issue was "not executed, performed, or breached in Kansas." *Id*. at 3. However, the court found the plaintiff negotiated the agreement in Kansas, the defendant regularly communicated with the plaintiff in Kansas by phone and email, the defendant received commission override payments from the plaintiff by checks prepared in and mailed from Kansas, the defendant terminated the agreement by directing written communication to the plaintiff in Kansas, and the plaintiff sustained injury in Kansas. *Id*. Further, the defendant made two trips to Kansas that were not directly related to the contract at issue but were part of the parties' business relationship. *Id*. In comparing the facts to those in *Fodor*, the court noted that in *Fodor*, the court was unable to discern whether the content of the defendant's communications to the plaintiff in Colorado were related to the plaintiff's claims, how the plaintiff's reputation in Colorado was injured by the defendant, and whether the defendant breached the contract or committed any other alleged acts giving rise to the plaintiff's claims in Colorado. *Id*. 4. The court ultimately held the facts in *Zagula*, unlike the facts in *Fodor*, establish that "a substantial part of the events or omissions giving rise to plaintiff's claims in this lawsuit occurred in Kansas," and therefore, venue was proper in Kansas. *Id*.

In 2009, the Montana Supreme Court analyzed a venue statute similar to the Colorado statute at issue in this case. *Deichl v. Savage*, 216 P.3d 749, 750-51 (Mont. 2009). The Montana statute provides the proper venue for a tort claim is "(a) the county in which the defendants or any of them reside at the commencement of the action; or (b) the county in which the tort was committed." *Id*. at 751 (quoting Section 25-2-122(1), MCA). This case involved the sale of a horse in Yellowstone County and a horse-riding accident in Silver Bow County. *Id*. at 750. In determining where venue was proper, the Montana Supreme Court first considered where the seller's negligent misrepresentation occurred. *Id*. The defendant argued the tort occurred in Yellowstone County because negligent misrepresentation does not "contain an 'accrual' element and is not a 'continuous' or 'portable' tort[.]" *Id*. at 751. The plaintiff argued venue was proper in Silver Bow County because "a tort has been committed for the purposes of determining venue

'where there is a concurrence of breach of obligation and the occasion of damages.'" *Id*. at 751. The court noted that "for certain unique claims" such as trademark infringement and wrongful death, venue may be proper "where damages occurred in a different county from the other elements of the tort." *Id*. at 753. Here, however, the court held "[f]or all practical purposes, this alleged tort was committed in Yellowstone County." *Id*. The court ruled negligent misrepresentation does not contain an inherent accrual element but is "committed in the location where the misrepresentation takes place[,]" and here, the tortious conduct was "misrepresenting the nature of the horse, which was followed by [the plaintiff's] reliance on that information, all of which occurred in Yellowstone County." *Id*. at 753-54.

v. Piercing the Corporate Veil

Courts should only pierce corporate veils "reluctantly and cautiously" because the law permits "the incorporation of businesses for the very purpose of isolating liabilities among separate entities." *Yoder v. Honeywell Inc*, 104 F.3d 1215, 1220 (10th Cir. 1997) (citing *Boughton v. Cotter Corp.*, 65 F.3d 823, 836 (10th Cir. 1995)). When the corporate structure is used "so improperly that the continued recognition of the corporation as a separate legal entity would be unfair, the corporate entity may be disregarded and corporate principals held liable for the corporation's actions." *Micciche v. Billings*, 727 P.2d 367 (Colo. 1986).

In determining whether a subsidiary is an instrumentality of the parent corporation, courts should examine the following factors: (1) whether the parent corporation owns all or the majority of the capital stock of the subsidiary; (2) whether the parent and subsidiary corporations have common directors or officers; (3) whether the parent corporation finances the subsidiary; (4) whether the parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation; (5) whether the subsidiary has grossly inadequate capital; (6) whether the parent corporation pays the salaries, expenses, or losses of the subsidiary; (7) whether the subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation; (8) whether the subsidiary is referred to as a "subsidiary" or a "department" or "division" in the papers of the parent corporation; (9) whether the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take direction from the parent corporation; and (10) whether the formal legal requirements of the subsidiary as a separate and independent corporation are observed. *Lowell Staats Mining Co., Inc. v. Pioneer Uravan, Inc.*, 878 F.2d 1259 (10th Cir. 1989) (citing *Fish v. East*, 114 F.2d 177, 191 (10th Cir. 1940)).

In addition to determining whether an entity is a mere instrumentality or "alter ego," courts must also determine "whether justice requires recognizing the substance of the relationship between the person or entity sought to be held liable and the corporation over the form because the corporate fiction was 'used to perpetrate a fraud or defeat a rightful claim.'" *McCallum Family L.L.C. v. Winger*, 221 P.3d 69, 74 (Colo. App. 2009) (quoting *In re Phillips*, 139 P.3d 639, 644 (Colo. 2006); *Reader v. Dertina & Assocs. Mktg., Inc.*, 693 P.2d 398, 399 (Colo. App. 1984)). Finally, courts must consider "whether an equitable result will be achieved by disregarding the corporate form and holding a shareholder or other insider personally liable for the acts of the business entity. *Winger*, 221 P.3d at 74 (citing *Phillips*, 139 P.3d at 644; *Sheffield Services Co. v. Trowbridge*, 211 P.3d 714, 721-22 (Colo. App. 2009)).

The party seeking to pierce the corporate veil bears the burden of proof and must prove the veil should be pierced by a preponderance of the evidence. *U.S. v. Friedland*, 173 F.Supp.2d 1077, 1091 (D. Colo. 2001); *Winger*, 221 P.3d at 73.

III. ANALYSIS

A. Forum Selection Clauses

i. 2009 Master Contract

The Court finds the forum selection clause in the 2009 Master Contract between Suncor USA and San Miguel County is not applicable to this lawsuit. The forum selection clause in the 2009 Master Contract provides for 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[.]" (Suncor Ex. 1 ¶ 13.) Plaintiffs' lawsuit seeks money damages from the Defendants for the role their production, promotion, refining, marketing, and sale of fossil fuels played in altering the climate. The Court finds this lawsuit does not "arise out of" or "relate to" the parties' 2009 Master Contract for the sale and purchase of asphalt for San Miguel County's road paving projects or any transaction contemplated by the 2009 Master Contract.

