

District Court, Broomfield County, Colorado 17 DesCombes Drive Broomfield, CO 80020	<b>▲ COURT USE ONLY ▲</b>
<b>Plaintiff:</b> Extraction Oil & Gas, Inc.  v.	
<b>Defendant:</b> City and County of Broomfield.	Case No. 2020 CV 30106  Division: B  Courtroom: 3
<b><i>Attorneys for Plaintiff Extraction Oil &amp; Gas, Inc.:</i></b> Ghislaine G. Torres Bruner, #47619 Colin C. Deihl, #19737 Bennett L. Cohen, #26511 Isuri Lawson, #52632 POLSINELLI PC 1401 Lawrence Street, Suite 2300 Denver, CO 80202 Phone: (303) 572-9300 Email: <a href="mailto:gbruner@polsinelli.com">gbruner@polsinelli.com</a>	
<b>EXTRACTION OIL &amp; GAS, INC.’S VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT, BREACH OF CONTRACT, AND INJUNCTIVE RELIEF</b>	

Extraction Oil & Gas, Inc. (“Extraction”) operates six multi-well oil and gas sites in Broomfield, pursuant to a contract with the City and County of Broomfield – the 2017 Operator Agreement. Rather than perform its contractual obligations in good faith, Broomfield has been using its regulatory and police powers in bad faith to shut down Extraction’s operations. In this action, Extraction seeks damages for Broomfield’s breach of that contract, declaratory judgments regarding that contract, and equitable relief including an injunction enjoining Broomfield from further use of its police and regulatory powers with respect to Extraction’s operations.

**I. SUMMARY**

1. Extraction acquired vested rights to develop oil and gas in Broomfield from

Sovereign and Noble. Extraction could have developed those vested interests the way its predecessors in interest had planned, but it agreed to work with Broomfield to redesign its Broomfield Project to minimize its footprint and maximize protections for Broomfield residents through state of the art technology and numerous best management practices. The revised Project underwent years of review, revision and public debate. The Broomfield City Council ultimately approved the Project in an open political process, by voting to approve and adopt the 2017 Operator Agreement.

2. But no good deed goes unpunished. In response to complaints from Broomfield residents who categorically oppose all oil and gas development, the current Broomfield government has publicly announced its intent to use its new authority under SB 19-181 to “penetrate” the Operator Agreement – *i.e.*, to find some reason to shut down the Project. Broomfield has ginned up one pretextual basis for shutdown after another: wrong drilling mud; wrong engines; inadequate disclosure of chemicals, etc. Broomfield enacted a custom-tailored noise ordinance to provide a basis for shutting down Extraction’s operations, even though the Operator Agreement contains the parties’ agreed-upon noise limits and enforcement regime, and prohibits Broomfield from trying to regulate the Project through its municipal code where the Operator Agreement controls.

3. Extraction has endured all of these baseless legal assaults on its vested contract and property rights, defending against each one in turn; but Broomfield’s latest shutdown attempt is the final straw. On March 25, 2020, the Broomfield City Council convened as the Broomfield Board of Health to consider adopting an emergency order to shut down Extraction’s operations due to the COVID-19 pandemic emergency. Broomfield’s theory was that Extraction’s

operations impact air quality, and could thus make breathing more difficult for COVID-19 sufferers. Extraction refuted this position, explaining how its state-of-the-art operations produce hardly any emissions. Broomfield's *own* petroleum experts and personnel agreed that this concern was baseless.

4. After Broomfield's subject-matter experts dismissed the air quality theory, Broomfield adopted a new shutdown theory at the suggestion of its Public Health Director: Extraction's operations could supposedly be shut down because many Broomfield residents experience anxiety and stress from the fact that oil and gas operations are occurring in their city; and this increased anxiety and stress could lead to adverse health impacts during the COVID-19 pandemic.

5. In other words, Broomfield now seeks to shut down Extraction not because Extraction's operations pose any actual health risks, but because Broomfield residents (with the City Council's assistance) have whipped themselves into such an anti-oil-and-gas-development frenzy that shutdown is now supposedly warranted to alleviate residents' own self-induced anxiety and stress over Extraction's operations.

6. Colorado law requires parties to perform their contractual obligations in good faith – *i.e.*, in a way that honors the other party's contractual expectations rather than thwarts them. Broomfield is performing the parties' contract, and using its police and regulatory powers, in bad faith. It has not only admitted, but has amply demonstrated that it will gin up one factually and legally baseless theory after another until it achieves its goal of shutting down Extraction's operations.

7. The Operator Agreement is a contract. In reasonable and justifiable reliance on

this contract, Extraction has invested hundreds of millions of dollars in the Broomfield Project and related pipelines and gathering facilities. SB 19-181 might give Broomfield authority to regulate away *future* oil and gas development (*e.g.* by adopting setbacks and zoning rules that make development impossible), but it does not and cannot authorize Broomfield to ignore vested property and contract rights.

8. The proper and legal way to shut down Extraction would be to buy out the Operator Agreement, which would mean negotiating with Extraction and writing a check on the order of \$500 million dollars to compensate Extraction for its reliance costs (*e.g.* construction and removal of the six Well Sites, pipeline system, central gathering system, etc.) and forgone expectation interests (*e.g.* the profits the Project would have generated). Broomfield is a wealthy city and county. If its residents want to shut down Extraction that badly, they should vote to approve the necessary taxes, raise the money, and negotiate to buy out the Operator Agreement, rather than direct Broomfield's government use its police and regulatory powers in abject bad faith to chase Extraction out of town. And Broomfield's government should know better.

9. Extraction's targeted operations are temporary. Once all the well sites are constructed, drilled and completed, they will be quietly and safely producing to pipelines. Extraction is entitled to complete this Project according the Operator Agreement, and without continuing bad faith interference from Broomfield.

10. Extraction therefore asks the Court to:

- declare its rights under the Operator Agreement, including the vested nature of its property rights;
- award Extraction damages for the many breaches of contract that Broomfield has committed through its various illegal shutdown strategies;

- rule that Broomfield has breached the implied covenant of good faith and fair dealing by using its police and regulatory powers in bad faith to shut down the Project;
- enjoin Broomfield from any further exercise of its regulatory or police powers with the respect to the Project, and declare that Extraction may continue the Project under the sole regulatory auspices of the Colorado Oil and Gas Conservation Commission – the state regulatory agency with the expertise and integrity to regulate the Project in good faith. If Broomfield feels it has a legitimate complaint about the Project, it can take it to the COGCC.

## **II. PARTIES, JURISDICTION AND VENUE**

11. Plaintiff Extraction is a Delaware corporation with its principal place of business in Denver, Colorado. Extraction is authorized to conduct business in Colorado by the Colorado Secretary of State.

12. The City and County of Broomfield is a home-rule municipality of the State of Colorado.

13. This Court has jurisdiction pursuant to C.R.S. § 13-1-124(a) and (c), and § 13-51-101 *et seq.* (declaratory judgments).

14. Venue is proper in this Court under C.R.C.P. 98(a) and (c) because this action concerns real property in Broomfield and conduct in Broomfield that constitutes a breach of contract and torts; and it seeks a declaration of the parties' rights and obligations under contracts regarding oil and gas development in Broomfield.

## **III. FACTUAL BACKGROUND**

15. Extraction appreciates that the equitable relief it requests – enjoining a city and county from using its regulatory and police powers – is extraordinary, and not a remedy that any court would grant lightly. That is why Extraction did not file this complaint after Broomfield's first, or second, or even third attempt to gin up a reason to shut down Extraction's operations. One or maybe even two such events might be attributed to some kind of misunderstanding rather

than bad faith.

16. Extraction therefore develops the history of its dealings with Broomfield regarding the Operator Agreement in full detail in order to establish how Broomfield's repeated efforts to shut down the Project are not legitimate exercises of its police and regulatory powers, but illegal and bad faith attempts to shut Extraction down and drive it out of town by any means necessary. The sheer number of times that Broomfield has attempted a bad faith shut down eliminates any question that it is acting in bad faith, and confirms that the extraordinary equitable relief of enjoining Broomfield from any further attempts to regulate Extraction (in favor of regulation by the COGCC) is well warranted. That is also why this complaint is so long.

**A. Extraction's Project and its constituent agreements**

**a. Predecessor agreements**

17. Extraction is the successor-in-interest to two prior agreements and associated use by special review permits approved by Broomfield.

18. First, Extraction is the successor-in-interest to the Oil and Gas Operator Agreement between Sovereign Operating Company and Broomfield (the "Sovereign Operator Agreement") entered into on August 27, 2013 which allowed Sovereign to drill and develop oil and gas wells from ten well pad sites in the City.

