BEFORE THE OIL & GAS CONSERVATION COMMISSION OF THE STATE OF COLORADO

IN THE MATTER OF AN AMENDED APPLICATION BY 8 NORTH LLC FOR AN ORDER ESTABLISHING A 1,280-ACRE DRILLING AND SPACING UNIT FOR SECTIONS 35 AND 36, TOWNSHIP 1 NORTH, RANGE 69 WEST, 6TH P.M, FOR HORIZONTAL WELL DEVELOPMENT OF THE CODELL AND NIOBRARA FORMATIONS, WATTENBERG FIELD, BOULDER COUNTY, COLORADO	CAUSE NO. 407 DOCKET NO. 171000694 TYPE: SPACING

MOTION TO DISMISS PROTEST OF BOULDER COUNTY AND CITY OF LAFAYETTE

8 North LLC, Operator No. 10575 ("8 North" or "Applicant"), by and through its attorneys, Beatty & Wozniak, P.C., respectfully submits this Motion to Dismiss ("Motion") the Protest ("Protest") filed by the Board of County Commissioners of the County of Boulder ("Boulder") and the City Council for the City of Lafayette ("Lafayette") (collectively, the "Protestants") of 8 North's Amended Application ("Application") for an order establishing an approximate 1,280-acre drilling and spacing unit for Sections 35 and 36, Township 1 North, Range 69 West, 6th P.M. ("Application Lands"), and authorizing the drilling of up to one horizontal well within the proposed unit, for the production of oil, gas, and associated hydrocarbons from the Codell and Niobrara Formations.

C.R.C.P. 121 § 1-15 ¶ 8 Certification: Counsel for 8 North conferred in good faith with counsel for Protestants regarding this motion on December 6, 2017. Protestants oppose the relief sought herein.

I. Factual and Procedural Background

A. *Introduction*

1. Applicant is a limited liability company duly authorized to conduct business in the State of Colorado, and has registered as an operator with the Colorado Oil and Gas Conservation Commission ("Commission" or "COGCC").

2. Applicant is an Owner with a right to drill in the Application Lands.

3. On February 19, 1992 (amended August 20, 1993), the Commission entered Order No. 407-87, which, among other things, established 80-acre drilling and spacing units for the production of oil, gas and associated hydrocarbons from the Codell-Niobrara Formations.

B. *8 North's Application*

1. On August 31, 2017, amended September 19, 2017, 8 North, by its attorneys, filed a verified application in Docket No. 171000694 requesting an order to establish an approximate 1,280-acre drilling and spacing unit for the Application Lands and authorize the drilling of up to one horizontal well within the proposed unit, for the production of oil, gas, and associated hydrocarbons from the Codell and Niobrara Formations, with the treated intervals of the wellbore of any permitted wells to be located not less than 460 feet from the unit boundaries and not less than 150 feet from the treated interval of any well being drilled or producing from the same formation without exception being granted by the Director.

2. On October 6, 2017, 8 North, by its attorneys, filed with the Commission a written request to approve the Application based on the merits of the verified Application and the supporting exhibits. Sworn written testimony and exhibits were submitted in support of the Application.

3. On October 16, 2017, Boulder and Lafayette filed a joint Protest to 8 North's Application in Docket No. 171000964 alleging that (1) public issues raised by the Application reasonably relate to significant adverse impacts to the public health, safety, and welfare of Boulder and Lafayette's citizens; (2) the Applicant has not specified the proposed location of the well; (3) the requirements of Rule 508 have not been satisfied; (4) the Application fails to allege facts that satisfy the standard set by the Colorado Court of Appeals in *Martinez v. Colorado Oil and Gas Conserv. Comm'n*, 2017 COA 37 (March 23, 2017) ("*Martinez*"); and (5) granting the Application will result in overlapping spacing.

II. <u>Protestants fail to state a claim upon which relief can be granted</u>.

A. *Standard of Review*

Commission Rule 519 incorporates C.R.C.P. 12(b)(5), which states that dismissal of a complaint is appropriate where the complaint, here the Protest, fails to state a claim upon which relief can be granted.

In ruling on a C.R.C.P. 12(b)(5) motion to dismiss, "all averments of material fact must be accepted as true, and all of the allegations in the complaint must be viewed in the light most favorable to the plaintiff." *Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377, 386 (Colo. 2001). Motions to dismiss are "viewed with disfavor and are rarely granted under our 'notice pleadings.'" *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992).

To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not provide detailed factual allegations, and the court must accept factual allegations as true. *Id.* at 555. The plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Id.* Further, a plaintiff must allege enough facts to nudge her claims "across the line from conceivable to

plausible." *Id.* at 570. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Allegations that are mere "formulaic recitation of the elements" of a protest are not entitled to the assumption of truth. *Id.* at 681. *See also Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016) (Colorado Supreme Court adopting the plausibility standard set forth in *Twombly* and *Iqbal*).

The Commission has strictly applied the standards set forth in *Warne v. Hall* to protests. Indeed, in dismissing protests, Commission Staff has stated, "[t]he tenant that a Hearing Officer must accept as true all of the allegations contained in the protest is inapplicable to legal conclusions and only a protest that states a plausible claim for relief survives a motion to dismiss. While notice pleading is still the norm, and allegations can still be made on information and belief, the allegations must be factual. Conclusory allegations are not entitled to an assumption that they are true." *See* Hearing Officer Order Granting Motion to Dismiss Protest in Docket No. 160800342 (citing *Warne*, 373 P.3d at 9, 21-24, and 27).

These standards are equally applicable to Boulder and Lafayette's Protest. In other words, taking all of Protestants' factual allegations as true and drawing all inferences in favor of Protestants, the Protest fails to allege a plausible basis on which the Application could be denied. Rather, the Protest contains mere formulaic recitations and legal conclusions couched as factual allegations, and such requires that Protestants' Protest be dismissed as it contains only legal conclusions and fails to provide any factual basis on which the Application could be denied.

B. *Analysis*

The Colorado legislature, by enacting the Colorado Oil and Gas Conservation Act ("Act"), declared it to be in the public interest to "foster the responsible, balanced development, production, and utilization of the natural resources of oil and gas" and to protect against waste. C.R.S. §§ 34-60-102(1)(a)(I), (II). To accomplish this legislative goal, the Commission is granted broad authority to establish drilling units with multiple wells in order to prevent or assist in preventing waste and protect correlative rights. C.R.S. §§ 34-60-116(1), (4). Further, the Commission is obligated to protect the public and private interests against waste in the production and utilization of oil and gas and to safeguard, protect, and enforce the co-equal and correlative rights of owners and producers in a common source or pool. C.R.S. § 34-60-102(1)(a)(I)-(III). Each drilling and spacing unit established by the Commission, therefore, should prioritize the orderly development of the reservoir, and the protection of the interests of the parties within the lands affected by the Application, and each applicant must demonstrate that its proposed unit satisfies this threshold. In modern unconventional resource development, in order to protect correlative rights (that is the opportunity to obtain one's just and equitable share, § 34-60-103(4), C.R.S.), drilling and spacing units with multiple wells are necessary. Without such units and multi-well development, it is less economic, and in some cases uneconomic, to develop unconventional reservoirs like the Codell and Niobrara Formations. Thus, not only is the establishment of drilling and spacing units

necessary to protect correlative rights, but multi-well units are necessary to prevent waste.

Protestants have not offered any supportable factual or legal justification for their attempts to disrupt and delay 8 North's development of its interests. Furthermore, the minerals underlying the Application Lands should not be held captive simply because Protestants wish to delay and prevent development of the Application Lands. 8 North should be permitted to develop its mineral interest through the establishment of the drilling and spacing unit proposed by the Application, and Protestants' Protest should be dismissed.

i. Issues related to public health, safety, and welfare are not relevant to the establishment of drilling and spacing units and are not valid grounds for a protest.

The establishment of drilling and spacing units under Section 34-60-116, C.R.S., and Commission Rule 503.b.(1) entails a technical evaluation of downhole reservoir characteristics. Applications seeking the establishment of downhole drilling and spacing units implicate waste and the protection of correlative rights, not public health, safety, and welfare.

Protestants conflate the requirements necessary to form drilling and spacing units under Section 34-60-116, C.R.S., and Commission Rule 503.b.(1) with those necessary for securing Form 2A and Form 2 Permits. Subsequent to the submission of a Form 2A, Location Assessment Permit ("Form 2A") and/or a Form 2, Application for Permit to Drill ("Form 2"), the Director will make a completeness determination and provide the same to the filing operator. Rule 305.c. Upon receipt, the operator shall notify all relevant parties of their opportunity to submit written comments about the proposed Oil and Gas Location. *Id.* With regard to these comments, Rule 305.e. provides as follows:

> Upon the conclusion of the comment period ... the Director may attach technically feasible and economically practicable conditions of approval to the Form 2 or Form 2A as the Director deems necessary to implement the provisions of the Act or these rules pursuant to Commission staff analysis or to ***respond to legitimate public health, safety, or welfare concerns expressed during the comment period***.

