DISTRICT COURT, BROOMFIELD COUNTY, COLORADO Address: 17 Descombes Drive Broomfield, CO 80020 Phone: 720-887-2100	
PLAINTIFF AND CONTESTOR: OUR BROOMFIELD v. **DEFENDANT AND CONTESTEE:** CITY AND COUNTY OF BROOMFIELD, COLORADO	▲ COURT USE ONLY ▲
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CONTESTOR'S TRIAL BRIEF	

INTRODUCTION AND SUMMARY OF ARGUMENT

There is little doubt that Contestee has broad discretion in setting a ballot title. That discretion is not, however, unbridled. The state legislature has made it clear that any title set by a municipality under the Home Rule Act, C.R.S. § 31-2-201 *et seq*., must "fairly and accurately represent[] the true intent and meaning of the proposed initiative." *Id.* at § 31-

11-103(5). That requirement is met when the title "fairly reflect[s] the proposed initiative so that . . . voters will not be misled into support for or against a proposition by reason of the words employed by the [title setting body]." *In re Title, Ballot Title and Submission Clause for 2009-2010 # 45*, 234 P.3d 642, 648 (2010) (citation omitted). It is not met when, as in the case at bar, the title instead "speculate[s] as to the measure's efficacy, or its practical or legal effects." *In re Title, Ballot Title and Submission Clause for 2007-2008 # 62*, 184 P.3d 52, 60 (2008) (citation omitted).

Here, the title set by Contestee for the proposed amendment to the Broomfield Home Rule Charter to regulate hydraulic fracturing ("fracking") **does not reflect** what the proposal is intended to do—place a 5-year moratorium on fracking in order to address, and hopefully better understand, the impact of fracking on public health, the environment, and property values within Broomfield. Instead, the title **reflects Contestee's opinion regarding what effect** the proposal may have on the oil & gas industry—an impingement on their property rights and regulation of fracking above the existing state requirements. While Contestor refutes that such opinion is grounded in either fact or existing law, that is not the issue in this case. What is at issue is whether the title is "fair and accurate." It is not, but instead may impermissibly confuse voters as to the true "intent and meaning" of the proposed charter amendment. As such, this Court should set aside the ballot title set by Contestee, set an appropriate title, and allow the voters to have their say on election day.

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ARGUMENT

A. LEGAL STANDARDS APPLICABLE TO THE SETTING, AND JUDICIAL REVIEW, OF BALLOT TITLES.[1]

As an initial matter, Contestor notes for the Court the dearth of available case law regarding challenges to the setting of titles for ballot initiatives at the local level. There are, however, a large number of opinions—many by the Colorado Supreme Court—regarding challenges to the setting of titles for statewide ballot initiatives. Because the standard for setting titles at both the state and local level are largely the same—to fairly reflect the initiative's intent and meaning—Contestor believes that these cases should be considered relevant precedent.

As such, the principle objective in setting and reviewing a ballot title is to "preserve and protect the right of initiative." C.R.S. § 1-40-106.5(2). Titles should "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *In re Title, Ballot Title and Submission Clause for 2009-2010 # 45*, 234 P.3d at 648 (citations omitted). In setting a title, the body doing so should "consider the public confusion that might be caused by misleading titles" and "avoid titles for which the general understanding of the effect of a 'yes' or 'no' vote will be unclear." *Id*. (citations omitted). The bottom line is, the title must "correctly and fairly express the true **intent** and **meaning**" of the initiative. *Id.* (citation omitted)(emphasis in original).

In reviewing a set ballot title, it is not the role of a court to "speculate on the future effects the Initiative may have if adopted." *In re Title, Ballot Title and Submission Clause for*

[1] Contestor does not in this Trial Brief provide a general legal overview of the Home Rule Act or a discussion of the relevant facts pertaining to the ballot proposal in this case, as both are provided in the Verified Petition.

1999-00 # 256, 12 P.3d 246, 257 (2000). Whether or not the proposal, if voted into law by the electorate will have certain legal or practical effects is beyond the scope of judicial review. *See id.; In re Title, Ballot Title and Submission Clause for 2007-2008 # 62*, 184 P.3d at 60. Instead, it is the job of a reviewing court to "sufficiently examine" the initiative and the title to determine if it is fair, clear, accurate and complete. *In re Title, Ballot Title and Submission Clause for 2011-2012 # 3*, 274 P.3d 562, 565 (2012). During these examinations, the court must employ "the general rules of statutory construction and accord the language of the proposed initiative and its title[] their plain meaning." *Id*. It would seem reasonable to state that if the two are found to have different meanings, the title is inappropriately set.

B. THE BALLOT TITLE CONTAINS NON-OPERATIVE WORDS AND FAILS TO ACCURATELY DESCRIBE THE PROPOSED AMENDMENT.

To give the Court a comparison of proper and improper title setting, this case is in stark contrast to *In re Title, Ballot Title, Submission Clause, and Summary, Adopted April 4th, 1990, Pertaining to the Proposed Initiative on Surface Mining*, 797 P.2d 1275 (1990). In that case, a citizen group, Citizens Against Mountain Scars, proposed a statewide ballot initiative to prohibit surface mining of aggregate or gravel, and related activities, along the east slope of the Front Range within view of Denver, Colorado Springs, Manitou Springs, Boulder, Pueblo, and Fort Collins. *Id*. at 1277. The contestor, Michael Flanagan, sought review by the Supreme Court of the title set by the state Title Board on the grounds that the title did not "correctly and fairly express the true intent and meaning of the proposed [constitutional] amendment." *Id*. at 1276 & 1279-80. Specifically, Flanagan argued that the presence of the word "scar" in the title created "prejudice against [] mining . . .." *Id*. at 1280. The Court rejected this contention, finding that the word "'scar' is an operative word in the initiative itself." *Id*.