In determining whether to apply a contractual forum selection clause to a tort claim, the *Manetti-Farrow* Court directed courts to look at whether resolution of the tort claims requires interpretation of the contract. 858 F.2d at 514. In a similar case, the US District Court for the District of Colorado instructed courts to examine whether tort claims involve the same operative facts as a parallel breach of contract claim. *United States Welding*, 2014 WL 10321666, at *10. In *Manetti-Farrow*, the court applied a forum selection clause to the plaintiff's allegations that the defendant implemented a price squeeze, fraudulently obtained business information, neglected delivery orders, and abrogated their contract. *Manetti-Farrow*, 858 F.2d at 514. The court found these claims were related to the duties in the parties' exclusive dealership contract, and the tort claims could not be adjudicated without analyzing whether the parties were in compliance with the contract. *Id*. The *United States Welding* Court similarly ruled the plaintiff's claims for fraudulent inducement and negligent misrepresentation were covered by the parties' forum selection clause because they involved the same operative facts as a parallel breach of contract claim. 2014 WL 10321666, at *10. These tort claims, the court ruled, induced the plaintiff to go into business with the defendant and enter into the agreement at issue. *Id*.

Here, the parties entered into this agreement for the sole purpose of selling and purchasing asphalt. In the Reply, however, Suncor argues Plaintiffs' lawsuit "relates to" the asphalt sales contract because Plaintiffs' nuisance claim is not limited to fossil fuel consumption but attacks Suncor's entire process that produces both fossil fuels and the asphalt purchased by San Miguel County. (Suncor Reply 2.) Suncor notes Plaintiffs' nuisance claim includes the operation of pipeline systems that transport crude oil from Cheyenne, Wyoming to Commerce City, Colorado; the processing of Canadian oil sands crude from mining operations and products from fractured oil and gas production in Colorado; the marketing, transportation, and storage of crude oil

products, including asphalt; Suncor's refining and transportation activities in Colorado; and the emissions traceable to Suncor's products, including asphalt. (Suncor Reply 2-3.)

Even taking Suncor's' argument at face value and interpreting the term "related to" broadly, the Court is not persuaded by this argument. To rule on the merits of this lawsuit, the Court need not examine or interpret the 2009 Master Contract. The fact that the Commerce City refinery produces asphalt does not bring Plaintiffs' lawsuit within the purview of the 2009 Master Contract's forum selection clause. As Plaintiffs' note in the Response, the word "asphalt" appears in the complaint only twice, and both times it is used to describe the effects of climate change on their roads. (Am. Compl. ¶¶ 245-46.) The asphalt San Miguel County purchases from Suncor USA and the business relationship between these parties is not related to this lawsuit.

Further, there is no parallel breach of contract claim to this lawsuit; none of Plaintiffs' tort claims stem from the parties' contractual relationship, as they did in *Manetti-Farrow* and *United States Welding*; and this lawsuit is based on an entirely different set of facts than the 2009 Master Contract, which is limited to the parties' agreement to purchase and sell asphalt.

Finally, *Lawson v. Global Payments* and *Barrett v. Life Insurance Company of the Southwest* direct courts to examine the plain language of an agreement and the specific facts and wording to determine the intent of the parties with respect to interpretation of a forum selection clause. 2019 WL 4412271, at *3; 623 F.Supp. at 948-49. Evaluating the language of the 2009 Master Contract within the context of the subsequent confirmation contracts demonstrates Suncor USA did not write a broad forum selection clause intended to cover ancillary tort claims. The 2018 and 2019 Confirmation Contracts, as discussed below, are broad in their language, covering "any and all claims . . . regarding any and all matters . . . regardless when claimed." (Suncor Ex. 2, 3.) Based on the language in the Confirmation Contracts, it is clear Suncor USA could have included a forum selection clause in the 2009 Master Contract sufficiently broad to cover this lawsuit. Suncor USA chose not to do so. This discrepancy illustrates Suncor USA did not intend for the 2009 Master Contract's forum selection clause to cover the nature of the allegations set forth in this lawsuit.

Because resolution of this lawsuit does not require any examination or interpretation of the 2009 Master Contract, the Court finds its forum selection clause does not apply.

ii. 2018 and 2019 Confirmation Contracts

The Court further finds the forum selection clauses in the 2018 and 2019 Confirmation Contracts do not apply to this lawsuit. The forum selection clause in the 2018 Confirmation Contract states, "[t]he Parties further agree that effective as of the date of the [2009] Master [Contract], Colorado law governs this Confirmation[,] and 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." (Suncor Ex. 2.) The 2019 Confirmation Contract is nearly identical but covers the parties' "affiliates" in addition to the parties themselves. (Suncor Ex. 3.) Despite the broad language in these clauses, the Court finds the forum selection clauses inapplicable to this lawsuit as (1) they were presented to San Miguel County after Plaintiffs commenced this action; (2) San Miguel County was represented by counsel

in this underlying litigation when it received these contracts; and (3) Suncor USA did not communicate through San Miguel County's counsel regarding the purportedly venue-altering contract provisions. Thus, the 2018 and 2019 Confirmation Contract forum selection clauses do not retroactively apply to this ongoing litigation.

Plaintiffs argue the 2018 and 2019 forum selection clauses should not apply as the Confirmation Contracts expired on December 31, 2018 and December 31, 2019 respectively. (Pl.'s Resp. 10-11.) The Court is not persuaded by this argument. The legal authority cited by Plaintiffs does not support the proposition that courts cannot apply forum selection clauses from expired contracts to an existing or subsequently filed lawsuit. Rather, as highlighted above, courts across the country routinely apply forum selection clauses from expired agreements to both existing and subsequent litigation. Therefore, the fact that the 2018 and 2019 Confirmation Contracts have expired does not, itself, render their forum selection clauses inapplicable.

Plaintiffs also argue the 2018 and 2019 forum selection clauses are not applicable to this lawsuit because Suncor USA inserted the clauses unilaterally between boilerplate language; because the clauses are the product of overreaching; because the signor did not have authority to sign contracts affecting litigation; and because they were not approved by the San Miguel County Board of County Commissioners. (Pl.'s Resp. 10-14.)

The Court finds these arguments persuasive in light of the fact that Suncor USA did not communicate this retroactive, venue-altering forum selection provision through San Miguel County's counsel. The Court finds these issues analogous to *Russell*, *Dasher*, and *AT&T Corp*.

In *Russell*, the Sixth Circuit ruled an arbitration provision in a new employment contract did not apply retroactively to the plaintiff's previously-filed class action against the same employer. 748 F.3d at 679. In reaching this decision, the court noted the defendant's behavior indicated it did not intend the employment contract to govern pending lawsuits, in part, because the defendant did not communicate with the plaintiff's lawyers before presenting him with the contract. *Id*. at 680. There, the court emphasized that a party's lawyer may not communicate regarding a pending case with an opposing litigant who is represented, and in such a scenario, the party "might find themselves near the edge of" the rules of professional responsibility. *Id*.