Emphasis added. Similarly, Rule 303.j. provides as follows:

> The Director may withhold approval of any Application for Permit-to-Drill, Form 2, or Oil and Gas Location Assessment, Form 2A, for any proposed well or Oil and Gas Location when, based on information supplied in a written complaint submitted by any party with standing under Rule 522.a.(1), other than a local governmental designee, or by staff analysis, the Director has reasonable cause to believe the proposed well or Oil and Gas Location is in material violation of the Commission's rules, regulations, orders or statutes, or otherwise ***presents an imminent threat to public health, safety and welfare, including the environment, or a material threat to wildlife resources***.

Emphasis added.

Section 34-60-116 contains no requirements that an operator address concerns related to the public health, safety, and welfare, and for good reason. Under Section 34-60-116, C.R.S., and Commission Rule 503.b.(1), an operator must demonstrate that the proposed unit is not smaller than the maximum area to be drained by the proposed well(s) and will prevent waste, protect correlative rights, and increase the ultimate recovery of oil, gas, and associated hydrocarbons, and the proposed number of wells is necessary for efficient and economic development of the reservoir. It is largely a technical analysis of the downhole characteristics of the underlying pool of resources, and may include consideration of "the size and shape of drilling units previously established by the commission for the same formation in other areas of the same geologic basin." C.R.S. § 34-60-116(2). Establishment of a drilling and spacing unit involves consideration of "evidence as to the existence of a pool and the appropriate size and shape of the drilling unit to be applied thereto." *Id.* Requiring an operator address surface concerns related to the public health, safety, and welfare at the drilling and spacing unit formation stage is contrary to longstanding Commission precedent.[1]

Furthermore, Protestants' arguments regarding public health, safety, and welfare are mere formulaic recitations of the Act, albeit portions of the Act that *do not apply to applications seeking the establishment of drilling and spacing units.* They are unsupported, lack any justification, and are not a basis by which to deny 8 North's Application. Therefore, under the *Warne* standard, they must be dismissed.

Protestants argue that the "public issues raised by the Application reasonably relate to significant adverse impacts to the public health, safety and welfare of citizens," but provide no evidence of any kind as to how or why such an argument warrants consideration by the Commission. Protest at ¶¶ 3, 5, 7, and 9, pp. 1-2. Protestants' allegations are direct recitations of the Commission Rules,[2] are simply legal conclusions

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[1] This position was reaffirmed by the Commission at the October 30-31, 2017 COGCC Hearing, where the Commissioners repeatedly reiterated that concerns related to public health, safety, welfare, and the environment raised by the City and County of Broomfield and Adams County were not relevant to spacing or additional well applications, and should be raised during the Forms 2/2A processes. *See* October 30-31, 2017 COGCC Hearing, Docket Nos. 170700471, 170900535, 170900596, 170900598, and 171000749.

[2] Regarding a protest, Rule 509.a.(2) requires a protestant provide a description of the affected interest, including the following information:

> i. That the public issues raised by the application reasonably relate to potential significant adverse impacts to public health, safety and welfare, including the environment and wildlife resources, that are within the Commission's jurisdiction to remedy; and
>
> ii. That the potential impacts were not adequately addressed by the application or by the Proposed Plan; and
>
> iii. That the potential impacts are not adequately addressed by the rules and regulations of the Commission.

Protestants recite this language verbatim, without providing any argument or facts to such effect, further demonstrating a total and complete failure to aver any factual basis for its claim. *See* Protest at ¶ 3, p. 1-2.

not factual allegations, and provide no plausible claim for relief. Protestants provide no elaboration about this claim. Protestants do not explain how the proposed downhole spacing unit creates issues related to public health, safety, and welfare and fail to allege any causality between the Application and the "issues" they allege.

This contention is a bare allegation with no supportive facts or detail. The Commission has the authority to approve a drilling and spacing unit in order to prevent or to assist in preventing waste, to avoid the drilling of unnecessary wells, or to protect correlative rights. C.R.S. § 34-60-116. Protestants merely restate requirements of Rule 509.a.(2) without even the slightest modicum of detail as to how the establishment of a drilling and spacing unit poses a threat, risk, or issue whatsoever to surface concerns pertaining to public health, welfare, and safety. This is a bare recital of the Rules with no supporting allegations.

Protestants have failed to assert any facts that raise a right to relief above the speculative level. Protestants assertions regarding issues pertaining to public health, safety, and welfare are well beyond the purview of consideration by the Commission for the establishment of drilling and spacing units, are bare legal conclusions couched as facts, and therefore do not pass the *Warne* plausibility test. *Warne*, 373 P.3d at 595. 8 North respectfully requests that the Protest be dismissed as it should not be used to block efficient and economic oil and gas development. For these reasons, the Protest must be dismissed.

ii. Neither the Commission Rules nor Colorado statute requires an operator specify the precise surface location of the wells approved for development of the unit.

In their Protest, Protestants demonstrate a categorical misunderstanding and/or misinterpretation of the Act, and specifically § 34-60-116, C.R.S., and the process by which the Commission establishes drilling and spacing units. As further explained below, this process involves an evaluation of the subsurface reservoir characteristics to determine whether the proposed unit is not smaller than the maximum area to be drained by the proposed wells such that wells will efficiently and economically develop the underlying pool, while preventing waste and protecting correlative rights.

Contrary to Protestants' assertions, neither the Act nor Commission Rules require a drilling and spacing unit application, filed pursuant to Section 34-60-116, C.R.S., and Commission Rule 503.b.(1), to specify the precise location of the wellbores approved for development of the unit.

Protestants argue that the "Application has not specified the proposed location of the well as required by § 34-60-113(3) [sic], C.R.S."; however, this assertion is incorrect. Protest at ¶ 3, p. 1. Section 34-60-116(3), C.R.S., provides, in relevant part, that "[t]he ***order*** establishing drilling units shall permit only one well to be drilled and produced from the common source of supply on a drilling unit, and shall specify the location of the permitted well thereon." Emphasis added.

First, as the plain language of the statute makes clear, it is the order, not the application, that specifies the location of the permitted well. Thus, if Protestants believe that the Act requires each and every well that is approved under the Form 2 and 2A process must be specified in the spacing order, then Protestants' remedy is not to protest the application, but to appeal the Commission's order.

Second, the Application *does* request a specific well location in the form of unit boundary and interwell setbacks.[3] So even if the Commission were to find that (contrary to the plain meaning of the Act), well locations must be stated in *applications*, not *orders* (or both for that matter), the Application would comply with the Act. Protestants urge an incorrect interpretation of Section 34-60-116(3) and the context in which the provision was adopted. The subject provision refers to specifying what, in the vertical well development period, were referred to as drilling windows by identifying the distances from the unit boundaries where a well was to be located in order to protect correlative rights. Spacing orders approving spacing units for modern horizontal development of unconventional resources, while different, still satisfy the Act by specifying where the treated interval of the wellbore may be located by the designation of interwell and unit boundary setbacks. Such setback requirements mandate the location of the productive interval of the wellbores, much in the same manner that orders governing vertical well development specified the distances from the unit boundaries that resulted in the order specifying the well location thereon.

Third, Protestants' interpretation is contrary to longstanding Commission precedent and would upset and render void hundreds, if not thousands, of Commission orders approving horizontal well development in the Wattenberg Field.[4] To that end, the Commission has explicitly stated that orders establishing drilling and spacing units are not required to include exact legal descriptions for or establish surface locations for wells planned within the unit. *See* October 30-31, 2017 COGCC Hearing, Docket Nos. 170700471, 170900535, 170900596, 170900598, 170900601, 170900602, 170900603, 170900605, 171000479, 171000749, and 171000752.

Therefore, Protestants' assertions that 8 North is required to specify surface locations in its Application to establish a drilling and spacing unit should be dismissed as Protestants have failed to state a claim upon which relief may be granted.

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[3] The Application states that for "any permitted wells to be drilled under this Application, the treated intervals of the wellbore should be not less than 460 feet from the unit boundaries with an inter-well setback of not less than 150 feet from the treated interval of a well producing from the Codell and Niobrara Formations, without exception being granted by the Director."

[4] The same holds true for Protestants' final argument that granting the Application will result in overlapping spacing units. The Commission has on countless occasions granted applications designating horizontal drilling and spacing units that overlap with either other vertical or horizontal spacing orders. It is well understood that establishment of drilling and spacing units in this manner prevents waste and is necessary for efficient and economic development of the reservoir.

iii. Commission Rule 508 does not apply to the Application and arguments related thereto should be dismissed.

The Application does not specify well site locations nor will approval of the Application automatically result in more than one well site or multi-well site per forty-acre quarter-quarter section. Therefore, the well site threshold necessary to trigger the requirements of Rule 508 has not been met and Rule 508 does not apply to the Application. All references thereto are irrelevant and should be dismissed.

As stated in the Rule, "[t]he provisions of Rule 508 ***only apply*** to applications that would result in more than one (1) well site or multi-wellsite" per quarter-quarter section "or that request approval for additional wells that ***would result*** in more than one (1) well site or multi-well site" per quarter-quarter. Rule 508.a. (emphasis added).