19. In 2014, in response to Broomfield's attempt to enact a moratorium on hydraulic fracturing, this Court adjudicated Sovereign's rights under the Sovereign Operator Agreement. This Court held that the mineral development rights under the prior Sovereign Operator Agreement were vested contract and property rights that Broomfield could not impair through a later-enacted hydraulic fracturing moratorium. See 9/25/2014 order in *Sovereign Operating Co. LLC v. City and County of Broomfield*, Case No. 14 CV 30092. **Exhibit 1**. This Court

specifically discussed how Sovereign’s investment of resources in its Broomfield project (which is now Extraction’s Project), in justifiable reliance on its bargained-for contract rights with the City, prevented the City from impairing these rights through later legislation. *Id.* at 11-12. The Court so held despite the “Future Regulations” provision of the Sovereign Operator Agreement (which is nearly identical to the parallel Future Regulations provision in Extraction’s Operator Agreement) which allowed Broomfield to enact more stringent regulations, so long as the regulations applied generally to all oil and gas activities. *Id.* at 5.

20. The second prior agreement is the Noble Energy, Inc. Surface Use Agreement entered into on November 13, 2012 (“Noble Agreement”), which provided rights to develop two well pad sites. The Noble Agreement governed the current Livingston Well Site, which (under the current Operator Agreement) is surrounded by sound walls and subjected to numerous BMPs to minimize its impact on nearby residents. Under the Noble Agreement, Noble was only required to surround this well site with a chain link fence. Any noise mitigation or other mitigation measures would have been Broomfield’s responsibility, and would have been subject to Noble’s veto should Noble decide that they interfered with its operations.

21. In combination, the Sovereign Operator Agreement and the Noble Agreement authorized 12 well sites from which Extraction could drill as many horizontal wells as a COGCC spacing order permitted.

**b. Extraction and Broomfield amend and restate the Sovereign and Noble Agreements in the 2017 Amended and Restated Operator Agreement and the related Settlement and Surface Use Agreements.**

22. The Broomfield Municipal Code provides two avenues for developing oil and gas: through a Use by Special Review (USR) process (the traditional permitting process); or through a contract between the operator and the City (called a memorandum of understanding or

operator agreement) that covers the requirements of USR permitting, and allows the parties to further tailor the project as they see fit. *See* Broomfield Municipal Code §§ 17-54-050 *et seq.* (USR) and 17-54-200 (operator agreement); *see also* § 17-54-280 (discussing enforcement for “special review permits, memorandums of understandings or operator agreements”).

23. After acquiring the Sovereign and Noble interests, Extraction could have developed those interests according the terms of the Sovereign Operator Agreement and Noble SUA. These operator agreements had already been approved by Broomfield, and this Court had adjudicated Sovereign’s rights as vested.

24. Extraction instead agreed to discuss with the City how the Sovereign and Noble interests could be combined and developed with a smaller footprint, and with better technology and additional best management practices, in order to accommodate concerns of Broomfield residents (the “Project”).

25. At that time (2015), Colorado law prevented a city or county like Broomfield from banning oil and gas development, or enacting regulations that effectively prohibited it in the guise of regulating it. *See Longmont v. COGCC*, 369 P.3d 573, 585-86 (Colo. 2016) (local bans on hydraulic fracturing were operationally preempted by state law, despite citizens’ rights under the Colorado Constitution to secure their safety and happiness); *Fort Collins v. COGCC*, 369 P.3d 586, 594 (Colo. 2016) (five-year moratorium on hydraulic fracturing was similarly preempted because the moratorium was effectively a prohibition); *Town of Frederick v. North American Resources Co.*, 60 P.3d 758 (Colo.App. 2002) (local oil and gas regulation largely preempted by state law).

26. Appreciating that it could not prevent Extraction from developing its vested

property rights, Broomfield embarked on a strategy of slowing down Extraction's development and making it as difficult and expensive as possible.

27. At Extraction's first meeting with Broomfield to discuss the Project in August 2015, Broomfield expressed its intent to delay the Project. Extraction nonetheless believed (in hindsight, erroneously) that Broomfield government officials were rational actors who would appreciate how Extraction's proposals to shrink the Project's footprint and implement other best management practices would be a win-win: Extraction could optimize its development, and Broomfield would get a smaller, cleaner, quieter development than it would have had under the prior Sovereign and Noble Agreements.

28. After about a year of engagement, in June 2016 the City and Extraction entered into the "Supplement to the Oil and Gas Operator Agreement" in which Extraction committed to reduce its ten approved well sites to three consolidated well pad sites: the Sheridan, original United, and Huron, pursuant to Broomfield City Council Resolution No. 2016-86. The Supplement substantially reduced Extraction's footprint for the Project.

29. Throughout the remainder of 2016 and 2017, Extraction continued its engagement with the City Council and Broomfield residents by appearing, presenting and answering questions at: numerous City Council meetings; special town hall meetings with over a thousand residents and additional stakeholders like the Colorado Oil and Gas Conservation Commission ("COGCC") and the Colorado Department of Health and the Environment ("CDPHE"); and special oil and gas task force meetings.

30. These efforts culminated in a proposed 2017 Amended and Restated Oil and Gas Operator Agreement, and its related Surface Use Agreement and Settlement Agreement. **Exhibit**

2, 3 and 4 (with irrelevant attachments and exhibits omitted).

31. Because these three Agreements were enacted together and reference each other, they are properly construed together. Extraction will refer to the three Agreements collectively as the Operator Agreement, unless circumstances require differentiation.

32. The Operator Agreement begins by re-affirming the vested nature of Extraction's rights:

WHEREAS, the Parties agree that Operator's rights and duties set out in the Operator Agreement, as Supplemented have been and **remain vested** as determined by the Court in *Sovereign Operating Co. LLC v. City and County of Broomfield*, Case No. 2014CV30092 and that the Operator Agreement, as Supplemented remains in full force and effect; ...

WHEREAS, the Parties agree that the Parties each have rights and duties set forth in the [prior Noble agreement], **which are also fully vested and may not altered or diminished without express agreement between the Parties;**

WHEREAS, the City and Operator value a balanced approach to oil and gas development that is protective of public health, safety, and welfare, including the environment and wildlife resources. To that end, **in order to achieve those goals in a cooperative manner, the City and the Operator enter into this Agreement pursuant to Chapter 1-54 of the Broomfield Municipal Code ("BMC") allowing for this Agreement to adopt the best management practices set forth in Exhibit B (hereinafter referred to as "BMPs") for Operator's oil and gas operations at the Well Sites set forth on Exhibit A;**

**Exhibit 2**, Operator Agreement at 1-2 (emphases added).

33. The Operator Agreement takes the 12 well sites with more than 200 wells contemplated by the prior Sovereign and Noble Agreements, and reduces them to six well sites with 84 wells. The Operator Agreement thus reduced the footprint of oil and gas development in Broomfield by half.

34. The Operator Agreement also includes 57 Best Management Practices ("BMPs"), many with numerous subparts, for New Wells at Well Sites. These BMPs meet or exceed all

federal, state and local standards. The Operator Agreement also conforms to the Broomfield Municipal Code and the Task Force recommendations.

35. The Operator Agreement has numerous provisions and BMPs addressing noise. For example the Operator Agreement requires Extraction to use grid-based electric power instead commonly-used diesel-generated power for operations; it prohibits unloading of pipe at night; and it requires Extraction to use quieter Tier 2 engines when available to operate pumps. Most importantly, the Operator Agreement's BMP 31 on Noise Mitigation BMP incorporates the existing COGCC noise regulation Rule 802, but imposes an lower noise limit of "4 dB(A) higher than baseline ambient sound measured at 1,000 feet from the sound walls at the Well Site."

**Exhibit 2** at BMP pages 16-17.

36. Broomfield produced a nearly 200-page "agenda packet" discussing every aspect of the proposed Operator Agreement. This packet was posted on the City Council's website prior to the noticed, public October 24, 2017 City Council meeting, at which the City Council would vote on the proposed Operator Agreement.

37. The October 24, 2017 City Council meeting went nearly nine hours, most of which was devoted to public debate and comment on the proposed Operator Agreement. Around 1:30 a.m., near the end of the meeting, the City Council voted and passed Resolution 2017-186 which adopted the 2017 Operator Agreement and the related Settlement and Surface Use Agreements. Broomfield's City Attorney approved these Agreements, and Broomfield's Mayor executed these Agreements on behalf of the City, pursuant to the City Council's approval.

**Exhibits 2, 3 and 4.**

38. The Surface Use Agreement gives Extraction the right to set up, construct, drill

and complete the six well sites contemplated by the Operator Agreement in a corridor of Broomfield municipal open space surrounding the Northwest Parkway between Interstate 25 on the east and the Sheridan Parkway on the west. *See Exhibit 5*, Broomfield website maps at: <https://www.broomfield.org/DocumentCenter/View/29209/Extraction-Well-Distance>; zoning map at <https://www.broomfield.org/DocumentCenter/View/290/Zoning>; and PUD zoning map.

39. The Surface Use Agreement generally governs Extraction’s access to its Well Sites and its operations in this open space corridor. It provides

**Conduct of Operations.** [Extraction’s] operations on the Surface Lands will be conducted pursuant to the terms of this Agreement, the Operator Agreement, the rules and regulations of the COGCC . . . .

