

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-1672-WYD-SKC

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY;
BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; and
CITY OF BOULDER,

Plaintiffs,

v.

SUNCOR ENERGY (U.S.A.) INC.;
SUNCOR ENERGY SALES INC.;
SUNCOR ENERGY INC.; and
EXXON MOBIL CORPORATION,

Defendants.

**DEFENDANTS’ MOTION FOR AN EXTENSION OF TIME TO SUPPLEMENT THEIR
DESIGNATION OF NON-PARTIES AT FAULT PURSUANT TO COLORADO
REVISED STATUTES SECTION 13-21-111.5(3)(B)**

INTRODUCTION

Today, Defendants filed a nonparty-at-fault designation notice (“Global Warming Liability Notice” or “Designation”) pursuant to Colorado Revised Statutes § 13-21-111.5(3)(b) (the “Statute”). Under the Statute, Defendants must designate any nonparty to the action that bears fault for combusting fossil fuels—the alleged root cause of Plaintiffs’ purported injuries. Defendants’ Designation complies fully with this requirement.

As a threshold matter, Defendants’ Designation contests application of the Statute to this action. *First*, for the reasons stated in Defendants’ Notice of Removal, Plaintiffs’ claims are governed by federal law. *Second*, the alleged damages suffered by Plaintiffs are the result of

lawful, global conduct by innumerable parties—including Plaintiffs themselves. Notwithstanding these objections, Defendants’ Designation identifies categories of nonparties as wholly or partially at fault for any and all alleged damages sustained by the combustion of fossil fuels or other activities that have contributed or currently contribute to greenhouse gas levels. These nonparties include “every single person or entity on the planet that has ever contributed to greenhouse gas emissions through activities such as the combustion of fossil fuels, deforestation, cement production, and agriculture.” In line with established precedent, Defendants designate categories of alleged joint tortfeasors, including, but by no means limited to, emitters and consumers of fossil fuels, producers of electricity, governments and governmental entities, manufacturers, and businesses.

Defendants’ Global Warming Liability Notice is sufficient under the terms of the Statute, which provide for the identification of unknown and unidentified parties. And it is particularly appropriate here due to the nature of the claims at issue. Nonetheless, in an abundance of caution, Defendants respectfully request an extension of time to supplement their Designation until at least 60 days after discovery commences.

CERTIFICATE OF COMPLIANCE WITH D.C.COLO.LCIVR 7.1(A) AND 6.1

Counsel for Suncor certifies that they conferred with Plaintiffs’ counsel, Mr. Hannon, and Plaintiffs have not consented to the relief requested herein. Counsel also certifies that they have sent a copy of this motion to representatives of Defendants.

BACKGROUND

Plaintiffs filed their amended complaint in Boulder County District Court on June 11, 2018, alleging that the use of fossil fuels has resulted in global warming, which in turn has

caused them damage. (ECF No. 1-18.) Plaintiffs seek to hold Defendants solely liable for the impacts of climate change based on their lawful production, promotion, refining, marketing, and sales of fossil fuels. Defendants removed this case to the United States District Court for the District of Colorado (the “Court”) on June 29, 2018. (ECF No. 1.) Plaintiffs have since moved to remand the matter back to state court. (ECF No. 44.) In light of Plaintiffs’ motion to remand, the Parties moved to stay discovery pending the Court’s decision on the remand motion (the “Discovery Stay”). (ECF No. 37.) The Court granted the Discovery Stay on August 10, 2018. (ECF No. 39.)

On September 10, 2018, Defendants filed their Global Warming Liability Notice. (ECF No. 45.) The Designation was filed within the statutory 90-day deadline. Given the nature of Plaintiffs’ sweeping allegations of harm and the innumerable nonparties responsible for contributing to the emission of greenhouse gases and other activities, Defendants submit that their Designation is legally adequate. *See* C.R.S. § 13-21-111.5(3)(b) (identification of nonparties may be made according to “the best identification of such nonparty which is possible under the circumstances”); *Pedge v. RM Holdings Inc.*, 75 P.3d 1126, 1127–28 (Colo. App. 2002) (designation of “any or all customers or employees . . . who may be the person or persons responsible for striking [the plaintiff]” complied with the Statute). Nonetheless, in an abundance of caution, Defendants respectfully request an extension of time to supplement their Designation until at least 60 days after discovery commences.

ARGUMENT

If Colorado law were to apply to this case, the nonparty-at-fault procedure would be applicable because nonparties have undisputedly contributed to Plaintiffs’ claimed injuries.

Under Colorado's *pro rata* liability statute, a defendant in a tort suit should be liable for no more than the percentage of fault attributable to that defendant. *See* C.R.S. § 13-21-111.5(1).

Defendants must designate nonparties who caused or contributed to the injuries alleged within 90 days of the commencement of the action "unless the court determines that a longer period is necessary." C.R.S. § 13-21-111.5(3)(b).

The statutory allowance for an extension recognizes that "[t]he natural course of litigation may prevent a defendant from developing a well-founded designation until after the 90-day period has run." *Watters v. Pelican Int'l, Inc.*, 706 F. Supp. 1452, 1457 (D. Colo. 1989). When considering the propriety of an extension, courts consider whether relief from the deadline is necessary and consistent with equitable considerations. *See, e.g., Spire Owners Ass'n, Inc. v. SimplexGrinnell, LP*, No. 12-CV-02421-RPM, 2013 WL 6068088, at *1 (D. Colo. Nov. 18, 2013); *Wason Ranch Corp. v. Hecla Mining Co., et al.*, No. 07-CV-00267-EWN-MEH, ECF No. 100 at *2 (D. Colo. Sept. 21, 2007). As set forth below, Defendants' timely motion to supplement their Designation should be granted.

First, Plaintiffs will not be prejudiced by the requested extension since discovery has not even commenced. *Second*, the extension requested will not affect the judicial proceedings since this Court entered a stay of the case on August 10. (ECF No. 39.) *Third*, the reason for the requested extension is due to the broad, sweeping nature of Plaintiffs' allegations and their own admission that unidentified and innumerable users of fossil fuels are responsible for causing the harms they allege. Accordingly, extending the deadline beyond the statutory period "is reasonable and consistent with equitable considerations." *Traenkner v. Capalbo*, No. 15-cv-

00743-WYD-KMT, 2016 WL 503079, at *2 (D. Colo. Feb. 9, 2016); *Wason Ranch Corp.*, No. 07-CV-00267-EWN-MEH, ECF No. 100 at *2.

CONCLUSION

Notwithstanding the propriety of their Global Warming Liability Notice, Defendants respectfully request an extension of time to supplement their Designation until at least 60 days after discovery commences.

Dated: September 10, 2018

Respectfully submitted,

/s/ Hugh Q. Gottschalk

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September, 2018, a true and accurate copy of the foregoing **DEFENDANTS' MOTION FOR AN EXTENSION OF TIME TO SUPPLEMENT THEIR DESIGNATION OF NON-PARTIES AT FAULT PURSUANT TO COLORADO REVISED STATUTES SECTION 13-21-111.5(3)(B)** was filed via ECF and served via electronic mail on the following:

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