As with their argument regarding specification of surface locations, Protestants incorrectly cite to rules intended to address the implications of vertical well development. Rule 508 was promulgated in 1998, more than a decade prior to the prolific use of horizontal well development and multi-well, pad drilling techniques. Unlike the era of vertical development, and consistent with current technology and industry practice, 8 North will use multi-well pads to consolidate wells to centralized locations.

Regardless, the rule is specific to when Local Public Forums are appropriate and the relevant metric is the number of well *sites* per nominal governmental quarter-quarter, not the number of *wells* proposed per quarter-quarter. The Application does not address well site locations. *See* discussion, *supra*. Thus, there is nothing in the Application which would trigger application of Rule 508. Moreover, because 8 North (or any other operator for that matter) may develop the proposed unit and planned wells from a single, multi-well site in a quarter-quarter section, Rule 508 is inapplicable to the relief requested in 8 North's Application. This premise is not untested. At the September 11-12, 2017 COGCC Hearing, the Commission denied the request of a local jurisdiction for a Rule 508 Local Public Forum on applications seeking to establish a drilling and spacing unit and for additional wells on the basis that Rule 508 did not apply. *See* September 11-12, 2017 COGCC Hearing Minutes at p. 9.

The Application does not specify well sites or surface locations. Moreover, the drilling unit and the proposed wells therein can be drilled from a single multi-well site in a quarter-quarter section. Therefore, Rule 508 does not apply and any reference thereto is irrelevant and should be dismissed.

iv. The *Martinez* decision does not create a standard with which the Application must comply and arguments to that extent lack merit and should be dismissed.

Protestants broadly assert that the "Application fails to allege facts that satisfy the health, safety and welfare standard set by" *Martinez*. See Protest at ¶ 9, p. 2. At best,

this is an improper understanding of the law. The *Martinez* decision has been stayed and does not constitute binding precedent.

With the *Martinez* decision, and consistent with Colorado Appellate Rules, the Court issued a mandate with a copy of the judgement, which provides that "[f]iling a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition." *Martinez*, p. 30; *see* C.A.R. 41. At the May 1-2, 2017 COGCC Hearing, the Commission unanimously directed the Office of the Attorney General to file a petition of certiorari to the Colorado Supreme Court to appeal the decision of the Colorado Court of Appeals in *Martinez*. *See* May 1-2, 2017 COGCC Hearing Minutes at p. 10. Such petition for certiorari was, in fact, filed on May 18, 2017. *See* audio of July 24-25, 2017 COGCC Hearing, at 19:55, available online at https://www.youtube.com/watch?v=L-PTX5Q2vDE&index=8&list=PLpwAEXLpeKyfmAi7_rlEutylVsh6fHzo7, last accessed on December 6, 2017. Thus, the *Martinez* decision, and therefore any binding, substantive law therein, is stayed, and Protestants' arguments in this regard are meritless and should be dismissed.

III. Conclusion

Protestants' Protest fails to state a claim upon which relief may be granted and should be dismissed as Protestants fail to provide enough facts to nudge their claims "across the line from conceivable to plausible." Despite Protestants' recitation of Rule 509, Protestants fail to provide any facts to support their conclusory statements that approval of 8 North's Application will result in "public issues" that "reasonably relate to significant adverse impacts to the public health, safety and welfare of citizens." To that end, Protestants' claims regarding issues of public health, safety, and welfare are merely formulaic recitations of the Rules with no supporting facts and fail the *Warne* plausibility standard. Furthermore, Protestants' assertions pertaining to the identification of surface locations and overlapping spacing are not founded in the Rules or governing statutes and are a misunderstanding of the necessary requirements for establishing a drilling and spacing unit under Section 34-60-116, C.R.S., and Commission Rule 503.b.(1). Similarly, references to Rule 508 are wholly improper and irrelevant as Rule 508 is not triggered. Finally, because *Martinez* is not binding precedent, it has no applicability to the matters brought forth in the Application. Therefore, 8 North respectfully requests that the Commission dismiss the Protest jointly filed by Boulder and Lafayette.

WHEREFORE, Applicant respectfully requests the following relief:

A. *Relief Sought:*

1. That the Commission dismiss the Protest, as Protestants have failed to state a claim up on which relief can be granted.

2. For such other findings and orders as the Commission may deem proper or advisable in the premises.

3. Applicant requests that no further testimony, exhibits, arguments, or pleadings be allowed from Protestants in Docket No. 171000694; and for such other relief as the Commission finds just and proper.

DATED this 6th day of December, 2017.

Respectfully submitted,

8 North LLC

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that, on December 6, 2017, Beatty & Wozniak, P.C. caused *8 North's Motion to Dismiss Protest of Boulder County and City of Lafayette* was served to the following as noted below:

VIA EMAIL AND COURIER TO:
Colorado Oil and Gas Conservation Commission
ATTN: James Rouse
1120 Lincoln Street, Suite 810
Denver, CO 80203
James.Rouse@state.co.us

VIA EMAIL AND BY U.S. MAIL TO:
David Hughes
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Jeffrey Robbins
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BEFORE THE OIL & GAS CONSERVATION COMMISSION OF THE STATE OF COLORADO

IN THE MATTER OF AN AMENDED APPLICATION BY 8 NORTH LLC FOR AN ORDER ESTABLISHING A 2,720-ACRE DRILLING AND SPACING UNIT FOR SECTIONS 13, 14, 23, AND 24, TOWNSHIP 2 NORTH, RANGE 69 WEST, 6TH P.M. AND SECTION 18, TOWNSHIP 2 NORTH, RANGE 68 WEST, 6TH P.M, FOR HORIZONTAL WELL DEVELOPMENT OF THE CODELL AND NIOBRARA FORMATIONS, WATTENBERG FIELD, BOULDER AND WELD COUNTIES, COLORADO	CAUSE NO. 407 DOCKET NO. 171000695 TYPE: SPACING

MOTION TO DISMISS PROTEST OF BOULDER COUNTY

8 North LLC, Operator No. 10575 ("8 North" or "Applicant"), by and through its attorneys, Beatty & Wozniak, P.C., respectfully submits this Motion to Dismiss ("Motion") the Protest ("Protest") filed by the Board of County Commissioners of the County of Boulder ("Boulder" or "Protestant") of 8 North's Amended Application ("Application") for an order establishing an approximate 2,720-acre drilling and spacing unit for Sections 13, 14, 23, and 24, Township 2 North, Range 69 West, 6th P.M. ("Application Lands"), and authorizing the drilling of up to one horizontal well within the proposed unit, for the production of oil, gas, and associated hydrocarbons from the Codell and Niobrara Formations.

C.R.C.P. 121 § 1-15 ¶ 8 Certification: Counsel for 8 North conferred in good faith with counsel for Boulder regarding this motion on December 6, 2017. Boulder opposes the relief sought herein.

I. Factual and Procedural Background

A. *Introduction*

1. Applicant is a limited liability company duly authorized to conduct business in the State of Colorado, and has registered as an operator with the Colorado Oil and Gas Conservation Commission ("Commission").

2. Applicant is an Owner with a right to drill in the Application Lands

3. On February 19, 1992 (amended August 20, 1993), the Commission entered Order No. 407-87, which, among other things, established 80-acre drilling and spacing units for the production of oil, gas and associated hydrocarbons from the Codell-Niobrara Formations.

4. On or about May 16, 2017, the Commission entered Order No. 407-405, which, among other things, established an approximate 320-acre wellbore spacing unit for the S½ of Section 18, Township 2 North, Range 68 West, 6th P.M., and authorized the drilling of one horizontal well within the unit (to accommodate the planned Williams #3A-19H Well), for production of oil, gas, and associated hydrocarbons from the Niobrara Formation, with the treated interval of the wellbore to be located no closer than 460 feet from the boundary of the unit, without exception being granted by the Director of the Commission. Portions of the Application Lands are subject to Order No. 407-405.

B. *8 North's Application*

1. On August 31, 2017, amended September 19, 2017, 8 North, by its attorneys, filed a verified application in Docket No. 171000695 requesting an order to establish an approximate 2,720-acre drilling and spacing unit for the Application Lands and authorize the drilling of up to one horizontal well within the proposed unit, for the production of oil, gas, and associated hydrocarbons from the Codell and Niobrara Formations, with the treated intervals of the wellbore of any permitted wells to be located not less than 460 feet from the unit boundaries and not less than 150 feet from the treated interval of any well being drilled or producing from the same formation without exception being granted by the Director.

2. On October 6, 2017, 8 North, by its attorneys, filed with the Commission a written request to approve the Application based on the merits of the verified Application and the supporting exhibits. Sworn written testimony and exhibits were submitted in support of the Application.