**Exhibit 3** at ¶ 12.

40. The Surface Use Agreement also contains this relevant enforcement provision:

**Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Colorado. *The Parties waive the right to trial by jury with respect of any action, suit or proceeding arising out of or relating to this Agreement or any contemplated transaction.*

**Exhibit 3** at ¶ 26 (emphasis added).

**B. Broomfield voters enact Charter Amendment 301.**

41. Some Broomfield residents categorically oppose all oil and gas development, and therefore did not view the enormous gains from the Operator Agreement as a sufficient win.

42. About two weeks after Broomfield approved the Operator Agreement, Broomfield voters passed ballot measure 301 (the “Charter Amendment”) which amended the Broomfield City Charter to direct that Broomfield exercise its powers of local self-governance and home rule to “condition oil and gas development permits to require oil and gas development to only occur in a manner that does not adversely impact the health, safety, and welfare of Broomfield’s

residents in their workplaces....”

43. If Broomfield voters believed that the City Council should not have approved the Operator Agreement, they could have expressly repudiated the Operator Agreement through this Charter Amendment or other similar act of direct democracy (and pay the resulting damages that a repudiation would entail). The Charter Amendment does not purport to repudiate the Operator Agreement.

44. The Charter Amendment does not purport to operate retroactively to impair contracts that the City entered into before its enactment.

45. In any event, the Charter Amendment or similar subsequent acts by Broomfield’s government or residents cannot operate retroactively per C.R.S. § 31-2-217 and settled principles of law regarding retroactivity. See **Exhibit 1**, 9/25/2014 order in *Sovereign v. Broomfield*, citing and discussing *City of Golden v. Parker*, 138 P.3d 285, 290 (Colo. 2006) and related cases; *Taylor Morrison of Colorado, Inc. v. Bemas Constr. Inc.*, 2014 COA 10, ¶ 17.

46. Retroactive application aside, the Charter Amendment provides no concrete rules or regulations for oil and gas development. It only directs Broomfield’s government to condition future “oil and gas development permits” on the absence of adverse impact on Broomfield residents’ health, safety and welfare (emphasis added). Extraction’s Project is authorized by the Operator Agreement – a contract – not a USR permit.

47. The Operator Agreement comports with the Charter Amendment. It protects the health, safety and welfare of Broomfield residents by, *inter alia*, reducing the footprint of the Project by half, and adding numerous BMPs and technological advances.

**C. Broomfield’s attempts to unilaterally change the parties’ agreements by attaching conditions to its approval of the CDP.**

48. Section 9 of the Operator Agreement required Extraction to submit a Comprehensive Drilling Plan (“CDP”) to the City for review and administrative approval per the terms of the Operator Agreement. The CDP contains the detailed plans, maps, protocols, etc. for each Well Site per the overarching terms of the Operator Agreement and Surface Use Agreement.

49. The CDP is not a USR permit governed by the permitting section of the Broomfield Municipal Code, B.M.C. § 17-54-050 *et seq.* The CDP is a contractual requirement of the Operator Agreement, governed by B.M.C. § 17-54-200 *et seq.* and principles of contract law. Extraction deliberately chose the operator agreement route so principles of contract law (such as the implied covenant of good faith and fair dealing, breach, repudiation etc.) would apply to its dealings with Broomfield, rather than principles of administrative law that impose lesser restraints, such as prohibiting arbitrary and capricious conduct, but otherwise giving the City broad discretion to determine how to permit or not permit oil and gas operations.

50. To that end, the terms of the Operator Agreement reflect Extraction’s substantial engagement with the City detailed above, and provided that the Operator Agreement would displace the City’s ordinary permitting process for the Project’s Well Sites. Specifically, section 9 provides that Extraction’s submission of the CDP constitutes full compliance with the City’s administrative process for the oil and gas development operations that are the subject of the Operator Agreement. Section 9 provides that the City’s administrative approval of the CDP “shall not be unreasonably withheld or delayed.” **Exhibit 2.**

51. Section 12 of the Operator Agreement provides that the City Manager “shall

issue” the administrative approvals for the CDP without further protest, objection or opposition from the City, per the terms of the Operator Agreement, the Settlement Agreement, and the Surface Use Agreement. *Id.*

52. The CDP is a massive document. Extraction submitted a portion of the CDP in December 2017, and the remainder on January 26, 2018. The January 26, 2018 CDP was complete and fully complied with the Operator Agreement and the City’s administrative process for the oil and gas development operations.

53. The City made numerous comments to the January 26, 2018 CDP. To address these comments, Extraction revised and refined the CDP on April 16, 2018 and May 11, 2018.

54. On June 15, 2018, in response to the City’s continuing and unjustified refusal to approve the CDP, Extraction sent the City a notice of breach letter. **Exhibit 6.** Extraction prepared for the possibility that it would have to sue the City to compel its approval of the CDP as required by the Operator Agreement, and enforce other provisions of the parties’ agreements as set forth in the notice of breach letter.

55. Nonetheless, in an effort to avoid litigation, Extraction submitted several further revisions to the CDP in July 2018 in response to the City’s continuing comments. The July 2018 drafts were provided to the City as part of confidential settlement discussions, but the City disclosed the July 2018 drafts to the public.

56. Like prior CDP submissions, the July 27, 2018 version of the CDP fully complied with the Operator Agreement. It included over 1,500 pages of all plans required by the Operator Agreement, and over 3,000 pages consisting of the COGCC Form 2 and 2A permits that the City requested Extraction provide for review.

57. On July 31, 2018, the City Manager issued a letter titled “Status Update and Approval Process” reviewing how Extraction had repeatedly revised the CDP in response to the City’s comments, and stating that the City Manager intended to approve the CDP.

58. Despite this commitment to approve the fully-compliant CDP, on August 20, 2018, the City sent a letter to Extraction which purported to “conditionally” approve the CDP.

**Exhibit 7.** The August 20, 2018 letter contained a list of 15 conditions that included substantial changes and additions to the terms that the parties had agreed upon in the Operator Agreement. The City also issued a press release detailing the additional conditions that the City sought to impose through its “conditional approval.” This proposed “conditional approval” of the CDP amounted to an attempt to unilaterally alter the terms of the Operator Agreement.

59. On September 10, 2018, Extraction responded to the City’s purported conditional approval of the CDP by explaining that the City could not unilaterally change the parties’ agreement by adding new conditions for CDP approval that the parties had not agreed to.

**Exhibit 8.** Extraction specifically agreed to four of the “conditions” in the City’s list of 15 conditions in its August 20, 2018 letter, because these specific terms were already required by the Operator Agreement. Extraction rejected the City’s attempt to insert other terms into the parties’ agreement per its “conditional approval.”

60. In a letter sent that same day, September 10, 2018, the City acknowledged Extraction’s September 10, 2018 letter, and formally approved the July 27, 2018 CDP. **Exhibit 9.**

61. The City’s September 10, 2018 letter nonetheless gratuitously stated that Extraction’s July 27, 2018 CDP effectively satisfied the City’s conditions of approval

enumerated in its August 20, 2018 letter – even though Extraction had made clear that it had rejected the City’s unilateral attempt to insert additional terms or conditions into the parties’ agreement, which the City had no power to do. *Id.*

62. Section E of the CDP is the noise study required by BMP 31, to determine the ambient background noise levels at the well sites. The Broomfield-approved noise expert conducting the study determined that the average ambient noise level at the planned location for the Livingston Well Site – before any involvement by Extraction – was 61 dBA. This relatively loud ambient noise level reflects the fact that the Livingston Well Site is located at the intersection of three busy highways: the Northwest Parkway, Sheridan Parkway, and Lowell Boulevard. Residents living near this area have been subjected to this ambient traffic and environmental noise levels before Extraction’s operations began.

63. Per the Operator Agreement and approved CDP, Extraction mobilized and began drilling and completions operations as detailed in the CDP. Using orders of magnitude rather than precise dollar amounts, Extraction has invested on the order of \$300 million in the Project so far, including over \$200 million for a pipeline system and central gathering facility called for by the best management practices in the Operator Agreement, which enables the oil and gas from the wells to be produced into a closed-loop system without permanent tanks and processed miles away from Broomfield in rural Weld County, minimizing the Project’s footprint, environmental impact, and noise.

**D. Lawsuits by environmental activists have failed to halt the Project.**

64. As noted, while the Project was approved in a lengthy and open political process, it has always faced opposition from some Broomfield residents and others who categorically oppose oil and gas development, or oppose oil and gas development in or near residential areas.