Quite the opposite is true here. The phrases "property rights in oil and gas minerals," "extracting their property, and "additional restrictions on wastewater storage and disposal than [under] existing state regulations" are not contained in the proposed amendment itself. At the same time, important operative words from the proposed amendment, such as "[t]o protect property, property values, public safety and welfare, and the environment," that the "people of Broomfield seek to protect themselves from the harms associated with hydraulic fracturing," and "threats to public health and safety, property damage, and diminished property values"—are absent from the title set by Contestee. Probably of most concern to Contestor is that while the true intent and meaning of the amendment—which is clear from the text of the amendment—is to, among other things, protect the **citizens of Broomfield's property**, the title set completely ignores this and instead suggests the proposal's intent is to diminish the property rights of outsiders, namely the oil and gas industry.

Likewise, in the surface mining case, Flanagan also complained that the title did "not accurately reflect the **practical effect** of the proposed amendment, which he allege[d] would be to prohibit all [] surface mining in certain areas along the Front Range." *Id*. at 1280 (emphasis added). The Court stated, however, that its inquiry "is limited to determining whether [the] language in the title fairly reflects the purpose of the proposed amendment." *Id*. (citation omitted). It found in that case, "the title language describes exactly the purpose" of the proposal. *Id*. ("Regardless of the actual legal effect the proposed amendment will have, its language prohibits surface mining which 'may scar the land' in certain areas along the Front Range.") Again, the opposite is true here. The ballot title does not describe **exactly the purpose** of the proposal, but instead sets forth what Contestee contends will be the **practical effect** of the amendment if passed. Because the title

language is not fair and accurate, and because it replaces operative words and terms with words and terms that appear nowhere in the proposed amendment itself, this Court should strike and reset the title.

PROPOSED TRIAL PLAN

A. MOTION TO DISMISS.

Contestor asks the Court to resolve the Motion to Dismiss as an initial matter the morning of trial. Contestor believes that only limited, if any, oral argument is necessary, and asks for no more than 5 minutes per-side be allocated by the Court.

B. SUMMARY ADJUDICATION.

Contestor also believes that the Court can summarily decide this case without the need to present fact witnesses, and asks the Court to consider doing so at the start of trial. As the Supreme Court has noted, the role of the reviewing court is to examine the initiative and the title to determine if it is fair, clear, accurate and complete. *In re Title, Ballot Title and Submission Clause for 2011-2012 # 3*, 274 P.3d at 565. In this case, Contestor believes that the intent and plain meaning of the proposed amendment are clearly not captured by the ballot title, and, in fact, a reading of each suggests two different meanings—the proposed amendment setting forth its exact purpose in clear terms, and the title setting forth the perceived practical effect of the proposal.

C. SETTING OF TIME AND OPENING ARGUMENT.

If the Court declines summary adjudication, Contestor asks the Court to split the remaining time the Court has allocated for the trial between the parties to use as they deem necessary. Contestor intends to use only a short portion of its allocated time—roughly 5 minutes—to summarize its case through Opening Argument. Contestor believes its

arguments are set out clearly and concisely in this Trial Brief, but wants to make sure any questions the Court may have are addressed before witnesses are called.

D. <u>FACT WITNESSES FOR THE CONTESTOR</u>.

Contestor plans to call the following three fact witnesses, if necessary:

- **Ms. Kaye Fissinger:** Ms. Fissinger will testify that the proposed charter amendment offered by Our Broomfield is not offered in isolation, but reflects similar attempts to place restrictions on fracking to protect public health, welfare, and the environment, as well as the property of residents, in several communities along the Front Range, including Longmont, Loveland, Lafayette, Colorado Springs and others. She will generally discuss these efforts, including how oil & gas proponents have raised similar concerns in these communities about their property rights and excessive regulation as suggested in the ballot title here. She will further testify that in Longmont—the first community to pass a charter amendment to restrict fracking—the amendment, while under challenge in court, has not been found to be illegal.
- **Mr. Nate Troup:** Mr. Troup is a member of Our Broomfield, a listed author of the proposed amendment, and helped prepare the "Purpose" section of the proposed amendment. He will provide testimony regarding the drafting of the proposed amendment, and the true intent and meaning of the proposed amendment both as a whole and as to some of its specific language. While Contestor believes, as stated above, the proposed amendment language is plain and clear, the state Supreme Court has stated that in determining how to describe the true intent and meaning of a ballot proposal, statements by the proponent can be considered as that person "best understands the reasons for

initiating the change or addition" to the existing law. *In re Title, Ballot Title and Submission Clause for 1999-2000 # 227 and 228*, 3 P.3d 1, 5 (2000).

- **Hon. Patrick Quinn**: Mayor Quinn will be asked to testify regarding his, and the Contestee's, perceived concerns regarding the practical effect of the proposed Charter Amendment.

E. <u>CLOSING</u>.

Contestor requests a brief closing argument not to exceed 10 minutes.

Respectfully submitted this 3rd day of September, 2013.

/s/ Michael Ray Harris
Michael Ray Harris

/s/ James Daniel Leftwich
James Daniel Leftwich

Counsel for Plaintiff & Contestor
Our Broomfield

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of September, 2013, a true and correct copy of the foregoing Contestor Our Broomfield's Trial Brief was served via ICCES on the following counsel of record:

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