3. On October 16, 2017, Boulder filed a Protest to 8 North's Application in Docket No. 171000695 alleging that (1) public issues raised by the Application reasonably relate to significant adverse impacts to the public health, safety, and welfare of Boulder's citizens; (2) the Applicant has not specified the proposed location of the well; (3) the requirements of Rule 508 have not been satisfied; (4) the Application fails to allege facts that satisfy the standard set by the Colorado Court of Appeals in *Martinez v. Colorado Oil and Gas Conserv. Comm'n*, 2017 COA 37 (March 23, 2017) ("*Martinez*"); (5) granting the Application will result in overlapping spacing; and (6) current market conditions are not favorable and therefore not economically beneficial to move forward with development.

II. **Boulder fails to state a claim upon which relief can be granted.**

A. *Standard of Review*

Commission Rule 519 incorporates C.R.C.P. 12(b)(5), which states that dismissal of a complaint is appropriate where the complaint, here the Protest, fails to state a claim upon which relief can be granted.

In ruling on a C.R.C.P. 12(b)(5) motion to dismiss, "all averments of material fact must be accepted as true, and all of the allegations in the complaint must be viewed in

the light most favorable to the plaintiff." *Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377, 386 (Colo. 2001). Motions to dismiss are "viewed with disfavor and are rarely granted under our 'notice pleadings.'" *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992).

To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not provide detailed factual allegations, and the court must accept factual allegations as true. *Id.* at 555. The plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Id.* Further, a plaintiff must allege enough facts to nudge her claims "across the line from conceivable to plausible." *Id.* at 570. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Allegations that are mere "formulaic recitation of the elements" of a protest are not entitled to the assumption of truth. *Id.* at 681. *See also Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016) (Colorado Supreme Court adopting the plausibility standard set forth in *Twombly* and *Iqbal*).

The Commission has strictly applied the standards set forth in *Warne v. Hall* to protests. Indeed, in dismissing protests, Commission Staff has stated, "[t]he tenant that a Hearing Officer must accept as true all of the allegations contained in the protest is inapplicable to legal conclusions and only a protest that states a plausible claim for relief survives a motion to dismiss. While notice pleading is still the norm, and allegations can still be made on information and belief, the allegations must be factual. Conclusory allegations are not entitled to an assumption that they are true." *See* Hearing Officer Order Granting Motion to Dismiss Protest in Docket No. 160800342 (citing *Warne*, 373 P.3d at 9, 21-24, and 27).

These standards are equally applicable to Boulder's Protest. In other words, taking all of Boulder's factual allegations as true and drawing all inferences in favor of Boulder, the Protest fails to allege a plausible basis on which the Application could be denied. Rather, the Protest contains mere formulaic recitations and legal conclusions couched as factual allegations, and such requires that Boulder's Protest be dismissed as it contains only legal conclusions and fails to provide any factual basis on which the Application could be denied.

B. *Analysis*

The Colorado legislature, by enacting the Colorado Oil and Gas Conservation Act ("Act"), declared it to be in the public interest to "foster the responsible, balanced development, production, and utilization of the natural resources of oil and gas" and to protect against waste. C.R.S. §§ 34-60-102(1)(a)(I), (II). To accomplish this legislative goal, the Commission is granted broad authority to establish drilling units with multiple wells in order to prevent or assist in preventing waste and protect correlative rights. C.R.S. §§ 34-60-116(1), (4). Further, the Commission is obligated to protect the public and private interests against waste in the production and utilization of oil and gas and to safeguard, protect, and enforce the co-equal and correlative rights of owners and

producers in a common source or pool. C.R.S. § 34-60-102(1)(a)(I)-(III). Each drilling and spacing unit established by the Commission, therefore, should prioritize the orderly development of the reservoir, and the protection of the interests of the parties within the lands affected by the Application, and each applicant must demonstrate that its proposed unit satisfies this threshold. In modern unconventional resource development, in order to protect correlative rights (that is the opportunity to obtain one's just and equitable share, § 34-60-103(4), C.R.S.), drilling and spacing units with multiple wells are necessary. Without such units and multi-well development, it is less economic, and in some cases uneconomic, to develop unconventional reservoirs like the Codell and Niobrara Formations. Thus, not only is the establishment of drilling and spacing units necessary to protect correlative rights, but multi-well units are necessary to prevent waste.

Boulder has not offered any supportable factual or legal justification for its attempts to disrupt and delay 8 North's development of its interests. Furthermore, the minerals underlying the Application Lands should not be held captive simply because Boulder wishes to delay and prevent development of the Application Lands. 8 North should be permitted to develop its mineral interest through the establishment of the drilling and spacing unit proposed by the Application, and Boulder's Protest should be dismissed.

i. Issues related to public health, safety, and welfare are not relevant to the establishment of drilling and spacing units and are not valid grounds for a protest.

The establishment of drilling and spacing units under Section 34-60-116, C.R.S., and Commission Rule 503.b.(1) entails a technical evaluation of downhole reservoir characteristics. Complaints and objections related to the public health, safety, and welfare are specifically reserved for the comment period for permit and location applications.

Boulder demonstrates a lack of understanding of the requirements necessary to form drilling and spacing units under Section 34-60-116, C.R.S., and Commission Rule 503.b.(1) versus those necessary for securing Form 2A and Form 2 Permits. Subsequent to the submission of a Form 2A, Location Assessment Permit ("Form 2A") and/or a Form 2, Application for Permit to Drill ("Form 2"), the Director will make a completeness determination and provide the same to the filing operator. Rule 305.c. Upon receipt, the operator shall notify all relevant parties of their opportunity to submit written comments about the proposed Oil and Gas Location. *Id.* With regard to these comments, Rule 305.e. provides as follows:

> Upon the conclusion of the comment period ... the Director may attach technically feasible and economically practicable conditions of approval to the Form 2 or Form 2A as the Director deems necessary to implement the provisions of the Act or these rules pursuant to Commission staff analysis or to ***respond to legitimate public health, safety, or welfare concerns expressed during the comment period***.

Emphasis added. Similarly, Rule 303.j. provides as follows:

> The Director may withhold approval of any Application for Permit-to-Drill, Form 2, or Oil and Gas Location Assessment, Form 2A, for any proposed well or Oil and Gas Location when, based on information supplied in a written complaint submitted by any party with standing under Rule 522.a.(1), other than a local governmental designee, or by staff analysis, the Director has reasonable cause to believe the proposed well or Oil and Gas Location is in material violation of the Commission's rules, regulations, orders or statutes, or otherwise ***presents an imminent threat to public health, safety and welfare, including the environment, or a material threat to wildlife resources***.

Emphasis added.

Section 34-60-116 contains no requirements that an operator address concerns related to the public health, safety, and welfare, and for good reason. Under Section 34-60-116, C.R.S., and Commission Rule 503.b.(1), an operator must demonstrate that the proposed unit is not smaller than the maximum area to be drained by the proposed well(s) and will prevent waste, protect correlative rights, and increase the ultimate recovery of oil, gas, and associated hydrocarbons, and the proposed number of wells is necessary for efficient and economic development of the reservoir. It is largely a technical analysis of the downhole characteristics of the underlying pool of resources, and may include consideration of "the size and shape of drilling units previously established by the commission for the same formation in other areas of the same geologic basin." C.R.S. § 34-60-116(2). Establishment of a drilling and spacing unit involves consideration of "evidence as to the existence of a pool and the appropriate size and shape of the drilling unit to be applied thereto." *Id.* Requiring an operator address surface concerns related to the public health, safety, and welfare at the drilling and spacing unit formation stage is contrary to longstanding Commission precedent.[1]

Furthermore, Boulder's arguments regarding public health, safety, and welfare are unsupported, lack any justification, and are not a basis by which to deny 8 North's Application and should be dismissed.

Boulder argues that the "public issues raised by the Application reasonably relate to significant adverse impacts to the public health, safety and welfare of citizens," but provides no evidence of any kind as to how or why such an argument warrants consideration by the Commission. Protest at ¶¶ 3, 5, 7, and 9, pp. 1-2. Boulder's allegations are direct recitations of the Commission Rules,[2] are simply legal conclusions

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[1] This position was reaffirmed by the Commission at the October 30-31, 2017 COGCC Hearing, where the Commissioners repeatedly reiterated that concerns related to public health, safety, welfare, and the environment raised by the City and County of Broomfield and Adams County were not relevant to spacing or additional well applications, and should be raised during the Forms 2/2A processes. *See* October 30-31, 2017 COGCC Hearing, Docket Nos. 170700471, 170900535, 170900596, 170900598, and 171000749.

[2] Regarding a protest, Rule 509.a.(2) requires a protestant provide a description of the affected interest, including the following information:

> i. That the public issues raised by the application reasonably relate to potential significant adverse impacts to public health, safety and welfare, including the environment and wildlife resources, that are within the Commission's jurisdiction to remedy; and

not factual allegations, and provide no plausible claim for relief. Boulder provides no elaboration about this claim. Boulder does not explain how the proposed downhole spacing unit creates issues related to public health, safety, and welfare and fails to allege any causality between the Application and the "issues" they allege.

This contention is a bare allegation with no supportive facts or detail. The Commission has the authority to approve a drilling and spacing unit in order to prevent or to assist in preventing waste, to avoid the drilling of unnecessary wells, or to protect correlative rights. C.R.S. § 34-60-116. Boulder merely restates requirements of Rule 509.a.(2) without even the slightest modicum of detail as to how the establishment of a drilling and spacing unit poses a threat, risk, or issue whatsoever to surface concerns pertaining to public health, welfare, and safety. This is a bare recital of the Rules with no supporting allegations.