65. Residents of Broomfield and other self-appointed activists have attempted to shut down the Project through several lawsuits, none of which has succeeded. *See The Broomfield Way et al v. Broomfield and Extraction*, no. 2017CV30213 (claims against Extraction dismissed, and remainder settled with Broomfield); *Wildgrass Oil and Gas Committee v. COGCC*, no. 2018CV32513 (dismissed, on appeal); *WildEarth Guardians et al v. Broomfield and Extraction*, no. 2018CV30316 (dismissed, on appeal); *Wildgrass Oil and Gas Committee v. COGCC*, U.S. District Court no. 19-cv-00190-RBJ (dismissed).

66. These lawsuits by organizations of Broomfield residents evidence the determination of these residents to shut down Extraction's operations in Broomfield.

67. These same residents elect Broomfield's City Council, and can thereby direct Broomfield government to use the full extent of its power to shut down the Project.

#### **E. SB 19-181**

68. Broomfield's power to regulate oil and gas development changed in April 2019, when Governor Polis signed SB 19-181 into law. SB 19-181 generally gives cities and counties like Broomfield greater local control over oil and gas development.

69. SB 19-181 does not apply retroactively. Specifically, section 19 of SB 19-181 states: "This act applies to conduct occurring on or after the effective date of this act, including determinations of applications pending on the effective date."

70. The Operator Agreement and CDP were both approved and adopted by Broomfield before the effective date of SB 19-181. The Operator Agreement (which is a contract) and its CDP contain the comprehensive regulations governing the Project. While Extraction's operations began before and will continue after the effective date of SB 19-181, the agreed-upon conditions for those operations were set before SB 19-181 became effective.

71. While SB 19-181 might give Broomfield authority to prevent *future* oil and gas development (*e.g.* by enacting zoning and setback requirements that effectively zone it out), SB 19-181 does not empower or permit Broomfield to unilaterally change the terms of the Operator Agreement or the CDP, or otherwise nullify Extraction’s vested contract and property rights. *See* Colo. Const. art II § 11 (impairment of contracts); U.S. Const. art. I, § 10, cl. 1 (impairment of contracts); *City of Golden v. Parker*, 138 P.3d 285 (Colo. 2006); **Exhibit 1**, 9/25/2014 order in *Sovereign v. Broomfield*. Nor does SB 19-181 authorize Broomfield to repudiate the Operator Agreement or CDP. Nor does SB 19-181 authorize Broomfield to perform its obligations under the Operator Agreement in bad faith, with the goal of thwarting Extraction’s reasonable expectations under the contract.

**F. Broomfield announces its intention to “penetrate” the Operating Agreement and shut down the Project.**

72. Broomfield has nonetheless publicly stated that it believes it can use its new powers under SB 19-181 and Charter Amendment 301 to “penetrate” the Operator Agreement – *i.e.* to find some basis for declaring Extraction in breach and shut down the Project.

73. In August 2019, Broomfield’s long-time City Manager Charles Ozaki retired. He was replaced by Jennifer Hoffman.

74. Ms. Hoffman, and other Broomfield government officials, have repeatedly stated that the City seeks use the powers they believe have been conferred by the Charter Amendment and SB 19-181 to “penetrate” the Operator Agreement, *i.e.* to find some basis for declaring Extraction in breach, or otherwise use the City’s police and regulatory powers to shut down the Project.

75. The City plainly and forthrightly declared this intent at a September 30, 2019,

Broomfield “Community Meeting on Methane and Soil Gas Testing Information.”

<https://www.broomfield.org/CivicAlerts.aspx?AID=1645>. Video of this meeting is also posted on Broomfield’s website, at

[https://drive.google.com/file/d/1Mcuf2u31dfe2fwypYakRxerV9H\\_wU-HC/view](https://drive.google.com/file/d/1Mcuf2u31dfe2fwypYakRxerV9H_wU-HC/view).

76. At this meeting, Ms. Hoffman responded to Broomfield residents’ desire to shut down the Project in the following language (at 1:03:18):

So from the Operator’s Agreement, and again you’re not going to agree with what I’m going to say, and I’m okay with that. The Operator Agreement has been in place; it is all encompassing. So until there is a point, and again it allows us a different conversation with [Charter Amendment] 301 married to [SB 19-] 181. It is a different playing field than we had before. **We are working hard to penetrate our existing rules and regs by incorporating 181 and having that be paramount. There is questions about how much [SB 19-] 181 can penetrate an existing oil and gas Operator’s Agreement.** So it’s not a swift, easy answer to be able to say we’re hesitant, we’re going to shut it down. We’re not there. I can’t speak to what was in the Operator’s Agreement. I can speak to the folks that put that together, in my opinion, did the very best that they could do with the knowledge that they had at the time. (emphasis added)

And later in response to a resident’s complaint that Extraction’s Project should be shut down (at 1:05:55), Ms. Hoffman states at 1:06:22:

They [Extraction] are not in breach. So . . . If I had an answer I would provide the answer. I don’t have the answer. I don’t have the answers. **I can tell you that we are working diligently. Every day we’re focused on this. I’ve been on the job eight weeks, and from the perspective of trying to figure out where the Operator’s Agreement is, how we are penetrating that Operator’s Agreement with [Charter Amendment] 301 and [SB 19-] 181 is a daily task. It consumes all of my time, my energy and my effort. From the breach perspective, will we get there? I don’t know.** (emphases added)

77. City Manager Hoffman thus publicly announced and explained to Broomfield residents who categorically oppose the Project that, as of September 2019, the City did not yet feel that it had found an adequate basis for declaring Extraction in breach of the Operator Agreement and shutting down the Project; but the City’s current and all-consuming task was to

do precisely this: find some basis for declaring Extraction to be in breach, and halt the Project.

78. **This is an extraordinary admission.** The City’s legal counsel has been careful to state in formal position letters that Broomfield is not repudiating the Operator Agreement, but the above candid admission by the City Manager says otherwise. Simply put, in response to the complaints from residents who oppose the Project (and oppose oil and gas development generally), Broomfield’s top administrator has confirmed that Broomfield is diligently working to gin up some legal argument that will allow the City to shut down Extraction. The only question is the legal route the City will take to accomplish this goal.

79. In November 2019, Broomfield elected a new City Council that more uniformly opposes oil and gas development in general, and Extraction’s Project in particular. Any prior division and disagreement over oil and gas development (such as enabled Broomfield City Council to vote in favor of the Operator Agreement in 2017) has now given way to uniform opposition. As a result, Broomfield can now bring all of its legislative and executive power to bear on its stated goal of shutting down Extraction’s operations.

**G. Broomfield’s initial efforts to declare Extraction in breach and shut down the Project**

80. Ms. Hoffman’s statement that Broomfield was working tirelessly to halt the Project by “penetrating” the Operator Agreement (*i.e.* orchestrating a breach claim) was not idle talk to placate an upset resident. Broomfield has tried to “penetrate” the Operator Agreement with several baseless claims. Extraction develops these efforts in detail to establish the depth of Broomfield’s bad faith.

**a. Drilling mud**

81. On September 5, 2019, Broomfield sent a letter to Extraction regarding the

drilling mud and engines used at well pads. **Exhibit 10.**

82. The September 5, 2019 letter quotes BMP 48 from the 2017 Operator Agreement, which requires Extraction to “control” odor from Well Sites by using “a filtration system or additives to the drilling and fracturing fluids to minimize odors.” The letter asserts that because one particular brand of drilling mud, NeoFlo™, has supposedly generated fewer odor complaints than other types of drilling mud, Extraction is required to use only NeoFlo™. *Id.* (Extraction says “supposedly” because there is ample reason to believe that Broomfield alerts residents to the time and location of Extraction’s drilling activities precisely so residents can register complaints, regardless of their validity.)

83. BMP 48 does not require Extraction to use NeoFlo™ (which is not widely available in the area), or any particular brand of drilling mud. BMP 48 does not even require Extraction to use the least odorous drilling mud available. Rather, BMP 48 requires Extraction to control odor from drilling mud by using a filtration system or additives to minimize odors. Extraction does this.

84. Broomfield’s letter demanding the use of NeoFlo™ drilling mud was plainly an attempt to lay the groundwork for a baseless breach claim that the City has not yet asserted but may assert in the future.

**b. Tier 4 engines**

85. The September 5, 2019 letter also quotes Operator Agreement BMP 20 regarding emissions, which requires Extraction to use Tier 2 hydraulic fracturing pumps; and further states: “If Tier 4 fracturing pumps become commonly available, Operator will begin using Tier 4 fracturing pumps.” *Id.* (emphasis added). The letter asserts that because “Extraction has proven that Tier 4 engines are in fact ‘commonly available’,” Extraction must use Tier 4 engines

exclusively.

86. In fact, Tier 4 engines are not commonly available in the area. There is only one fleet of such engines in the area: the Liberty fleet. Extraction uses the Liberty fleet when available, but cannot use the fleet when another operator is using it, or use that single fleet at two of its own locations simultaneously. Extraction's use of the one Tier 4 Liberty fleet, when it is available for use, does not make Tier 4 engines "commonly available."