In *Dasher*, the Eleventh Circuit denied a defendant-bank's motion to compel arbitration based on an updated agreement it sent to customers during a pending lawsuit. 882 F.3d at 1020. The court noted the bank unilaterally "distributed the proposed, purportedly retroactive and litigation-ending amendment directly to [the plaintiff], even though [it] knew [the plaintiff] was an adverse litigant actively represented by counsel as to the very issues raised in the [arbitration] amendment[.]" *Id*. at 1021. Like in *Russell*, the *Dasher* Court emphasized "the risks of communicating directly with the opposing party as to a purportedly court-evicting amendment outside the presence of opposing counsel are manifest." *Id*. at 1023.

Finally, in *AT&T Corp.*, a defendant-company sued a third-party telephone answering service company after the defendant was charged $75,000 for phone calls. 2006 WL 1371651, at *1. After the court denied the third-party's Motion for Summary Judgment, the answering service forwarded the defendant-company's president a service agreement "to set out modifications to the

charges for services." *Id*. The president signed the agreement without realizing it contained a purportedly retroactive forum selection clause. *Id*. The court ultimately ruled the forum selection clause could not apply retroactively because of "the stage of the [on-going] litigation" and "the circumstances surrounding execution of the [a]greement." *Id*. at 3. The court noted the third-party answering service represented the agreement to the president as mere service modifications, did not discuss any other changes to the parties' agreement, did not indicate the forum selection clause would be retroactive, and did not advise the president it intended to rely on the forum selection provision in the present action. *Id*. at 2.

Here, Plaintiffs filed the Complaint on April 17, 2018 and the Amended Complaint on June 11, 2018. The 2018 Confirmation Contract, signed by a Suncor USA representative and a representative for San Miguel County, states, "[t]he term of this agreement shall commence on June 18, 2018[.]" (Suncor Ex. 2.) Plaintiffs were clearly represented by counsel in this action at the time the 2018 Confirmation Contract was executed. Like in *AT&T Corp.*, it appears Suncor USA represented this contract to a San Miguel County representative as a routine annual sales confirmation agreement without providing any indication that any provision of it would apply to the previously-filed lawsuit. Further, Suncor USA unilaterally inserted the forum selection clauses between boilerplate language in the contracts and failed to inform San Miguel County it had included provisions intended to affect the parties' ongoing litigation. And like *Dasher* and *Russell*, Suncor USA knew or should have known San Miguel County was represented by counsel, and therefore had a duty to direct any litigation-related communications through counsel. As the *Dasher* and *Russell* Courts noted, failing to communicate through counsel in a litigated matter is fraught with issues. In finding that the Confirmation Contracts' forum selection provisions are not applicable to this lawsuit, the Court places considerable weight on Suncor USA's failure to communicate through Plaintiff's counsel in this existing litigation.

At the time the 2018 and 2019 Confirmation Contracts were signed, San Miguel County was a represented opposing litigant in an on-going lawsuit. Accordingly, Suncor USA was prohibited from directly communicating with San Miguel County about any matter related to this lawsuit, let alone binding it to a venue-altering contract provision, without such communication occurring through counsel.

Forum selection clauses are presumptively valid and should be enforced by courts unless they are unreasonable under the circumstances, fraudulently induced, or against public policy. *Cagle*, 295 P.3d at 465. The Court finds the forum selection clauses contained in the 2018 and 2019 Confirmation Contracts are the product of overreaching and are unreasonable under the circumstances. The clauses were unilaterally inserted between boiler plate language in routine sales confirmation contracts, and Suncor USA did not make San Miguel County aware that the clauses, which would have an impact on pending litigation, had been included in the contracts. Further, because Suncor USA and San Miguel County were adverse litigants at the time the Confirmation Contracts were signed, Suncor USA had a professional obligation to communicate through counsel about all litigation-related matters. Suncor USA failed to alert counsel for San Miguel County that they included litigation-affecting language in the contracts but rather presented the contracts to a San Miguel County representative who was not involved with this pending litigation. Suncor USA knew or should have known that the representative had not discussed the issue with counsel representing San Miguel County in this underlying litigation because Suncor

USA themselves had not alerted opposing counsel of the inserted provisions Therefore, the Court finds the forum selection clauses in the 2018 and 2019 Confirmation Contracts to be unenforceable as enforcement would be "unreasonable under the circumstances." *Id*.

B. Venue

i. Section 16-13-307(2), C.R.S.

The Court finds venue is not proper in Boulder County under § 16-13-307(2), C.R.S., which provides, "[a]n action to abate a public nuisance shall be brought in the county in which the subject matter of the action, or some part thereof, is located or found or in the county where the public nuisance act, or any portion thereof, was committed." Plaintiffs argue venue is proper in Boulder County under this statute because "the nuisance and trespass which Defendants caused and contributed to exist in Boulder County [and] because the subject matter of the action is located in Boulder County[.]" (Am. Compl. ¶ 87.) The Court, however, ultimately finds venue is not proper in Boulder County under this statute because Plaintiffs seek money damages, and this lawsuit is not an action to "abate" a nuisance within the meaning of § 16-13-307(2), C.R.S.

In the Amended Complaint, Plaintiffs request "[m]onetary relief to compensate Plaintiffs for their past and future damages and costs to mitigate the impact of climate change," "[d]amages to compensate Plaintiffs for past and reasonably certain future damages," "remediation and/or abatement of the hazards . . . by any other practical means[,]" and "any other applicable remedies and any other relief as this Court deems just and proper." (Am. Compl. ¶ 532-34, 540.) Plaintiffs, however, "**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) (emphasis in original).

In the Response, Plaintiffs essentially argue that despite seeking monetary damages, this lawsuit is an action for abatement because they seek money to address the alleged nuisance. (Pl.'s Resp. 6-7.) Further, Plaintiffs contend §§ 16-13-301(1) and 16-13-307(2), C.R.S., do not specifically state actions for money cannot be considered abatement. (Pl.'s Resp. 7.) § 16-13-301(1), C.R.S. provides, "'[a]ction to abate a public nuisance' means any action authorized by this part 3 to restrain, remove, terminate, prevent, abate, or perpetually enjoin a public nuisance." Plaintiffs argue this definition is "circular[,]" and the term "abate" is not defined. (Pl.'s Resp. 7.)