Boulder has failed to assert any facts that raise a right to relief above the speculative level. Boulder's assertions regarding issues pertaining to public health, safety, and welfare are well beyond the purview of consideration by the Commission for the establishment of drilling and spacing units, are bare legal conclusions couched as facts, and therefore do not pass the *Warne* plausibility test. *Warne*, 373 P.3d at 595. 8 North respectfully requests that the Protest be dismissed as it should not be used to block efficient and economic oil and gas development. For these reasons, the Protest must be dismissed.

ii. Neither the Commission Rules nor Colorado statute requires an operator specify the precise surface location of the wells approved for development of the unit.

In its Protest, Boulder demonstrates a categorical misunderstanding and/or misinterpretation of the Act, and specifically § 34-60-116, C.R.S., and the process by which the Commission establishes drilling and spacing units. As further explained below, this process involves an evaluation of the subsurface reservoir characteristics to determine whether the proposed unit is not smaller than the maximum area to be drained by the proposed wells such that wells will efficiently and economically develop the underlying pool, while preventing waste and protecting correlative rights.

Contrary to Boulder's assertions, neither the Act nor Commission Rules require a drilling and spacing unit application, filed pursuant to Section 34-60-116, C.R.S., and Commission Rule 503.b.(1), specify the precise location of the wellbores approved for development of the unit.

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ii. That the potential impacts were not adequately addressed by the application or by the Proposed Plan; and

iii. That the potential impacts are not adequately addressed by the rules and regulations of the Commission.

Boulder recites this language verbatim, without providing any argument or facts to such effect, further demonstrating a total and complete failure to aver any factual basis for its claim. *See* Protest at ¶ 2, p. 1-2.

Boulder argues that the "Application has not specified the proposed location of the well as required by § 34-60-113(3) [sic], C.R.S."; however, this assertion is incorrect. Protest at ¶ 3, p. 1. Section 34-60-116(4), C.R.S., provides, in relevant part, that "[t]he ***order*** establishing drilling units shall permit only one well to be drilled and produced from the common source of supply on a drilling unit, and shall specify the location of the permitted well thereon." Emphasis added.

First, as the plain language of the statute makes clear, it is the order, not the application, that specifies the location of the permitted well. Thus, if Boulder believes that the Act requires each and every well that is approved under the Form 2 and 2A process must be specified in the spacing order, then Boulder's remedy is not to protest the application, but to appeal the Commission's order.

Second, the Application *does* request a specific well location in the form of unit boundary and interwell setbacks.[3] So even if the Commission were to find that (contrary to the plain meaning of the Act), well locations must be stated in *applications*, not *orders* (or both for that matter), the Application would comply with the Act. Boulder urges an incorrect interpretation of Section 34-60-116(4) and the context in which the provision was adopted. The subject provision refers to specifying what, in the vertical well development period, were referred to as drilling windows by identifying the distances from the unit boundaries where a well was to be located in order to protect correlative rights. Spacing orders approving spacing units for modern horizontal development of unconventional resources, while different, still satisfy the Act by specifying where treated interval of the wellbore may be located by the designation of interwell and unit boundary setbacks. Such setback requirements mandate the location of the productive interval of the wellbores, much in the same manner that orders governing vertical well development specified the distances from the unit boundaries that resulted in the order specifying the well location thereon.

Third, Boulder's interpretation is contrary to longstanding Commission precedent and would upset and render void hundreds, if not thousands, of Commission orders approving horizontal well development in the Wattenberg Field.[4] To that end, the Commission has explicitly stated that orders establishing drilling and spacing units are not required to include exact legal descriptions for or establish surface locations for wells planned within the unit. *See* October 30-31, 2017 COGCC Hearing, Docket Nos.

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[3] The Application states that for "any permitted wells to be drilled under this Application, the treated intervals of the wellbore should be not less than 460 feet from the unit boundaries with an inter-well setback of not less than 150 feet from the treated interval of a well producing from the Codell and Niobrara Formations, without exception being granted by the Director."

[4] The same holds true for Boulder's fourth argument that granting the Application will result in overlapping spacing units. The Commission has on countless occasions granted applications designating horizontal drilling and spacing units that overlap with either other vertical or horizontal spacing orders. Boulder's own Protest demonstrates this very point as it acknowledges that the lands are *currently* subject to Order Nos. 407-87 (vertical spacing) and 407-405 (horizontal spacing). It is well understood that establishment of drilling and spacing units in this manner prevents waste and is necessary for efficient and economic development of the reservoir.

170700471, 170900535, 170900596, 170900598, 170900601, 170900602, 170900603, 170900605, 171000479, 171000749, and 171000752.

Therefore, Boulder's assertions that 8 North is required to specify surface locations in its Application to establish a drilling and spacing unit should be dismissed as Boulder has failed to state a claim upon which relief may be granted.

iii. Commission Rule 508 does not apply to the Application and arguments related thereto should be dismissed.

The Application does not specify well site locations nor will approval of the Application automatically result in more than one well site or multi-well site per forty-acre quarter-quarter section. Therefore, the multi-well threshold necessary to trigger the requirements of Rule 508 has not been met, and Rule 508 does not apply to the Application. All references thereto are irrelevant and should be dismissed.

As stated in the Rule, "[t]he provisions of Rule 508 ***only apply*** to applications that would result in more than one (1) well site or multi-wellsite" per quarter-quarter section "or that request approval for additional wells that would result in more than one (1) well site or multi-well site" per quarter-quarter. Rule 508.a. (emphasis added).

As with its argument regarding specification of surface locations, Boulder incorrectly cites to rules intended to address the implications of vertical well development. Rule 508 was promulgated in 1998, more than a decade prior to the prolific use of horizontal well development and multi-well, pad drilling techniques. Unlike in the era of vertical development, and consistent with current technology and industry practice, 8 North will use multi-well pads to consolidate wells to centralized locations.

Regardless, the rule is specific to when Local Public Forums are appropriate and the relevant metric is the number of well *sites* per nominal governmental quarter-quarter, not the number of *wells* proposed per quarter-quarter. The Application does not address well site locations. *See* discussion, *supra*. Thus, there is nothing in the Application which would trigger application of Rule 508. Moreover, because 8 North (or any other operator for that matter) may develop the proposed unit and planned wells from a single, multi-well site in a quarter-quarter section, Rule 508 is inapplicable to the relief requested in 8 North's Application. This premise is not untested. At the September 11-12, 2017 COGCC Hearing, the Commission denied the request of a local jurisdiction for a Rule 508 Local Public Forum on applications seeking to establish a drilling and spacing unit and for additional wells on the basis that Rule 508 did not apply. *See* September 11-12, 2017 COGCC Hearing Minutes at p. 9.

The Application does not specify well sites or surface locations. Moreover, the drilling unit and the proposed wells therein can be drilled from a single, multi-well site in a quarter-quarter section. Therefore, Rule 508 does not apply and any reference thereto is irrelevant and should be dismissed.

iv. The *Martinez* decision does not create a standard with which the Application must comply and arguments to that extent lack merit and should be dismissed.

Boulder broadly asserts that the "Application fails to allege facts that satisfy the health, safety and welfare standard set by" *Martinez*. See Protest at ¶ 8, p. 2. At best, this is an improper understanding of the law. The *Martinez* decision has been stayed and does not constitute binding precedent.

With the *Martinez* decision, and consistent with Colorado Appellate Rules, the Court issued a mandate with a copy of the judgement, which provides that "[f]iling a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition." *Martinez*, p. 30; *see* C.A.R. 41. At the May 1-2, 2017 COGCC Hearing, the Commission unanimously directed the Office of the Attorney General to file a petition of certiorari to the Colorado Supreme Court to appeal the decision of the Colorado Court of Appeals in *Martinez*. *See* May 1-2, 2017 COGCC Hearing Minutes at p. 10. Thus, the *Martinez* decision, and therefore any binding, substantive law therein, is stayed, and Boulder's arguments in this regard are meritless and should be dismissed.

v. Boulder's arguments regarding market conditions wholly lack substance and should be dismissed.

Lastly, Boulder's assertions that current market conditions do not warrant development at this time are not a valid basis for protest. Boulder's Protest at ¶ 10 p. 3. First and foremost, Boulder provides no evidence or basis for its assertion that market conditions are not favorable. It simply states that current market conditions are "widely recognized." *Id.* This is a conclusory allegation and is not entitled to an assumption of truth. Boulder does not provide any supporting facts regarding market conditions; that is, any factual allegations which, if true, would demonstrate that market conditions are unfavorable. For example, Boulder could have alleged facts about its ability to obtain acceptable lease bonuses. Instead, Boulder offers a bare, unsupported *conclusion* about market conditions and dogmatically expects the Commission to simply accept its conclusions as truth.