87. Broomfield's position on Tier 4 engines is a similar attempt to set up a baseless breach claim.

**c. Compliance with conditions that are not part of the parties' agreement**

88. The City's September 5, 2019 letter closes by quoting the City's August 20, 2018 letter conditionally approving the CDP, and asserting that Extraction is required to comply with these conditions of approval. *Id.*

89. As explained above, Extraction properly rejected the City's attempt to attach additional conditions to the parties' agreements through the August 20, 2018 conditional approval letter, and the terms of the August 20, 2018 letter are not part of the parties' agreements. **Exhibits 7 and 8.**

90. Broomfield's continuing citation to these rejected conditions of approval illustrates its ongoing efforts to unilaterally change the parties' agreement, contrary to law.

**d. Material Data Safety Sheets**

91. On October 4, 2019 City Manager Hoffman sent Extraction an "order to comply" letter, demanding that Extraction provide Material Safety Data Sheets within ten days, and threatening that "Failure to comply may result in criminal liability pursuant to Broomfield Code Section 17-50-050." **Exhibit 11.**

92. Chemical storage and disclosure is specifically addressed by BMP 13 of the Operator Agreement. In July 2019 Extraction provided detailed chemical disclosures to Broomfield as required by BMP 13. Material Data Safety Sheets have always been available for Broomfield's review; and Extraction responded by providing the all the requests documents directly to Broomfield.

93. Threats of criminal liability are serious, and require prosecutors to act in good faith and honor basic principles of due process.

94. The sole purpose of Broomfield's letter threatening criminal liability was to harass Extraction, make its performance of the Operator Agreement more difficult and expensive, and if possible gin up a basis for declaring Extraction in breach and shut down the Project.

**e. Disturbing wildlife**

95. The Operator Agreement requires Extraction to plug and otherwise address certain legacy well sites. In August 2018, Extraction's road maintenance subcontractor performed road maintenance work on one of these well sites.

96. Almost a year later (just before the one-year limitations period expired), Broomfield served Extraction with criminal complaint, alleging that photographs of tire tracks near prairie dog holes at a legacy well site established that Extraction (not its subcontractor) violated a municipal wildlife ordinance prohibiting disturbing wildlife in parks – here, supposedly burrowing owls who sometimes live in these prairie dog holes. *See* Broomfield Municipal Court no. 2019 M 800464.

97. Extraction challenged this prosecution based on insufficient evidence: photographs of tire marks near a hole in the ground that might (or might not) have been occupied

by burrowing owls do not establish or even suggest that Extraction caused these tire track marks near the hole; or that any owls lived in this hole; or that any owls were present when the track marks were made; or that any owls were disturbed by the vehicle that made the tire marks. State wildlife officials reached the same conclusion.

98. On January 7, 2020, a Broomfield municipal court judge dismissed Broomfield's prosecution – not for the patent evidentiary insufficiency, but for purely legal reasons that the court raised *sua sponte*: (1) the well site could not be a “park” (defined as a place devoted to recreation and leisure) if Broomfield leased it out for oil drilling; and (2) Extraction could not be held vicariously liable for the actions of an independent contractor (*i.e.* if there was a crime worth charging, Broomfield should have charged the road maintenance subcontractor).

99. Broomfield filed a motion for reconsideration that did not challenge any of these bases for dismissal, but argued only that municipal court rules do not permit the court to entertain pretrial motions, so Extraction must go to trial. The municipal court judge granted Broomfield's motion for reconsideration and vacated its dismissal. Extraction has contested this ruling, and the case remains pending.

100. The amount of resources that Broomfield has devoted to such a meritless and in any event minor alleged municipal code violation further evidences how Broomfield is targeting Extraction with every legal resource at its command.

**f. Noise violations.**

101. Broomfield's most concerted effort to shut down Extraction has been by prosecuting Extraction for alleged violations of the noise provisions of the Broomfield municipal code.

102. The Operator Agreement contains many noise mitigation measures, and BMP 31

in particular includes a precise and detailed noise limitation regime: noise from Extraction's operations must stay below ambient noise levels (as established by the CDP noise study) + 4 dBA, measured at 1,000 feet from a sound wall. The average ambient noise level at the Livingston Well Site location, before Extraction, was 61 dBA. So noise from Extraction's operations at the Livingston Well Pad could not exceed 65 dBA. This is a substantially quieter than the noise limits that would otherwise apply under COGCC Rule 802.<sup>1</sup>

103. Of the Project's six Well Sites, the Livingston Well Site is located closest to residential neighborhoods. Starting November 2019, when Extraction began hydraulic fracturing operations at Livingston, some residents began to complain about night noise.

104. As nearby residents began complaining over Extraction's night noise levels at the Livingston Well Site, Broomfield realized that noise complaints might be its best legal weapon for shutting down Extraction's operations.

105. Opposition to Extraction's Project is well organized. Websites such as Broomfield Concerned effectively tell opponents of Extraction's Project about the current strategy for shutting down the Project, and how they can participate in these shut-down efforts. *See, e.g.,* <http://broomfieldconcerned.org/take-action/call-to-action-residents-urged-to-write-in-and-attend-tuesday-city-council-meeting/> (exhorting opponents of the Project to register noise complaints to support an emergency noise ordinance). No surprise then, that once word goes out that noise complaints are the way to shut down the Project, complaints pour in. *See*

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<sup>1</sup> The otherwise applicable COGCC Rule 802(b)(1) would have limited noise levels to 80 dBA during the day and 75 dBA at night, measured at 350 feet, during completions operations. Extraction could have abandoned negotiations over the Operator Agreement and instead developed per the terms of the prior Sovereign and Noble Agreements, which would have applied Rule 802. Broomfield thus obtained a good deal for its residents by bargaining for and obtaining the ambient + 4 dBA noise limit of 65 dBA at the Livingston Well Site.

<http://broomfieldconcerned.org/wp-content/uploads/2020/01/Oil-and-Gas-Complaint-Summary-Jan-6-2020-scaled.jpg> (Broomfield Concerned’s map of noise complaints, which the City

Council relied upon in enacting its Emergency Noise Ordinance). Some of these noise complaints came from miles away, where Extraction’s operations are unquestionably inaudible.

106. Once the City felt it had received enough noise complaints, it sent Extraction a notice of breach letter alleging violations of the Operator Agreement’s BMP 31 on noise mitigation, based on readings from Broomfield’s noise monitor stations at the Livingston Pad.

**Exhibit 12**, 12/12/2019 Broomfield letter.

107. However, Broomfield either mistakenly believed (or baselessly asserted) that any noise readings above 65 dBA at the sound monitoring stations near Livingston established a violation. That is not what BMP 31 (or the otherwise applicable COGCC Rule 802) provides. The noise spikes that Broomfield pointed to as violations could have been caused by semi-trucks on the Northwest Parkway, airplane overflights, or other environmental sources. BMP 31 limits only the noise produced by Extraction’s operations.

108. Extraction immediately responded to Broomfield’s notice of breach letter by explaining that Broomfield’s breach claim was unfounded for this reason. Extraction also explained why Broomfield’s noise data were unsound: because the City had not calibrated its sound meters; those meters lacked a wind screen on their microphones; the meters measured sound during periods of high winds, etc. **Exhibit 13**, Extraction’s 12/14/2019 letter to Broomfield.

109. Extraction nonetheless explained that it was increasing its sound mitigation at the Livingston Site (an additional sound wall and hay bales, greater use of electric line power, and

rearranging equipment within the well site), and committed to work with Broomfield to address any real noise concerns. *Id.*

110. In response to this compelling showing that Extraction had not violated the noise BMP, and would address and cure any real noise problems, Broomfield abandoned all pretense of relying the agreed-upon terms of the Operator Agreement, or on objective and reliable data, for its noise-based shut-down strategy. Broomfield decided to rely entirely on subjective noise complaints by residents only – *i.e.* the type of complaints that pour in when Broomfield Concerned puts out word that registering noise complaints is the way to shut down Extraction. Under this deliberately subjective approach, as long as some Broomfield residents are willing to say that noise from Extraction’s operations is keeping them awake at night, the City can claim justification for taking action against Extraction.

111. Broomfield sent a letter to Extraction’s state regulator, the COGCC, asking it to force Extraction to halt all night operations at the Livingston Pad due to residents’ noise complaints. **Exhibit 14**, 12/20/2019 Broomfield letter to the COGCC. This letter cited the COGCC’s Rule 802 on noise limits, but made no claim that Extraction had violated the Rule, let alone the parties’ contract. Broomfield simply cited the Rule, and then asked the COGCC to limit Extraction’s operations to daytime hours and require it to shut down from 10:00pm to 6:00am. *Id.* at 1, last par.

112. Broomfield copied Governor Polis, his staff, and select legislators on this letter to the COGCC. *Id.* p. 2, bottom.