The Court is not convinced by either of Plaintiffs' arguments. As Suncor notes in the Reply, the plain meaning of "abatement"—"the act of eliminating or nullifying"—does not include reimbursement or compensation for injury. (Suncor Reply 9); *Abatement*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Further, the Colorado Supreme Court has ruled in a civil public nuisance action, "the only remedy is injunctive relief[.]" *Cory*, 514 P.2d at 311. While Plaintiffs request relief besides monetary damages, including "remediation and/or abatement of the hazards[,]" the Plaintiffs themselves state, in bold font, they do not seek an injunction. (Am. Compl. ¶ 532-34, 542.) Accordingly, as the Supreme has held that injunctive relief is the only remedy in a public nuisance

action and Plaintiffs clearly set forth they seek no injunctive relief, venue is not proper under § 16-13-307(2), C.R.S.

To support their position that actions to abate a nuisance under § 16-13-307(2), C.R.S., can be for money damages for the cost of abatement, Plaintiffs cite *Munn v. Corbin*, *Price v. Lakewood*, and *Oberst v. Mays*. These cases, however, are distinguishable from this action. In *Munn*, the court held the City Public Health Commissioner was authorized to abate a nuisance and collect the cost of abatement with interest and damages only after a court established the existence of a nuisance and the landowner had been given notice of his duty to abate and failed to do so. 44 P. at 788. Similarly, in *Price*, the court held a city is authorized to abate a nuisance and make the individual responsible for the reasonable costs of abatement after the individual is found to be in violation of a city's anti-nuisance ordinance and has been given notice of a duty to abate pursuant to a municipal court judgment. 818 P.2d at 765. Finally, in *Oberst*, the court held a city's assessment against a landowner for the costs of abatement was valid when the nuisance was a nuisance per se, subject to summary abatement, and the landowner had failed to abate after receiving notice of his duty to do so. 365 P.2d at 904-05.

All of these cases, unlike the present action, involve a court finding the existence of a nuisance, a court ordering the landowner to take specific action to abate the nuisance, and the landowner failing to do so, thus resulting in the municipality incurring costs to enforce abatement of the nuisance. While Plaintiffs' cited cases recognize that public entities may address a nuisance and charge the costs of abatement, this practice only follows the public entity initially ordering the landowners to abate the nuisance. Here, there has been no determination that a nuisance exists and no request, let alone an order, that Defendants take action to abate the nuisance. Here, Plaintiffs seek monetary damages rather than seeking to enjoin Defendants from continuing with the nuisance.

Had Plaintiffs sought an injunction, the Court might be inclined to find venue proper in Boulder County pursuant to § 16-13-307(2), C.R.S. However, this is an action seeking relief in the form of money damages. The Colorado Supreme Court has held an injunction is the only appropriate remedy under § 16-13-307(2), C.R.S. Plaintiffs plainly set forth they do not seek an injunction. Thus, the Court finds venue is not proper in Boulder County under § 16-13-307(2), C.R.S.

ii. C.R.C.P. 98(a)

With respect to Plaintiffs claims pertaining to land affected in Boulder County, the Court finds venue is proper in Boulder County under C.R.C.P. 98(a), for Plaintiffs City of Boulder and County of Boulder. C.R.C.P. 98(a) provides, "[a]ll actions affecting real property, franchises, or utilities shall be tried in the county in which the subject of the action, or a substantial part thereof, is situated."

The existing case law on this issue lacks precision, and the parties provided minimal analysis on this issue in their pleadings. While Plaintiffs contend this theory is their "primary basis for venue[,]" their analysis is approximately one-half a page. (Pl.'s Resp. 4-5.) Suncor's analysis is similarly sparse. (Suncor Reply 8.)

In reaching its conclusion, this Court examined the historical application and evolution of C.R.C.P. 98(a) and finds the phrase "actions affecting real property" under the current existing state of the law includes actions involving injury to real property.

Plaintiffs contend C.R.C.P. 98(a) is their primary basis for venue and cite paragraph 87 of the Amended Complaint to support their contention. Paragraph 87 states, "[v]enue is proper in this Court pursuant to . . . Colorado Rule of Civil Procedure 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, including the carrying out of deceptive trade practices." (Am. Compl. ¶ 87.) The only portion of this paragraph relevant to an analysis of venue under C.R.C.P. 98(a) is Plaintiffs' assertion that "the subject matter of the action is located in Boulder County[.]" In its Reply, Suncor contends Plaintiffs "never" pled this venue theory in the Amended Complaint. (Suncor Reply 8) (emphasis in original).

While specific reference to C.R.C.P. 98(a) as a basis for venue does not appear in the Amended Complaint, save the portion of paragraph 87 identified above, the Colorado Supreme Court has held "in determining whether an action [is] one 'affecting property,' it [is] the substance of the action, not its form, that control[s]." *Sanctuary House*, 177 P.3d at 1259; *Jameson*, 172 P.2d at 451; *7 Utes Corp*, 702 P.2d at 266; *Colorado Nat. Bank of Denver v. District Court*, 542 P.2d 853, 856 (Colo. 1975).

Here, regardless of whether Plaintiffs specifically pled C.R.C.P. 98(a) in the Amended Complaint, the Court looks to the substance of the action, not the form, to determine venue. The Court finds the injuries to land and property located in the City of Boulder and Boulder County, allegedly caused by Defendants' production, promotion, refining, marketing, and sale of fossil fuels, to be the substance of the action.

In their Response, Plaintiffs rely heavily on *Twin Lakes Reservoir*, a 1939 case, which Plaintiffs concede applied a prior version of C.R.C.P. 98(a) to a private landowner's trespass action against a reservoir and canal company. 89 P.2d at 1013. Section 25 of the Code, which was, in part, the prior version of C.R.C.P. 98(a), provided actions "'for injuries to real property' shall be tried in the county 'in which the subject of the action . . . is situated.'" *Id*. at 1014. In *Twin Lakes Reservoir*, the plaintiff-landowner sued a reservoir and canal company that had previously acquired water rights west of the Continental Divide and constructed a tunnel under the divide to bring the water to the Eastern Slope. *Id*. at 1013. The company directed the water from the Western Slope through the tunnel to Lake Creek, to the Twin Lakes, to the Arkansas River, and eventually to farm lands in Crowley County. *Id*. The plaintiff sued the company in Lake County, alleging the company's actions caused Lake Creek to flood and damage his 500-acre ranch. *Id*. None of the company's direct actions were alleged to have occurred in Lake County. *Id*. Despite this fact, the court found venue to be proper because Lake County was "the county where the injury to real estate [was] alleged to have taken place." *Id*. at 1014.