Furthermore, Boulder's conclusory statement is not only unsupported, but is currently unsupportable. The Commission's own October 30, 2017 Staff Report shows clear upward trends for the statewide rig count, APDs filed, well spuds, and active wells. Additionally, current market conditions are improved from the price environment in which 8 North's economics is based as provided in its Rule 511 Testimony, which resulted in favorable economics at the time.

Finally, 8 North's correlative rights are entitled to protection under the Act; therefore, 8 North has the right to produce its mineral interests underlying the Application Lands under current market conditions if it can demonstrate to the Commission that its proposed development is efficient and economic. 8 North has

made such a showing for single-well development, and Boulder's arguments to the contrary should be dismissed

III. Conclusion

Boulder's Protest fails to state a claim upon which relief may be granted and should be dismissed as Boulder fails to provide enough facts to nudge its claims "across the line from conceivable to plausible." Despite Boulder's recitation of Rule 509, Boulder fails to provide any facts to support its conclusory statements that approval of 8 North's Application will result in "public issues" that "reasonably relate to significant adverse impacts to the public health, safety and welfare of citizens." To that end, Boulder's claims regarding issues of public health, safety, and welfare are merely formulaic recitations of the Rules with no supporting facts and fail the *Warne* plausibility standard. Furthermore, Boulder's assertions pertaining to the identification of surface locations and overlapping spacing are not founded in the Rules or governing statutes and are a misunderstanding of the necessary requirements for establishing a drilling and spacing unit under Section 34-60-116, C.R.S., and Commission Rule 503.b.(1). Similarly, references to Rule 508 are wholly improper and irrelevant as Rule 508 is not triggered. Additionally, because *Martinez* is not binding precedent, it has no applicability to the matters brought forth in the Application. Finally, 8 North has demonstrated that its proposed development is both efficient and economic, and Boulder has failed to state a claim up on which relief may be granted regarding market conditions. Therefore, 8 North respectfully requests that the Commission dismiss the Protest filed by Boulder.

WHEREFORE, Applicant respectfully requests the following relief:

A. *Relief Sought:*

1. That the Commission dismiss the Protest, as Protestant has failed to state a claim up on which relief can be granted.

2. For such other findings and orders as the Commission may deem proper or advisable in the premises.

3. Applicant requests that no further testimony, exhibits, arguments, or pleadings be allowed from Protestant in Docket No. 171000695; and for such other relief as the Commission finds just and proper.

DATED this 6th day of December, 2017.

Respectfully submitted,

8 North LLC

By: _____

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Address of Movant:
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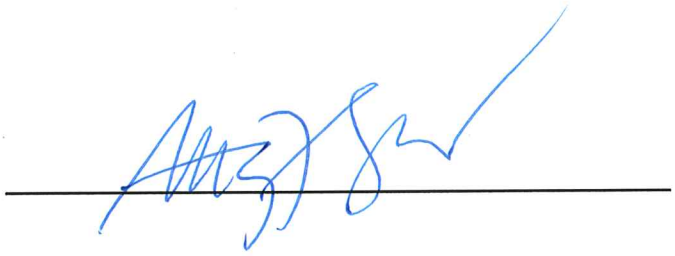
ATTN: Allyson Vistica Boies
370 17th Street, Suite 5300
Denver, CO 80202

CERTIFICATE OF SERVICE

I hereby certify that, on December 6, 2017, Beatty & Wozniak, P.C. caused *8 North's Motion to Dismiss Protest of Boulder County* was served to the following as noted below:

VIA EMAIL AND COURIER TO:
Colorado Oil and Gas Conservation Commission
ATTN: James Rouse
1120 Lincoln Street, Suite 810
Denver, CO 80203
James.Rouse@state.co.us

VIA EMAIL AND BY U.S. MAIL TO:
David Hughes
Katherine A. Burke
Attorneys for Boulder County
dhughes@bouldercounty.org
kaburke@bouldercounty.org



BEFORE THE OIL & GAS CONSERVATION COMMISSION OF THE STATE OF COLORADO

IN THE MATTER OF AN APPLICATION BY 8 NORTH LLC FOR AN ORDER AUTHORIZING NINETEEN (19) ADDITIONAL HORIZONTAL WELLS, FOR A TOTAL OF TWENTY (20) HORIZONTAL WELLS, FOR PRODUCTION FROM THE CODELL AND NIOBRARA FORMATIONS IN AN APPROXIMATE 1,280-ACRE DRILLING AND SPACING UNIT PROPOSED FOR SECTIONS 35 AND 36, TOWNSHIP 1 NORTH, RANGE 69 WEST, 6TH P.M, WATTENBERG FIELD, BOULDER COUNTY, COLORADO	CAUSE NO. 407 DOCKET NO. 171200773 TYPE: DENSITY

MOTION TO DISMISS PROTEST OF BOULDER COUNTY AND CITY OF LAFAYETTE

8 North LLC, Operator No. 10575 ("8 North" or "Applicant"), by and through its attorneys, Beatty & Wozniak, P.C., respectfully submits this Motion to Dismiss ("Motion") the Protest ("Protest") filed by the Board of County Commissioners of the County of Boulder ("Boulder") and the City Council for the City of Lafayette ("Lafayette") (collectively, the "Protestants") of 8 North's Application ("Application") for an order authorizing nineteen (19) additional horizontal wells, for a total of twenty (20) horizontal wells, for the production from the Codell and Niobrara Formations, in an approximate 1,280-acre drilling and spacing unit proposed for Sections 35 and 36, Township 1 North, Range 69 West, 6th P.M. ("Application Lands").

C.R.C.P. 121 § 1-15 ¶ 8 Certification: Counsel for 8 North conferred in good faith with counsel for Protestants regarding this motion on December 6, 2017. Protestants oppose the relief sought herein.

I. Factual and Procedural Background

A. *Introduction*

1. Applicant is a limited liability company duly authorized to conduct business in the State of Colorado, and has registered as an operator with the Colorado Oil and Gas Conservation Commission ("Commission").

2. Applicant is an Owner with a right to drill in the Application Lands

3. On February 19, 1992 (amended August 20, 1993), the Commission entered Order No. 407-87, which, among other things, established 80-acre drilling and spacing units for the production of oil, gas and associated hydrocarbons from the Codell-Niobrara Formations.

B. *8 North's Application*

1. On September 19, 2017, 8 North, by its attorneys, filed a verified application in Docket No. 171200773 requesting an order to authorize the drilling of up to twenty (20) horizontal wells within an approximate 1,280-acre drilling and spacing unit proposed for the Applications lands, for the production of oil, gas, and associated hydrocarbons from the Codell and Niobrara Formations, with the treated intervals of the wellbore of any permitted wells to be located not less than 460 feet from the unit boundaries and not less than 150 feet from the treated interval of any well being drilled or producing from the same formation without exception being granted by the Director, to be drilled from no more than three (3) multi-well pads on the surface of the drilling unit, or on adjacent lands with consent of the landowner, and the wellbores may enter the Codell and Niobrara Formations anywhere within the unit, without exception being granted by the Director.

2. On November 15, 2017, Boulder and Lafayette filed a joint Protest to 8 North's Application in Docket No. 171200773 alleging that (1) public issues raised by the Application reasonably relate to significant adverse impacts to the public health, safety, and welfare of Boulder and Lafayette's citizens; (2) the requirements of Rule 508 have not been satisfied; (3) the Application fails to allege facts that satisfy the standard set by the Colorado Court of Appeals in *Martinez v. Colorado Oil and Gas Conserv. Comm'n*, 2017 COA 37 (March 23, 2017) ("*Martinez*"); and (4) the Application is premature because the proposed unit for which the additional wells are being requested has not yet been established.

II. Protestants Fail to State a Claim Upon which Relief can be Granted.

A. *Standard of Review.*

Commission Rule 519 incorporates C.R.C.P. 12(b)(5), which states that dismissal of a complaint is appropriate where the complaint, here the Protest, fails to state a claim upon which relief can be granted.

In ruling on a C.R.C.P. 12(b)(5) motion to dismiss, "all averments of material fact must be accepted as true, and all of the allegations in the complaint must be viewed in the light most favorable to the plaintiff." *Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377, 386 (Colo. 2001). Motions to dismiss are "viewed with disfavor and are rarely granted under our 'notice pleadings.'" *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992).

To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not provide detailed factual allegations, and the court must accept factual allegations as true. *Id.* at 555. The plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Id.* Further, a plaintiff must allege enough facts to nudge her claims "across the line from conceivable to plausible." *Id.* at 570. Threadbare recitals of the elements of a cause of action,

supported by mere conclusory statements, do not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Allegations that are mere "formulaic recitation of the elements" of a protest are not entitled to the assumption of truth. *Id.* at 681. *See also Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016) (Colorado Supreme Court adopting the plausibility standard set forth in *Twombly* and *Iqbal*).