113. Broomfield’s protests to the COGCC and Governor Polis constitute a breach of paragraph 12 of the Operator Agreement, **Exhibit 2**, in which Broomfield agrees that it will not

make such protests, but will resolve disputes with Extraction per the Operator Agreement's dispute resolution provision, paragraph 22. These protests also breached paragraph 3(ii) of the Settlement Agreement, **Exhibit 4**.

114. On December 31, 2019, Broomfield received a detailed report from its noise consultant Vibra-Tech regarding the noise level study of the Livingston Well Site that Broomfield had commissioned to support its breach claim. **Exhibit 15**. Vibra-Tech took detailed noise level measurements at monitoring stations surrounding the Livingston Well Site, and the report includes detailed noise logs describing noise levels as influenced by wind, traffic, planes, barking dogs, honking geese, etc. from December 16-18, 2019. *Id.* Vibra-Tech also took noise level readings at the nine home locations in the Anthem neighborhood to the north of the Livingston Well Site (but closer to the noisy Northwest Parkway). The home site noise data was taken between the hours of 4:00 p.m. and midnight on December 17 and 18, 2019. *Id.*

115. The Vibra-Tech report concluded that Extraction's Livingston Well Site operations did not exceed the limits in the Operator Agreement, and also comported with COGCC Rule 802. The report noted that the environmental noise at the home sites was generally high, but that this was largely due to traffic and other environmental factors rather than noise coming from the Livingston Well Site.

116. Broomfield government met with Governor Polis on January 7, 2020 to ask for his assistance in shutting down Extraction's night operations – another breach of the Operator Agreement paragraph 12 and Settlement Agreement paragraph 3(ii). Governor Polis rejected Broomfield's entreaty, but reminded Broomfield how SB 19-181 provided new authority to regulate oil and gas operations. Governor Polis essentially told Broomfield that if it wanted to

shut down Extraction, it shouldn't look to the State to do it, but would have to do the deed itself – and it should expect a lawsuit.

117. Broomfield therefore adopted a strategy to shut down Extraction's operations based on noise complaints, rather than on any violation of the agreed-upon noise limits in the Operator Agreement BMP 31; or any objective, verifiable data on noise levels.

118. Broomfield drafted "Emergency Ordinance No. 2117, Restrictions on Noise in Residential Areas" for consideration at the January 14, 2020 City Council meeting, and enacted the ordinance at that meeting. **Exhibit 16**, ("Emergency Noise Ordinance"). *See also* [http://broomfield.granicus.com/ViewPublisher.php?view\\_id=6](http://broomfield.granicus.com/ViewPublisher.php?view_id=6) (agenda, minutes, video and audio of the 1/14/2020 City Council Meeting).

119. The Ordinance purports to define Extraction's oil and gas operation as an "industrial use," and then imposes noise regulations on industrial uses. *Id.* section 3.

120. The Emergency Noise Ordinance's preamble specifically states that it is being enacted pursuant to Operator Agreement's "Future Regulations" provision. **Exhibit 16** at p. 1 second "Whereas" from bottom, quoting the Operator Agreement, **Exhibit 2** ¶ 15. However, the "Future Regulations" provision in the Operator Agreement permits Broomfield to enact more stringent regulations so long as they apply to both all "**commercial and** industrial operations in the City." **Exhibit 2** at ¶ 15 (emphasis added). The Ordinance does not apply to commercial operations, only industrial operations.

121. The Ordinance provides that any industrial operation outside of an existing industrial zoned area, and which is **not in an enclosed building with a roof**, may not operate at night (between 10:00 pm to 7:00 am) unless and until it submits a noise modeling study showing

that its night operations do not exceed 40 dBA when measured at the boundary of the nearest residentially-zoned district; and also submits an actual noise study showing that five days of noise data confirm that the industrial use never once exceeds these noise limits. **Exhibit 16** section 4.

122. The decibel scale is logarithmic— an increase of 3dB constitutes a doubling of sound intensity. The Emergency Noise Ordinance’s 40 dBA limit is not roughly two-thirds of the BMP 31’s 65 dBA limits. It is a fraction of 1% of the agreed-upon 65 dBA limit. For reference, the federal Centers for Disease Control describes 30 dBA as a volume of soft whisper; 40 dBA as a refrigerator’s hum.<sup>2</sup>

123. The Ordinance’s contorted definition of “industrial use” is thus designed to apply only to Extraction; and its 40 dBA limit is designed to insure violations from Extraction’s operations.

124. The Noise Ordinance was “unquestionably conceived, cut, [and] tailored” to shut down Extraction’s operations. *In re Senate Bill No. 95*, 361 P.2d 350, 354 (Colo. 1961) (legislation that is “unquestionably conceived, cut, [and] tailored” for a particular situation violates the Colorado Constitution’s Article V § 25 prohibition on special legislation).

125. Extraction did not submitted a noise study or data per the Emergency Noise Ordinance because the Ordinance does not apply to Extraction. In addition to the Ordinance not being a valid Future Regulation, the Operator Agreement prohibits Broomfield from prosecuting Extraction under the noise or nuisance chapters of the Broomfield Municipal Code for any

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<sup>2</sup> See CDC decibel chart at [https://www.cdc.gov/nceh/hearing\\_loss/what\\_noises\\_cause\\_hearing\\_loss.html](https://www.cdc.gov/nceh/hearing_loss/what_noises_cause_hearing_loss.html). Courts properly take judicial notice of such information on government websites. *United States v. Garcia*, 855 F.3d 615, 621-22 (4th Cir. 2017).

conduct that is addressed by the Operator Agreement, like noise. **Exhibit 2**, Operator Agreement ¶ 27, BMP 31.

126. As soon as the Emergency Noise Ordinance took effect, Broomfield began issuing criminal citations to Extraction for operating at night without having previously submitted the required noise study and data. When Extraction challenged the Emergency Noise Ordinance, Broomfield began issuing citations for alleged violations of a different provision of its noise code, and a provision of its nuisance code. *See Broomfield v. Extraction*, Municipal Court case nos. 20M800107, 20M800108, 20M800109, 20M800120, 20M800153, 20M800169, 20M800187, 20M800188, and 20M800189.

127. After serving its first criminal citation to Extraction, Broomfield filed an unusual “Motion Requesting an Order Requiring Immediate Compliance” with the Emergency Noise Ordinance in the Municipal Court criminal action opened by its citation. Broomfield apparently wanted a judge’s approval and imprimatur before taking any enforcement steps beyond issuing citations, like sending police cars out to Well Sites to compel a shutdown. Broomfield’s decision to file such an unusual motion here further evidences its appreciation of how the Noise Ordinance cannot be enforced against Extraction, and how its illegal and unconstitutional conduct here could give rise to constitutional tort liability under Section 1983. *See, e.g., County of Adams v. Hibbard*, 918 P.2d 212, 220-21 (Colo. 1996) (discussing individual liability for county officials under Section 1983). Broomfield’s attempt to obtain qualified immunity this way did not work. The municipal court judge denied Broomfield’s motion at the first hearing on the Noise Ordinance violations.

128. The numerous noise prosecutions remain pending. Broomfield may realize from

the motions to dismiss that it is unlikely to succeed in shutting down Extraction's operations based on this pretext.

**g. COVID-19**

129. Appreciating that its strategy of using noise enforcement will not work, Broomfield has seized on a new pretext for shutting down Extraction's operations: the COVID-19 pandemic.

130. On March 25, 2020, Governor Polis issued an Executive Order instituting a "stay at home" order for all persons in the state of Colorado, and requiring all non-essential businesses to close. *See Exhibit 17*, Executive Order D 2020 017. The Governor's Order and the accompanying FAQs, state that oil and gas operations are among those business that are exempt from closure, and are in fact encouraged to remain operating. *Id.* This is because oil and gas operations are critical infrastructure. The development of natural resources such as oil and gas are essential because they power our homes, our transportation, and keep our hospitals and urgent care centers operating. The Governor's order is as strong a "stay-open" directive as he can issue short of ordering businesses to stay open, which would raise constitutional concerns. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (rejecting President Truman's order that steel companies stay open as an unconstitutional seizure of private property).

131. On March 26, 2020, the Colorado Department of Health and the Environment (CDPHE) issued an Updated Public Health Order 20-24 Implementing Stay at Home Requirements. **Exhibit 18**. The CDPHE Order confirms that oil and gas extraction, production, refining, storage, and transport are critical business. *Id.* The Order also instructs local public agencies that the CDPHE is calling the shots regarding the public health response to the pandemic, and that any local agency wanting to do things differently must request and obtain a

variance through a process to be established by the CDPHE. *Id.* (final page regarding local variances).

132. Despite these authoritative directives from the Governor and CDPHE, Broomfield has now attempted to use the COVID-19 pandemic to justify shutting down Extraction's operations – only to be paused by this Court's TRO.