While the current version of C.R.C.P. 98(a) does not specifically provide for venue based on "injuries" to real property, subsequent cases analyzing the current version of C.R.C.P. 98(a)

continue to cite *Twin Lakes Reservoir* and interpret the phrase "affecting real property" as including "injuries" to real property. Thus, the Court finds *Twin Lakes Reservoir* to be of import, as the Colorado Supreme Court found venue to be proper in the county where injury to the land occurred despite the defendant taking no affirmative actions in that county.

In 1946, seven years after deciding *Twin Lakes Reservoir*, the Colorado Supreme Court decided *Craft v. Stumpf*. This Court finds the Colorado Supreme Court's articulation of the applicability of Rule 98(a) in *Craft v. Stumpf* pertinent to the case at bar. The change in C.R.C.P. 98(a) between 1939 and 1946 involved the word "injury" being replaced by "affecting" and a move from "real property" to "property." Considering that the court interpreted the 1946 version of C.R.C.P. 98(a) as including actions involving "injury" to property, this Court views the change from the 1939 version of the statute—actions "for injuries to real property" to the 1946 version of the statute—actions "affecting property," to be an expansion of the rule rather than a contraction of the rule.

In *Craft*, Mr. Stumpf sued Mr. Craft in Boulder County, where he resided, to recover the value of furniture, fixtures, and equipment of a business sold to Mr. Craft and located in Jefferson County. 170 P.2d at 779-80. The Court noted Rule 98(a) had been created by "combin[ing] former code sections 25 and 26, has to do with actions affecting specific property[,] and does not control in an action in which there is no issue as to title, lien, *injury*, quality or possession, but which is concerned only with recovery of the purchase price." *Id*. at 780 (emphasis added). The *Craft* Court found Rule 98(a) had no application to that case, as it only concerned the recovery of the purchase price of goods and fixtures. *Id*. However, the Supreme Court in *Craft* specifically included "injury" to property as an action that would fall within "affecting property" as defined in C.R.C.P. 98(a).

Also in 1946, the Colorado Supreme Court decided *Jameson*. In *Jameson*, relying on a contract created by his predecessor in title, the plaintiff sued the defendant for breach of contract for failing to "cut, fell, trim and remove" timber on the premises of land in Grand County. 172 P.2d at 450. The court held that "[w]hile in form this is an action to rescind a contract, in substance it is an action to determine title to timber located on land in Grand [C]ounty." *Id*. The court identified the "present Rule 98(a)" and noted it "provides that all actions affecting property shall be tried in the county in which the subject of the action or a substantial part thereof is situated." *Id*. The court further noted "[t]o 'affect' is as broad a term as '[to determine] a right or interest in'" and the rule was not "restricted to real property[.]" *Id*. In finding venue proper in Grand County, the court held "[t]he subject of the action, ultimately, is not the contract, but the timber."

Here, much like the timber in *Jameson*, the Court finds a substantial part of the action in the present case is the land in Boulder County that has been allegedly injured by Defendant's production, promotion, refining, marketing and sale of fossil fuels.

In 1975, twenty-nine years after *Craft* and *Jameson*, the Colorado Supreme Court decided *Colorado National Bank of Denver v. District Court of Second Judicial District, City and County of Denver*, which includes a discussion of C.R.C.P. 98(a) in its current form, which had been amended in 1975 to make clear that its reference to property intends only real property. 542 P.2d at 524. *See also Sanctuary House*, 177 P.3d at 1261. The court held venue for this probate action

was proper in Garfield County, where the ranch at issue was located and where the decedent's estate was being probated, pursuant to C.R.C.P. 98(a) because the action "directly affect[ed] the ownership of the . . . [r]anch." *Id*. In its discussion of C.R.C.P. 98(a), the court cited both *Jameson* and *Craft* and noted "affecting . . . is as broad a term as 'to determine a right or interest in.'" *Id*. (quoting *Jameson*, 172 P.2d at 450).

Ten years later, in 1985, the Colorado Supreme Court analyzed the current version of C.R.C.P. 98(a) in *7 Utes Corp.* In *7 Utes Corp.*, the court found 7 Utes' action against the State Board of Land Commissioners to enforce a provision in a special use permit to negotiate a lease was not an action affecting real property within the meaning of C.R.C.P. 98(a). The court rather found the action was principally an *in personam* suit against the board subject to C.R.C.P. 98(b)(2). 702 P.2d at 266. In reaching this conclusion, the court cited *Craft* and *Jameson* and noted "[a]n action affecting real property is one in which 'title, lien, *injury*, quality or possession' is at issue." *Id*. at 266 (quoting *Craft*, 170 P.2d at 780) (emphasis added). Further, the court noted "[a]n action for damages *alone* is not one affecting real property." *Id*. (citing *Craft*, 170 P.2d at 780) (emphasis added).

Suncor, relying on *7 Utes Corp.*, argues venue is not proper in Boulder County under C.R.C.P. 98(a) because Plaintiffs only seek damages. (Suncor Reply 8.) The Court does not concur. This Court acknowledges an existing tension in case law that provides for injury to real property as a proper basis for venue, while also finding that seeking damages alone does not "affect real property" under the rule. Though Plaintiffs principally seek damages, and did not seek an injunction, Plaintiffs do seek "remediation and/or abatement of the hazards . . . by any other practical means . . .[,] a determination that Defendants consciously conspired and deliberately pursued a common plan to commit tortious acts . . .[, and] any other applicable remedies and any other relief as this Court deems just and proper . . ." (Am. Compl. ¶¶ 534, 536, 540, 541).

Finally, in 2008, the Colorado Supreme Court decided *Sanctuary House*. The court found the plaintiff's action for breach of a purchase agreement for failure to convey foreign real property was not an action "affecting real property" within the meaning of C.R.C.P. 98(a). *Sanctuary House*, 177 P.3d at 1257. The court noted the defendants failed to show that ownership of the land located in Costa Rica was disputed and would need to be resolved by the trial court. *Id*. at 1260. Further, the plaintiff's desired remedies of "rescission of the parties' contract, damages, attorneys' fees, and an accounting" was not relief "pertaining directly to the property[,]" such as a declaratory judgment regarding ownership or an injunction "to dispossess another of the property[.]" *Id*.

Here, unlike in *Sanctuary House*, Plaintiffs seek a litany of remedies "pertaining directly to the property" at issue. *Id*. While mostly in the form of monetary relief, Plaintiffs seek costs associated with wildfire response, management and mitigation; costs of responding to, managing and repairing damage from pine beetle and other pest infestations; costs associated with increased drought conditions including alternate planting and increased landscape maintenance costs; costs associated with repairing and replacing existing flood control and drainage measures and repairing flood damage; costs of repair, maintenance, mitigation and rebuilding and replacement of road systems to respond to the impacts of climate alteration; costs associated with alteration and repair of bridge structures; repair of physical damage to buildings owned by Plaintiffs; construction costs for alternative building designs; and loss of income from property owned by Plaintiffs due to

reduced agricultural productivity. (Am. Compl. ¶ 532.) All of the alleged injuries "affects real property."