The Commission has strictly applied the standards set forth in *Warne v. Hall* to protests. Indeed, in dismissing protests, Commission Staff has stated, "[t]he tenant that a Hearing Officer must accept as true all of the allegations contained in the protest is inapplicable to legal conclusions and only a protest that states a plausible claim for relief survives a motion to dismiss. While notice pleading is still the norm, and allegations can still be made on information and belief, the allegations must be factual. Conclusory allegations are not entitled to an assumption that they are true." *See* Hearing Officer Order Granting Motion to Dismiss Protest in Docket No. 160800342 (citing *Warne*, 373 P.3d at 9, 21-24, and 27).

These standards are equally applicable to Boulder and Lafayette's Protest. In other words, taking all of Protestants' factual allegations as true and drawing all inferences in favor of Protestants, the Protest fails to allege a plausible basis on which the Application could be denied. Rather, the Protest contains mere formulaic recitations and legal conclusions couched as factual allegations, and such requires that Protestants' Protest be dismissed as it contains only legal conclusions and fails to provide any factual basis on which the Application could be denied.

B. *Analysis*

The Colorado legislature, by enacting the Colorado Oil and Gas Conservation Act ("Act"), declared it to be in the public interest to "foster the responsible, balanced development, production, and utilization of the natural resources of oil and gas" and to protect against waste. C.R.S. §§ 34-60-102(1)(a)(I), (II). To accomplish this legislative goal, the Commission is granted broad authority to establish drilling units with multiple wells in order to prevent or assist in preventing waste and protect correlative rights. C.R.S. §§ 34-60-116(1), (4). Further, the Commission is obligated to protect the public and private interests against waste in the production and utilization of oil and gas and to safeguard, protect, and enforce the co-equal and correlative rights of owners and producers in a common source or pool. C.R.S. § 34-60-102(1)(a)(I)-(III). Each drilling and spacing unit established by the Commission, therefore, should prioritize the orderly development of the reservoir, and the protection of the interests of the parties within the lands affected by the Application, and each applicant must demonstrate that its proposed unit satisfies this threshold. In modern unconventional resource development, in order to protect correlative rights (that is the opportunity to obtain one's just and equitable share, § 34-60-103(4), C.R.S.), drilling and spacing units with multiple wells are necessary. Without such units and multi-well development, it is less economic, and in some cases uneconomic, to develop unconventional reservoirs like the Codell and Niobrara Formations. Thus, not only is the establishment of drilling and spacing units necessary to protect correlative rights, but multi-well units are necessary to prevent waste.

Protestants have not offered any supportable factual or legal justification for their attempts to disrupt and delay 8 North's development of its interests. Furthermore, the minerals underlying the Application Lands should not be held captive simply because Protestants wish to delay and prevent development of the Application Lands. 8 North should be permitted to develop its mineral interest through the authorization of additional wells proposed by the Application, and Protestants' Protest should be dismissed.

i. Issues related to public health, safety, and welfare are not relevant in the authorization of additional wells and are not valid grounds for a protest.

The authorization of additional wells under Section 34-60-116, C.R.S., and Commission Rule 503.b.(1) entails a technical evaluation of downhole reservoir characteristics. Applications seeking the establishment of downhole drilling and spacing units implicate waste and the protection of correlative rights, not public health, safety, and welfare.

Protestants conflate the requirements necessary for the authorization of additional wells under Section 34-60-116, C.R.S., and Commission Rule 503.b.(1) with those necessary for securing Form 2A and Form 2 Permits. Subsequent to the submission of a Form 2A, Location Assessment Permit ("Form 2A") and/or a Form 2, Application for Permit to Drill ("Form 2"), the Director will make a completeness determination and provide the same to the filing operator. Rule 305.c. Upon receipt, the operator shall notify all relevant parties of their opportunity to submit written comments about the proposed Oil and Gas Location. *Id.* With regard to these comments, Rule 305.e. provides as follows:

> Upon the conclusion of the comment period ... the Director may attach technically feasible and economically practicable conditions of approval to the Form 2 or Form 2A as the Director deems necessary to implement the provisions of the Act or these rules pursuant to Commission staff analysis or to ***respond to legitimate public health, safety, or welfare concerns expressed during the comment period***.

Emphasis added. Similarly, Rule 303.j. provides as follows:

> The Director may withhold approval of any Application for Permit-to-Drill, Form 2, or Oil and Gas Location Assessment, Form 2A, for any proposed well or Oil and Gas Location when, based on information supplied in a written complaint submitted by any party with standing under Rule 522.a.(1), other than a local governmental designee, or by staff analysis, the Director has reasonable cause to believe the proposed well or Oil and Gas Location is in material violation of the Commission's rules, regulations, orders or statutes, or otherwise ***presents an imminent threat to public health, safety and welfare, including the environment, or a material threat to wildlife resources***.

Emphasis added.

Section 34-60-116 contains no requirements that an operator address concerns related to the public health, safety, and welfare, and for good reason. Under Section 34-60-116, C.R.S., and Commission Rule 503.b.(1), an operator must demonstrate that

the proposed unit is not smaller than the maximum area to be drained by the proposed wells and will prevent waste, protect correlative rights, and increase the ultimate recovery of oil, gas, and associated hydrocarbons, and the proposed number of wells is necessary for efficient and economic development of the reservoir. It is largely a technical analysis of the downhole characteristics of the underlying pool of resources. Protestant's interpretation is contrary to longstanding Commission precedent and would upset and render void hundreds, if not thousands, of Commission orders approving horizontal well development in the Wattenberg Field.[1]

Furthermore, Protestants' arguments regarding public health, safety, and welfare are mere formulaic recitations of the Act, albeit portions of the Act that *do not apply to applications seeking the establishment of drilling and spacing units*. They are unsupported, lack any justification, and are not a basis by which to deny 8 North's Application. Therefore, under the *Warne* standard, they must be dismissed.

Protestants argue that the "public issues raised by the Application reasonably relate to significant adverse impacts to the public health, safety and welfare of citizens," but provide no evidence of any kind as to how or why such an argument warrants consideration by the Commission. Protest at ¶¶ 3, 5, 7, and 9, pp. 1-2. Protestants' allegations are direct recitations of the Commission Rules,[2] are simply legal conclusions not factual allegations, and provide no plausible claim for relief. Protestants provide no elaboration about this claim. Protestants do not explain how the proposed number of additional wells creates issues related to public health, safety, and welfare and fail to allege any causality between the Application and the "issues" they allege.

This contention is a bare allegation with no supportive facts or detail. The Commission has the authority to approve additional wells in a drilling unit in order to prevent or to assist in preventing waste, to avoid the drilling of unnecessary wells, or to

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[1] This position was reaffirmed by the Commission at the October 30-31, 2017 COGCC Hearing, where the Commissioners repeatedly reiterated that concerns related to public health, safety, welfare, and the environment raised by the City and County of Broomfield and Adams County were not relevant to spacing or additional well applications, and should be raised during the Forms 2/2A processes. See October 30-31, 2017 COGCC Hearing, Docket Nos. 170700471, 170900535, 170900596, 170900598, and 171000749.

[2] Regarding a protest, Rule 509.a.(2) requires a protestant provide a description of the affected interest, including the following information:

> i. That the public issues raised by the application reasonably relate to potential significant adverse impacts to public health, safety and welfare, including the environment and wildlife resources, that are within the Commission's jurisdiction to remedy; and
>
> ii. That the potential impacts were not adequately addressed by the application or by the Proposed Plan; and
>
> iii. That the potential impacts are not adequately addressed by the rules and regulations of the Commission.

Protestants recite this language verbatim, without providing any argument or facts to such effect, further demonstrating a total and complete failure to aver any factual basis for its claim. *See* Protest at ¶ 3, p. 1-2.

protect correlative rights. C.R.S. § 34-60-116. Protestants merely re-state requirements of Rule 509.a.(2) without even the slightest modicum of detail as to how the authorization of additional wells poses a threat, risk, or issue whatsoever to surface concerns pertaining to public health, welfare, and safety. This is a bare recital of the Rules with no supporting allegations.

Protestants have failed to assert any facts that raise a right to relief above the speculative level. Protestants assertions regarding issues pertaining to public health, safety, and welfare are well beyond the purview of consideration by the Commission for the authorization of additional wells, are bare legal conclusions couched as facts, and therefore do not pass the *Warne* plausibility test. *Warne*, 373 P.3d at 595. 8 North respectfully requests that the Protest be dismissed as it should not be used to block efficient and economic oil and gas development. For these reasons, the Protest must be dismissed.

ii. Commission Rule 508 does not apply to the Application and arguments related thereto should be dismissed.

The Application does not specify well site locations nor will approval of the Application automatically result in more than one well site or multi-well site per forty-acre quarter-quarter section. Therefore, the multi-well threshold necessary to trigger the requirements of Rule 508 has not been met, and Rule 508 does not apply to the Application. All references thereto are irrelevant and should be dismissed.

As stated in the Rule, "[t]he provisions of Rule 508 ***only apply*** to applications that would result in more than one (1) well site or multi-wellsite" per quarter-quarter section "or that request approval for additional wells that would result in more than one (1) well site or multi-well site" per quarter-quarter. Rule 508.a. (emphasis added).