133. On Wednesday night March 25, 2020, the Broomfield City Council convened a special meeting in the Council's capacity as the Broomfield Board of Health. *See* BMC 2-04-030; Chapter V, City Council Procedure. The purpose of the meeting was to "review the public health issues attributed to the continued development of oil and gas well on the Livingston Pad during COVID-19 pandemic." **Exhibit 19**, meeting agenda. The anticipated action for the Board's consideration was whether or not to issue "a public health order requiring the shutdown of Extraction's flowback operations during the pandemic (this is an exercise of the police power) ..." *Id.* No other commercial or industrial activity has been subject to similar action by the Broomfield City Council.

134. The Board invited Extraction to present on the current status of the operations, its plans for flowback and its COVID-19 preparedness. The Board also heard presentations from:

- Broomfield's retained petroleum engineer consultant, Barbara Ganong, to address whether Extraction's flowback would be safe or result in air quality impacts;
- Broomfield's Police Chief Gary Creager and North Metro Fire Rescue District Deputy Chief Jeff Bybee, to address evacuation plans, tactical response plans and emergencies;
- State Senator Mike Foote (primary author of SB 19-181), to address Broomfield's authority under the new law, and what would constitute a reasonable nexus to health concerns to justify shutting down Extraction's operations;
- outside Special Counsel for Broomfield, Lance Astrella, regarding the legal requirements for a shutdown, and to report on the opinions of another of Broomfield's retained inspectors, Reg Wiemers; and

- Jeff Robbins, director of the Colorado Oil and Gas Conservation Commission, regarding the status of COGCC inspections, Extraction BMP's, risks, safety measures in place, and how social distancing requirements affect these risks and the ability to maintain safe operations.

*Id.*, agenda.

135. Broomfield's theory for using the COVID-19 pandemic as a basis to shut down Extraction's operations was that Extraction's operations impact air quality, and could thus make breathing more difficult for COVID-19 sufferers.

136. Extraction first presented on its planned flowback operations that are scheduled to begin mid-April. These are not traditional flowback operations. Traditional flowback would require the use of separate and specific equipment such as temporary separators, open-top tanks and flares, and haul-off trucks to transport water and oil. Extraction, however, had eliminated the need for these temporary tanks with open tops, flares and truck traffic with its "Next Generation Flowback." Instead of a traditional flowback phase, Extraction's wells in Broomfield flow directly to a permanent separator via pipeline where the product is separated into natural gas, oil and water; and then piped to the company's central gathering facility in Weld County. Extraction invested over \$250 million in this closed loop system to protect the health of the Broomfield residents. The system eliminates open-top tanks, replaces temporary flares with enclosed combustion units, and removes millions of truck miles from Broomfield's roads by transporting via pipeline oil, gas and water to Extraction's own facilities. The system is designed to capture 99.9% of emissions.

137. This Next Generation Flowback system had already been proven at the nearby Interchange Well Site, per Broomfield's insistence, to test its efficacy. It works. During the March 25, 2020 meeting, Broomfield's air quality experts verified that the levels of Volatile

Organic Compounds detected during flowback at the Interchange Well Site were approximately one-fifteenth the levels typically seen during traditional flowback.

138. The system is now ready to be implemented at the Livingston Well Site.

139. Broomfield's own petroleum expert, Ms. Ganong, stated that Extraction's flowback operations were safe. She discussed how Extraction's Next Generation Flowback system represented a "paradigm shift" by abandoning the use of traditional flowback, avoiding the use of certain equipment that is more traditionally used, further reducing any impact on health and safety. She further stated she observed "[a]ppropriate and proven industry-leading safeguards on equipment were observed. There were no discernible odors personally detected by me while standing or walking around on the site." See audio of 3/25/2020 meeting, [http://broomfield.granicus.com/MediaPlayer.php?view\\_id=6&clip\\_id=1571](http://broomfield.granicus.com/MediaPlayer.php?view_id=6&clip_id=1571), at 34:00-36:39.

140. Chief Bybee stated that the North Metro Fire Department ("NMFD") was ready for emergency events and had executions protocols, had run drills, and NMFD and Extraction and had a Tactical Response Plan in place approved by Broomfield and incorporated in Extraction's Comprehensive Drilling Plan.

141. Broomfield's Public Health Director, Jason Vahling, concurred with Broomfield's other experts (and Extraction) that the upcoming flowback phase at the Livingston Well Site raised no genuine health and safety concerns that could warrant shutting down Extraction's operations. Mr. Vahling stated, "there is no peer-reviewed studies or even data to show a direct association between susceptibility to COVID-19 and air pollution specifically from oil and gas development." See audio at 1:34:20.

142. However, after much discussion with the Council / Board of Health, Mr. Vahling

opined that a shutdown could be justified because of “anxiety.” As Mr. Vahling explained, many Broomfield residents believe that oil and gas development is inherently dangerous and unhealthy. So regardless of whether these subjective beliefs have any scientific support, the mere existence of oil and gas operations can cause these residents to experience anxiety and stress. Mr. Vahling described such residents as a vulnerable population that might suffer headaches, difficulty sleeping, and other symptoms associated with anxiety; and that individuals with preexisting conditions might be predisposed to having complications if they contract COVID-19 because of these mental health concerns. *See* audio at 3:27:30 - 3:30:00.

143. Mr. Vahling therefore recommended that Extraction’s operations should be shut down as a public health hazard – not because they pose any actual health or safety risks, but because shutting down operations could relieve anxiety and stress among Broomfield residents who subjectively believe (without basis) that nearby oil and gas operations are inherently unhealthy. *See* audio at 3:58:48 - 4:02:30. . Councilmember Castriotta cheered at Mr. Vahling’s recommendation. *Id.* at 4:02:00.

144. Upon Mr. Vahling’s recommendation, the City Council/Board of Health prepared to vote on a resolution to shut down Extraction’s operations. However, when Broomfield legal counsel raised liability concerns, the Board decided instead to reconvene on Tuesday, March 31, 2020 to vote on whether to order Extraction to shut down its flowback operations until after the Governor’s stay in place order is lifted.

145. This latest pretextual attempt to shut down Extraction’s operations, and the brazen legal and logical baselessness of it, was the last straw.

146. On Friday March 27, 2020, Extraction commenced this action with a motion for a

TRO to enjoin Broomfield from shutting down its operations based on this COVID-19 pretext.

The Court granted the TRO that same day.

**FIRST CLAIM FOR RELIEF**  
*Declaratory judgment – vested rights*

147. Extraction incorporates all prior paragraphs by reference.

148. Extraction’s rights to develop oil and gas in Broomfield according to the terms of the Operator Agreement are vested rights that cannot be impaired by Broomfield. *See City of Golden v. Parker*, 138 P.3d 285 (Colo. 2006); *Eason v Board of County Com'rs of County of Boulder*, 70 P.3d 600 (Colo.App. 2003).

149. The vested nature of Extraction’s rights has even been determined by this Court in the *Sovereign* action. **Exhibit 1**. That legal determination applies here through principles of issue preclusion. *Foster v. Plock*, 2017 CO 39, ¶ 13, 394 P.3d 1119, 1123. And even without issue preclusion, this Court’s analysis in the *Sovereign* order is legally correct and applicable here.

150. Extraction requests a declaratory judgment that its rights under the Operator Agreement are vested rights, as determined by the *Sovereign* Order and acknowledged by Broomfield in the Operator Agreement; and that Broomfield therefore may not impair these vested rights through subsequently adopted legislation.

151. To the extent that any rights in the Operator Agreement are not covered by the *Sovereign* Order, Extraction requests that the Court determine that such rights are vested per the same authority and analysis.

**SECOND CLAIM FOR RELIEF**  
*Breach of contract (Operator Agreement ¶ 12; Settlement Agreement ¶ 3 - protests)*

152. Extraction incorporates all prior paragraphs by reference.

153. Paragraph 12 of the Operator Agreement requires Broomfield to resolve disputes with Extraction pursuant to the dispute resolution provision of the Operator Agreement, and prohibits Broomfield from protesting to the COGCC or Governor.

154. Paragraph 3(ii) of the Settlement Agreement contains a similar prohibition on protesting any aspect of the Project.

155. As set forth above, Broomfield breached this provision of the Operator Agreement, entitling Extraction to damages in an amount to be proven at trial.

**THIRD CLAIM FOR RELIEF**  
***Breach of contract (Operator Agreement ¶ 15)***

156. Extraction incorporates all prior paragraphs by reference.

157. Paragraph 15 of the Operator Agreement permits Broomfield to enact future regulations, but only if such regulations are “general in nature” and “applicable to all commercial and industrial operations in the City.”

158. As set forth above, Broomfield’s Emergency Noise Ordinance purports to be enacted under paragraph 15, but it is not generally applicable, excludes commercial operations, and specifically targets Extraction. It is designed to give Broomfield an ostensible legal basis to shut down Extraction’s night operations.

159. Broomfield’s enactment of an Noise Ordinance targeted at Extraction’s operations, and its attempts to enforce that Ordinance against Extraction, are breaches of paragraph 15 of the Operator Agreement which have caused Extraction damages in an amount that Extraction will prove at trial.