Further, in outlining its past applications of C.R.C.P. 98(a), the *Sanctuary House* Court, as other courts that preceded it, continued to reference *Craft*, noting it has held C.R.C.P. 98(a) "'has to do with actions affecting specific property and does not control in an action in which there is no issue as to title, lien, *injury*, quality or possession[.]" *Id*. at 1259 (quoting *Craft*, 170 P.2d at 780) (emphasis added). Additionally, the court referenced *Jameson*, noting that it previously held "affecting" "is as broad a term as '[to determine] a right or interest in.'" *Id*. (quoting *Jameson*, 172 P.2d at 450). The Colorado Supreme Court has not specifically resolved the issue of whether "injury" to real property must also include a determination of the title or interest in real property. Given the existing state of Colorado law, this Court finds "injury" to real property alone to be a sufficient basis for venue without a specific issue regarding title or interest in the property."

In support of its conclusion, this Court looks to the concurrence in *Sanctuary House*, by Justice Coats who concurred in judgment only. Justice Coats states, "[a]lthough there may be adequate reason from the reported cases of this court to conclude otherwise, I believe that C.R.C.P. 98(a), which circumscribes permissible venues for actions having real property as their subject, is properly construed to apply only to actions that are, with minor exceptions, truly *in rem*." *Id*. at 1260-61. Because Justice Coats concurs in judgment only, this Court reads the *Sanctuary House* Opinion and the Colorado Supreme Court's prior rulings as finding venue proper under C.R.C.P. 98(a) in both "truly *in rem*" actions, as well as actions that are not *in rem*. *Id*. at 1261.

Justice Coats continues, "[r]ather than attempt to distinguish this action from others we have previously found to be included within our broad reading of the term 'affecting,' I would take this opportunity to construe Rule 98(a), with regard to real property, as prescribing venue only for actions seeking to resolve actual ownership interests in, *or perhaps direct injury to*, real property." *Id*. (emphasis added). In this concurrence, Justice Coats opines that the Colorado Supreme Court should use its *Sanctuary House* ruling as an opportunity to limit its "broad reading" of the term "affecting." *Id*. The Supreme Court in *Sanctuary House* did not do so. The fact that Justice Coats includes "injury" to real property in his proposed narrowed reading of "affecting," coupled with the fact that the majority's opinion references *Craft* and actions involving injury to real property, indicates to this Court that "injury to real property" is included in the meaning of "actions affecting real property."

Plaintiffs have alleged direct injury to real property in both the city of Boulder and Boulder County and seek remedies pertaining directly to that property. Therefore, the Court finds venue is proper in Boulder County under C.R.C.P. 98(a).

However, by this analysis and logic, the Court finds Plaintiffs concede venue is not proper in Boulder County for San Miguel County's claims. As Suncor argues in the Reply, "[u]nder Rule 98(a), a case 'affecting real property' in San Miguel must be brought solely and exclusively in San Miguel." (Suncor Reply 8.) Because the Court does not find venue to be proper in Boulder County based on any other theory, the Court concurs with Suncor and finds the Court's C.R.C.P. 98(a) ruling applies only to Plaintiffs City of Boulder and County of Boulder.

iii. C.R.C.P. 98(c)(5)

Finally, the Court finds venue is not proper in Boulder County under C.R.C.P. 98(c)(5), which provides "[a]n action for tort may also be tried in the county where the tort was committed." Plaintiffs argue venue is proper under this rule for three separate reasons. First, Plaintiffs suffered injuries in Boulder County, and "the location where the tort occurred includes where injuries are suffered." (Pl.'s Resp. 5-6.) Second, the Defendants carried out deceptive trade practices in Boulder County, and Colorado residents, including residents of Boulder County, were the targets of these deceptive trade practices. (Pl.'s Resp. 6). And third, Petro-Canada Resources (USA) Inc., a Suncor subsidiary, produced fossil fuels in Boulder County. (*Id*.) The Court addresses these three arguments in turn.

A. Venue Based on the Location of Plaintiffs' Injuries

First, though the Court finds there is injury to real property in Boulder County, the Court is not persuaded by Plaintiffs' argument that a tort was committed in Boulder County as a result of those injuries to real property occurring in Boulder County. Plaintiffs provided a minimal analysis of this theory, relying solely on *Magill* and *Classic Auto Sales*.

Initially, the Court finds *Classic Auto Sales* inapplicable to this issue. In *Classic Auto Sales*, the Colorado Supreme Court held Colorado's long arm statute is satisfied "when only the resulting injury" occurs in Colorado and not "both the tortious conduct constituting the cause and the injury constituting the effect[.]" 832 P.2d at 235. The Court finds jurisdiction in Colorado is not at issue in Defendants' Motion to Dismiss or Transfer Venue, and therefore, *Classic Auto Sales* is not pertinent to the Court's venue analysis.

Next, in analyzing *Magill*, Plaintiffs assert the Colorado Supreme Court held "venue would have been proper [in Douglas County] under Rule 98(c)(5) where the accident occurred *and* injuries were suffered, even though none of Ford's tortious acts occurred there." (Pl.'s Resp. 5) (emphasis added). The Court finds this is a misconstruction of the ruling in *Magill*. In *Magill*, the plaintiff was involved in a car accident with another driver, Polunci, in Douglas County. *Magill*, 379 P.3d at 1035. The plaintiff sued Polunci, an El Paso County resident; Ford Motor Company, a Delaware corporation with its principal place of business in Michigan and with a registered agent in Denver County; and other defendants, in Denver County District Court. *Id*. Ford and Polunci both moved to change venue. *Id*. The plaintiff asserted strict liability, negligence or negligence per se, and loss of consortium against Ford and negligence against Polunci. *Id*. The trial court denied the motions to change venue, reasoning Ford resided in Denver because it maintained a registered agent in Denver. *Id*. The Colorado Supreme Court rejected the trial court's reasoning, holding an out-of-state company is not a resident of a county simply because it maintains an authorized agent in that county. *Id*. at 1040-41. The court further held venue would be proper in El Paso County, where Polunci resided, or in Douglas County, where "[t]he accident central to this case occurred[.]" *Id*. at 1041. The Colorado Supreme Court remanded the case to the trial court with instructions to transfer the case to either El Paso County or Douglas County. *Id*.

Nowhere in *Magill* does the court state venue would be proper in Douglas County because "injuries were suffered" in Douglas County, as Plaintiffs contend. In fact, the *Magill* Court does not mention the location where injuries occurred in its venue analysis. Rather, this Court reads *Magill* as finding venue proper in Douglas County because the accident, and Polunci's alleged tort of negligence, occurred in Douglas County, not based on Douglas County being the location of the plaintiff's injuries, which allegedly stemmed from Ford's out-of-state conduct. Therefore, the Court finds *Magill* does not support Plaintiffs' venue theory.

The Court finds this case to be more analogous to *Deichl v. Savage*. In analyzing a venue statute nearly identical to C.R.C.P. 98(c)(5), the Montana Supreme Court ruled the tort of negligent misrepresentation, for purposes of determining venue, occurred "in the location where the misrepresentation [took] place" and not where the purchaser suffered injuries. 216 P.3d at 754. Similarly, in *Fodor v. Hartman*, examining a federal venue statute, the United States District Court for the District of Colorado noted "the locus of damage to a plaintiff has not been found to be the basis for setting venue." *Fodor*, 2006 WL1488894, at *4. Citing *Goff v. Hackett Stone Co.*, the *Fodor* Court further noted "'venue statutes are generally designed for the benefit of defendants, and in determining what events or omissions give rise to a claim, the focus [is] on relevant activities of the defendant, not of the plaintiff.'" *Id.* (citing *Goff v. Hackett Stone Co.*, 185 F.3d 874 at *1 (Table) (10th Cir. 1999)) (quoting *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995)).[5] Though not binding, the Court finds these cases persuasive.

Here, Plaintiffs' venue theory is based on the fact that injuries were suffered in Boulder County. As discussed above, the location of injuries alone is not sufficient for establishing venue under the tort theory set forth at C.R.C.P. 98(c)(5), which is a different analysis than injuries to real property under C.R.C.P. 98(a). Further, when a case involves "the substantial right of a defendant to have a case against him tried in the county in which he resides, the party denying such right must at least balance the showing made by the moving party." *Cliff*, 351 P.2d at 396. Here, Defendants' alleged tortious conduct is their production, promotion, refining, marketing, and sale of fossil fuels. Once Suncor challenged venue in Boulder County, Plaintiffs failed to satisfy this burden by demonstrating that these torts occurred in Boulder County.

Accordingly, the Court finds Plaintiffs failed to establish venue in Boulder County pursuant to C.R.C.P 98(c)(5) under the theory that Defendants committed torts in Boulder County based on Plaintiffs having suffered injuries in Boulder County.

B. Venue Based on Defendants' Deceptive Trade Practices

Next, the Court finds venue is not proper in Boulder County based on Plaintiffs' assertions that Defendants carried out deceptive trade practices in Boulder County, and Colorado residents in Boulder County were the targets of these deceptive trade practices. The Court finds Plaintiffs have failed to identify specific conduct to support their claim that Defendants engaged in deceptive trade practices in Boulder County or targeted Boulder County residents. In their Response, Plaintiffs cite to ¶ 87 of the Amended Complaint, but this paragraph simply states "[v]enue is proper in this Court pursuant to . . . Colorado Rule of Civil Procedure 98 because . . . Defendants

[5] While *Deichl* and *Fodor* are Montana and Federal cases respectively, the Court relies on them due to the similarity of the venue statutes and Colorado's location in the Tenth Circuit.

have committed a tort in Boulder County, including the carrying out of deceptive trade practices." (Am. Compl. ¶ 87.) Plaintiffs further contend Defendants "misleadingly marketed their fossil fuels" in Boulder County. (Pl.'s Resp. 6.) The Amended Complaint states:

> 415. Defendants have promoted fossil fuels as safe, environmentally friendly and necessary. They have made these representations in their own commercial advertisements and marketing materials, and through third-party advertisements and marketing materials designed to encourage fossil fuel use more generally. At no point did Defendants or their associations disclose that continued reliance on and the increased unchecked use of fossil fuels were threatening the climate.
>
> 416. For years, API has also blanketed the airwaves and print media, including in Boulder County, San Miguel County and elsewhere in Colorado, with misleading statements about the safety of, need for and benefits of fossil fuel use. API did not disclose that continued reliance on and unchecked use of fossil fuels was threatening to the climate.

(Am. Compl. ¶¶ 415-16.) Finally, Plaintiffs argue in the Amended Complaint that "Colorado residents, including residents in Plaintiffs' communities, that were the target of these deceptive trade practices were, and are, actual and potential consumers of Defendants' goods or services." (Am. Compl. ¶ 498.)

Suncor, on the other hand, provided an affidavit from Steven J. Ewing, who serves as a Director and Officer of Suncor Energy (U.S.A.) and Suncor Energy Sales Inc. (Suncor Ex. 4 ¶ 4.) The affidavit states Suncor Sales owns or leases forty-four gas stations in Colorado but none in Boulder County; Suncor Energy Services Inc. does not sell fossil fuels in Colorado; Suncor USA does not sell fossil fuels in Boulder County; and Suncor Sales does not sell fossil fuels in Boulder County. (*Id*. ¶¶ 6-10.)

Plaintiffs have failed to demonstrate any specific actions Defendants took in Boulder County or actions Defendants took that specifically targeted Boulder County residents. Instead, Plaintiffs have provided conclusory assertions with little to no factual support. As the Colorado Supreme Court ruled in *Cliff*, Plaintiffs "must *at least* balance the showing made" by the party seeking a change of venue when the case involves "the substantial right of a defendant to have a case against him tried in the county in which he resides[.]" *Cliff*, 351 P.2d at 396 (emphasis added). Plaintiffs have failed to meet their burden, and therefore, venue is not proper in Boulder County based on this theory.

C. Venue Based on Petro-Canada Resources (USA) Inc.'s Production of Fossil Fuels

Finally, the Court finds venue is not proper in Boulder County based on Plaintiffs' assertions that Petro-Canada Resources (USA) Inc., a Suncor subsidiary, produced fossil fuels in Boulder County. Plaintiffs assert in the Amended Complaint that Petro-Canada Resources (USA) Inc. is a subsidiary of Suncor Energy and is a Colorado corporation with its principle office located in Denver. (Am. Compl. ¶ 97.) Petro-Canada Resources (USA) Inc., the Amended Complaint

alleges, "produced fossil fuels in Colorado, including in Boulder County." (Am. Compl. ¶ 98.) In describing the Suncor Defendants, Plaintiffs state, "[i]n 2009, Suncor Energy amalgamated with Petro-Canada to form a single corporation continuing the same name, which to date has operated as an independent company." (Am. Compl. ¶ 48.) Plaintiffs continue, "Suncor Energy publicly has stressed the 'integrated' nature of its operations stating that 'the integration of our business, both financially and physically, creates the conditions for our success.' Suncor Energy files consolidated regulatory filings that include its subsidiaries, claiming profit and responsibility for the production, marketing, refining, transportation and fossil fuel sales of its subsidiaries." (Am. Compl. ¶ 49.)