**FOURTH CLAIM FOR RELIEF**  
***Breach of contract (Operator Agreement ¶ 27)***

160. Extraction incorporates all prior paragraphs by reference.

161. Noise from Extraction's operations is addressed by the Operator Agreement.

162. Paragraph 27 of the Operator Agreement states that Broomfield may enforce violations of the Operator Agreement under the oil and gas chapter of its Municipal Code.

163. Broomfield is currently prosecuting Extraction for alleged violations of the noise and nuisance chapters of the Broomfield Municipal Code based on noise at the Livingston Well Site. *See* Broomfield Municipal Court matter numbers: 20M800107, 20M800108, 20M800109, 20M800120, 20M800153, 20M800169, 20M800187, 20M800188, and 20M800189. The citations in these criminal actions charge violations of B.M.C. 9-36-020 and 9-36-070, which are provisions in the noise chapter of the Broomfield Municipal Code; and also violations of B.M.C. 8-16-010, which is a provision in the nuisance chapter of the Code. These prosecutions do not charge Extraction with any violations of the oil and gas chapter of the Broomfield Municipal Code.

164. Each of these prosecutions constitutes a breach of paragraph 27 of the Operator Agreement.

165. Extraction's damages for these breaches include, but are not necessarily limited to, all of its attorney fees incurred in defending against these prosecutions; and any fines that the Municipal Court might issue.

**FIFTH CLAIM FOR RELIEF**  
***Declaratory judgment and injunction (municipal ordinances)***

166. Extraction incorporates all prior paragraphs by reference.

167. Broomfield has authority as a city and county to enact reasonable regulations to protect the health and welfare of its residents. But controlling law requires that any such regulations be reasonably calculated to alleviate the harm at issue, be fairly and neutrally applied, and comport with constitutional and statutory law prohibiting cities and counties from impairing contracts or vested rights.

168. Extraction requests the Court to issue a declaratory judgment that Broomfield's Emergency Noise Ordinance is not enforceable against Extraction because: it violates Colorado Constitution Article V section 25's prohibition against special legislation; it is unreasonable; it is not calculated to alleviate the noise complaints it claims to address; it is not neutral but is discriminatorily targeted at Extraction, with the goal of shutting down Extraction's operations; and/or it violates constitutional and statutory law prohibiting cities and counties from impairing contracts or vested rights.

169. Extraction also requests the Court to enjoin Broomfield from prosecuting Extraction under the Emergency Noise Ordinance.

170. Extraction also requests the Court to enjoin Broomfield from prosecuting Extraction under any municipal ordinance outside of its oil and gas chapter 17-54 for any conduct that is addressed by the Operator Agreement.

**SIXTH CLAIM FOR RELIEF**  
*Declaratory judgment and injunction (COVID-19 shutdown)*

171. Extraction incorporates all prior paragraphs by reference.

172. Broomfield has authority as a city and county to enact reasonable health and safety regulations to protect its residents from dangers posed by the COVID-19 pandemic, provided such measures are related to real (not imagined or pretextual) threats, are proportional

and reasonable, are fairly and neutrally applied, and are not preempted by state law.

173. Broomfield’s recent action to shut down Extraction’s operations based on COVID-19 concerns meet none of these required predicates. Rather, the proposed basis for shutdown that the Broomfield City Council articulated and nearly voted to approve at the March 25, 2020 special hearing (alleviating residents’ stress and anxiety caused by oil and gas operations) is legally baseless, logically circular, and transparently pretextual.

174. Extraction requests the Court to enjoin Broomfield from shutting down Extraction’s operations on any such basis.

**SEVENTH CLAIM FOR RELIEF**

***Breach of contract (implied covenant of good faith and fair dealing)***

175. Extraction incorporates all prior paragraphs by reference.

176. The Operator Agreement is a contract between Extraction and Broomfield.

177. Under well-settled Colorado law, all contracts contain an implied covenant of good faith and fair dealing. *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995).

178. Good faith means, *inter alia*, acting in a reasonable manner, and not trying to thwart the other contracting party’s reasonable expectations. Specifically, Colorado courts have held that “each party to a contract has a justified expectation that the other will act in a reasonable manner in its performance,” *Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*, 872 P.2d 1359, 1363 (Colo.App. 1994); and that “good faith performance of a contract involves faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” *Miller v. Bank of New York Mellon*, 2016 COA 95 ¶ 40, 379 P.3d 342, 348 (cleaned up). *Accord Ervin*, 908 P.2d at 498 (“The good faith performance doctrine is generally used to effectuate the intentions of the parties or to honor their reasonable expectations.”)

179. Broomfield's admitted goal of finding some basis for declaring Extraction to be in breach of the Operator Agreement so it can shut down the Project constitutes a breach of the covenant of good faith and fair dealing.

180. Broomfield's bad faith conduct is amply evidenced by its numerous efforts to "penetrate" the Operator Agreement (*i.e.*, to find some legal basis to shut down Extraction's operations), culminating in the enactment of the Emergency Noise Ordinance and proposed COVID-19 shutdown.

181. Broomfield's breach of the implied covenant of good faith and fair dealing is a breach of the Operator Agreement that has caused Extraction damages in an amount that Extraction will prove at trial.

**EIGHTH CLAIM FOR RELIEF**  
*Equitable remedies*

182. Extraction incorporates all prior paragraphs by reference.

183. The legal way to shut down Extraction's operations would be to buy out the Operator Agreement. The core component of such a buyout would be Extraction's reliance and expectation interests, which are on the order of \$500 million dollars. Extraction believes that Broomfield will not, and in any event cannot, pay such amounts.

184. Additionally, Extraction is an oil and gas developer. It buys oil and gas interests to develop them, not to engage in arbitrage. Extraction wants to finish its Broomfield Project and get its Well Sites producing oil and gas to pipelines cleanly, silently and safely.

185. Under other circumstances, Extraction might request equitable relief in the form of an injunction enjoining Broomfield from further bad faith efforts to shut down or illegally interfere with Extraction's operations, and to perform the Operator Agreement in good faith.

186. If Broomfield's answer to the above Seventh Claim for bad faith contains anything other than unqualified admissions, then there is little point in the Court enjoining Broomfield from further bad faith conduct. That is, if Broomfield still denies that it has acted in bad faith (as Extraction expects it to do in its answer, despite this litany of bad faith), then the appropriate and warranted equitable remedy here is for the Court to enjoin Broomfield from further use of its regulatory or police powers with respect to the Project.

187. Accordingly, the Court should so enjoin Broomfield, and declare that henceforth the sole regulatory authority over the Project shall be exercised by the COGCC, the state-level regulator that (unlike Broomfield) can be trusted to regulate the Project in good faith pursuant to the Operator Agreement, the CDP, and applicable Colorado law.

188. This requested relief does not leave Broomfield without a means of enforcing its rights under the Operator Agreement or protecting the health, safety and welfare of its residents. Broomfield would simply be required to bring such concerns regarding the Project to the COGCC for appropriate relief.

189. This equitable relief may be extraordinary, but it is grounded on sound equitable principles, is entirely appropriate under the circumstances, and is warranted by Broomfield's admitted and demonstrated intent to shut down Extraction's operations through any means necessary, including illegal and bad faith conduct.

#### **PRAYER FOR RELIEF**

WHEREFORE, Extraction requests:

- A money judgment for damages on its breach of contract claims;
- Declarations from the Court pursuant to its declaratory judgment claims;

- Temporary and permanent injunctions per its claims for equitable relief, including an injunction enjoining Broomfield from any further exercise of its regulatory or police powers with respect to the Project;
- declaring that Broomfield's Charter Amendment and SB 19-181 cannot be applied retroactively to the Project; and
- All other damages, costs, interest, penalties and other relief that may be available and warranted by law or equity.

DATED this \_\_\_ day of April, 2020.

Respectfully submitted,

POLSINELLI PC

*s/ Ghislaine G. Torres Bruner* \_\_\_\_\_

Ghislaine G. Torres Bruner

Colin C. Deihl

Bennett Cohen

Isuri Lawson

*Attorneys for Extraction Oil & Gas, Inc.*

Plaintiff's address:  
370 17<sup>th</sup> Street, Ste. 5300  
Denver CO, 80202

**VERIFICATION**

I, Eric Christ, the Vice President and General Counsel of the Plaintiff Extraction Oil & Gas, Inc., have read this Complaint and I affirm that factual statements are true to the best of my knowledge

\_\_\_\_\_  
Date

\_\_\_\_\_  
Eric Christ

STATE OF COLORADO    )  
  ) ss.  
COUNTY OF DENVER    )

Subscribed and sworn before me, a Notary Public this \_\_\_\_ day of \_\_\_\_\_, 2020.

**CERTIFICATE OF SERVICE**

By filing this document via Colorado Courts E-filing, it has been served on all parties to this action. It will also be served via personal service for CRCP 4 purposes.

*s/ Polsinelli PC* \_\_\_\_\_