Plaintiffs further allege "Suncor Energy controls and directs fossil fuel activities . . . across its corporate family, which include many other subsidiaries and joint ventures, and which act as its agents." (Am. Compl. ¶ 50.) Finally, Plaintiffs assert "Suncor Energy refers to its subsidiaries as part of, and Suncor acts as, a single enterprise[.]" (Am. Compl. ¶ 51.) To support these assertions, Plaintiffs refer to a 2017 Annual Report, in which Suncor Energy uses the words "we", "our", "Suncor", and "the company" to refer to Suncor Energy, Inc., its subsidiaries, partnerships and joint arrangements." (*Id.*) The 2017 Annual Report also describes Suncor's two primary operations as refining and supply operations, consisting of Western North America operations including refineries in Edmonton, Alberta and Commerce City, Colorado; and marketing operations to sell refined petroleum products through a combination of "company-owned, Petro-Canada branded dealers in Canada and a Sunoco branded-dealer and other retail stations in Colorado[.]" (*Id.*)

Suncor disputes this basis for venue, arguing Petro-Canada Resources (USA) Inc. is "a nonparty . . .[, n]o authority permits Plaintiffs to establish venue based on the actions of nonparties . . .[, and] Plaintiffs provide no competent evidence to support their veil-piercing theory of venue[.]" (Suncor Reply 10.) To support this argument, Suncor provides a Declaration from Nancy Thonen[6] that addresses many of the factors[7] courts consider when determining whether a subsidiary is an instrumentality of a parent corporation. The Declaration states Petro-Canada Resources (USA) Inc. "sold substantially all of its assets to a third party in 2010 and has not conducted any exploration and production or any other 'fossil fuel activities' . . . in Colorado since such time." (Thonen Decl. ¶ 32.) Further, the Declaration provides each of Suncor's subsidiaries "is in full compliance with applicable corporate requirements[;]" has a Board of Directors "meeting applicable legal requirements[;]" has "corporate bylaws[;]" holds "an annual meeting or resolution of shareholders" to elect its Board of Directors; holds "an annual meeting or resolution of the Board of Directors[;]" has a Board of Directors that acts independently; maintains "corporate minutes and other records" of meetings; maintains accounting records and independent financial statements; maintains corporate records in the jurisdiction of its principal place of business; maintains "required licenses and permits[;]" maintains separate bank accounts to not comingle

[6] Thonen is the Director of U.S. Pipelines and Logistics, is the President of Suncor Energy (U.S.A.) Pipeline Company, and serves on the Suncor Energy (U.S.A.) Board of Directors. (Thonen Decl. ¶ 3.)

[7] In conducting a veil-piercing analysis, courts consider many factors, including whether the subsidiary and parent company have common directors and officers; whether the subsidiary has grossly inadequate capital; whether the parent company pays the salaries, expenses, or losses of the subsidiary; whether the parent company owns all of or the majority of the capital stock of the subsidiary; whether the parent company finances the subsidiary; whether the subsidiary has any business outside its relationship with the parent company; and whether the formal legal requirements of the subsidiary are observed. *See Lowell Staats Mining Co., Inc.*, 878 F.2d at 1262-63.

funds with Suncor Canada; "conducts business with third parties other than . . . other subsidiaries and affiliates[;]" "pays for its own business expenses and other financial obligations[;]" maintains adequate capitalization; and "employs and pays the salaries and expenses of its employees." (*Id.* ¶¶ 33-47.)

The Court finds Suncor has presented significant evidence refuting Plaintiffs veil-piercing theory, and Plaintiffs, in turn, have failed to present specific facts to establish that Petro-Canada Resources (USA) Inc.'s corporate veil should be pierced. As noted above, courts should only pierce corporate veils "reluctantly and cautiously[.]" *Yoder*, 104 F.3d at 1220. Further, when a case involves "the substantial right of a defendant to have a case against him tried in the county in which he resides[,]" the plaintiff "must *at least* balance the showing made" by the party seeking a change of venue. *Cliff*, 351 P.2d at 396 (emphasis added). Based on the information presented by both parties, the Court finds the evidence presented does not support piercing Petro-Canada Resources (USA) Inc.'s corporate veil, and therefore, venue is not proper in Boulder County under C.R.C.P. 98(c)(5).

IV. CONCLUSION

The Court finds the forum selection clause in the 2009 Master Contract between San Miguel County and Suncor USA is not applicable to this case because this action does not "relate to" their contract for the sale and purchase of asphalt. The Court further finds the forum selection clauses in the 2018 and 2019 Confirmation Contracts are not applicable to this case because Suncor USA failed to communicate the purportedly venue-altering provisions of the contracts through San Miguel County's counsel when the parties were opposing litigants in this ongoing litigation. Additionally, Suncor USA's unilateral action of inserting the clauses between boilerplate language without informing San Miguel County's counsel of their insertion renders enforcement of the forum selection clauses "unreasonable under the circumstances." Therefore, the Motion to Dismiss or Transfer Venue based on the forum selection clauses is hereby DENIED.

The Court further finds venue is not proper in Boulder County under § 16-13-307(2), C.R.S. because Plaintiffs did not seek an injunction to abate the nuisance.

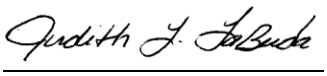
The Court also finds venue is not proper in Boulder County under C.R.C.P. 98(c)(5) because Plaintiffs have failed to support their assertion that Defendants committed torts in Boulder County.

Finally, the Court finds venue is proper in Boulder County under C.R.C.P. 98(a) for Plaintiffs' claims related to the alleged injuries to real property located in the city of Boulder and county of Boulder. However, the Court finds venue is not proper in Boulder County under C.R.C.P. 98(a) for Plaintiffs' claims related to alleged injuries to real property in San Miguel County.

Accordingly, the Court DENIES Suncor's Motion to Dismiss or Transfer Venue to the Denver County District Court as it relates to Plaintiff City of Boulder and Plaintiff Board of County Commissioners of Boulder County. The Court GRANTS Suncor's Motion to Transfer Venue as it relates to Board of County Commissioners San Miguel County.

DATED: January 25, 2021.

BY THE COURT



Judith L. LaBuda
District Court Judge