As with their argument regarding specification of surface locations, Protestants incorrectly cite to rules intended to address the implications of vertical well development. Rule 508 was promulgated in 1998, more than a decade prior to the prolific use of horizontal well development and multi-well, pad drilling techniques. Unlike in the era of vertical development, and consistent with current technology and industry practice, 8 North will use multi-well pads to consolidate wells to centralized locations.

Regardless, the rule is specific to when Local Public Forums are appropriate and the relevant metric is the number of well *sites* per nominal governmental quarter-quarter, not the number of *wells* proposed per quarter-quarter. The Application does not address well site locations. *See* discussion, *supra*. Thus, there is nothing in the Application which would trigger application of Rule 508. Moreover, because 8 North (or any other operator for that matter) may develop the proposed unit and planned wells from a single, multi-well site in a quarter-quarter section, Rule 508 is inapplicable to the relief requested in 8 North's Application. This premise is not untested. At the September 11-12, 2017 COGCC Hearing, the Commission denied the request of a local jurisdiction for a Rule 508 Local Public Forum on applications seeking to establish a

drilling and spacing unit and for additional wells on the basis that Rule 508 did not apply. *See* September 11-12, 2017 COGCC Hearing Minutes at p. 9.

The Application does not specify well sites or surface locations. Moreover, the drilling unit and the proposed wells therein can be drilled from a single, multi-well site in a quarter-quarter section. Therefore, Rule 508 does not apply and any reference thereto is irrelevant and should be dismissed.

iii. The *Martinez* decision does not create a standard with which the Application must comply and arguments to that extent lack merit and should be dismissed.

Protestants broadly assert that the "Application fails to allege facts that satisfy the health, safety and welfare standard set by" *Martinez*. See Protest at ¶ 8, p. 2. At best, this is an improper understanding of the law. The *Martinez* decision has been stayed and does not constitute binding precedent.

With the *Martinez* decision, and consistent with Colorado Appellate Rules, the Court issued a mandate with a copy of the judgement, which provides that "[f]iling a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition." *Martinez*, p. 30; *see* C.A.R. 41. At the May 1-2, 2017 COGCC Hearing, the Commission unanimously directed the Office of the Attorney General to file a petition of certiorari to the Colorado Supreme Court to appeal the decision of the Colorado Court of Appeals in *Martinez*. *See* May 1-2, 2017 COGCC Hearing Minutes at p. 10. Such petition for certiorari was, in fact, filed on May 18, 2017. *See* audio of July 24-25, 2017 COGCC Hearing, at 19:55, available online at https://www.youtube.com/watch?v=L-PTX5Q2vDE&index=8&list=PLpwAEXLpeKyfmAi7_rlEutylVsh6fHzo7, last accessed on December 6, 2017. Thus, the *Martinez* decision, and therefore any binding, substantive law therein, is stayed, and Protestants' arguments in this regard are meritless and should be dismissed.

iv. Protestants' arguments regarding the timing of the application seeking additional wells is wholly without merit and should be dismissed.

Protestants assert pursuant to Sections 34-60-116(3) and (4), C.R.S., that Docket No. 171200773 cannot be approved unless and until a well is first drilled in the unit to be established by Docket No. 171000694. And, they argue, only after that well is drilled, can 8 North come back to the Commission to apply for additional wells. Protestants' argument is entirely without support in the Act.

Section 34-60-116(4), C.R.S., imposes no such drill-first obligation: "The commission, ***upon application, notice, and hearing, may*** decrease or increase the size of the drilling units or ***permit additional wells to be drilled within the established units*** in order to prevent or assist in preventing waste or to avoid the drilling of unnecessary wells, or to protect correlative rights." Emphasis added. The

Act's language is clear, that the only precondition to seeking additional wells is application, notice, and hearing.

Even if Protestants' argument had some basis in the actual language of the Act, which it does not, they place form over substance and ask the Commission to create a procedural fiction that ignores the Act's statutory scheme to foster development of the State's oil and gas resources and the Commission's broad authority to issue orders and do whatever is reasonably necessary to ensure responsible and efficient development. Furthermore, there is no timing component to Section 34-60-116(4), C.R.S. To that extent, the Commission may establish a drilling and spacing unit and immediately thereafter, within the same order no less, authorize the drilling of additional wells. Arguments to the contrary ask the Commission to ignore years of precedent and hundreds of orders approving multiple horizontal wells at the time the controlling drilling and spacing unit is established, including recently at the September 11-12, 2017 COGCC Hearing. *See* Order Nos. 535-844 and 535-845 (approving two 1,280-acre drilling and spacing units with one horizontal well in each); see also Docket Nos. 535-846 and 535-847 (approving four horizontal wells in the 1,280-acre drilling and spacing units established by Order Nos. 535-844 and 535-845). Protestants' argument further asks the Commission to ignore the well-established science that recognizes that efficient and economic development of unconventional resources like the Codell and Niobrara Formations depends upon multiple wells within a unit.

III. Conclusion

Protestants' Protest fails to state a claim upon which relief may be granted and should be dismissed as Protestants fail to provide enough facts to nudge their claims "across the line from conceivable to plausible." Despite Protestants' recitation of Rule 509, Protestants fail to provide any facts to support their conclusory statements that approval of 8 North's Application will result in "public issues" that "reasonably relate to significant adverse impacts to the public health, safety and welfare of citizens." To that end, Protestants' claims regarding issues of public health, safety, and welfare are merely formulaic recitations of the Rules with no supporting facts and fail the *Warne* plausibility standard. Furthermore, references to Rule 508 are wholly improper and irrelevant as Rule 508 is not triggered. Additionally, because *Martinez* is not binding precedent, it has no applicability to the matters brought forth in the Application. Finally, Protestants' arguments pertaining to the timing of the increased density application are entirely inconsistent with the Commission's accepted practices. Therefore, 8 North respectfully requests that the Commission dismiss the Protest jointly filed by Boulder and Lafayette.

WHEREFORE, Applicant respectfully requests the following relief:

A. *Relief Sought:*

1. That the Commission dismiss the Protest, as Protestants have failed to state a claim up on which relief can be granted.

2. For such other findings and orders as the Commission may deem proper or advisable in the premises.

3. Applicant requests that no further testimony, exhibits, arguments, or pleadings be allowed from Protestants in Docket No. 171200773; and for such other relief as the Commission finds just and proper.

DATED this 6th day of December, 2017.

Respectfully submitted,

8 North LLC

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370 17th Street, Suite 5300
Denver, CO 80202

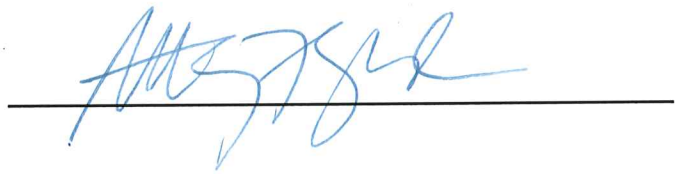
CERTIFICATE OF SERVICE

I hereby certify that, on December 6, 2017, Beatty & Wozniak, P.C. caused *8 North's Motion to Dismiss Protest of Boulder County and City of Lafayette* was served to the following as noted below:

VIA EMAIL AND COURIER TO:
Colorado Oil and Gas Conservation Commission
ATTN: James Rouse
1120 Lincoln Street, Suite 810
Denver, CO 80203
James.Rouse@state.co.us

VIA EMAIL AND BY U.S. MAIL TO:
David Hughes
Katherine A. Burke
Attorneys for Boulder County
dhughes@bouldercounty.org
kaburke@bouldercounty.org

Jeffrey Robbins
Attorney for City of Lafayette
robbins@grn-law.com



BEFORE THE OIL & GAS CONSERVATION COMMISSION OF THE STATE OF COLORADO

IN THE MATTER OF AN APPLICATION BY 8 NORTH LLC FOR AN ORDER AUTHORIZING AN ADDITIONAL THIRTY-ONE (31) HORIZONTAL WELLS, FOR A TOTAL OF THIRTY-TWO (32) HORIZONTAL WELLS, FOR PRODUCTION FROM THE CODELL AND NIOBRARA FORMATIONS IN AN APPROXIMATE 2,720-ACRE DRILLING AND SPACING UNIT PROPOSED FOR SECTIONS 13, 14, 23, AND 24, TOWNSHIP 2 NORTH, RANGE 69 WEST, 6TH P.M. AND SECTION 18, TOWNSHIP 2 NORTH, RANGE 68 WEST, 6TH P.M., WATTENBERG FIELD, BOULDER AND WELD COUNTIES, COLORADO	CAUSE NO. 407 DOCKET NO. 171200774 TYPE: DENSITY

MOTION TO DISMISS PROTESTS OF BOULDER COUNTY AND CITY OF LONGMONT

8 North LLC, Operator No. 10575 ("8 North" or "Applicant"), by and through its attorneys, Beatty & Wozniak, P.C., respectfully submits this Motion to Dismiss ("Motion") the Protests ("Protests") filed by the Board of County Commissioners of the County of Boulder ("Boulder") and the City of Longmont ("Longmont") (collectively, the "Protestants") of 8 North's Application ("Application") for an order authorizing an additional thirty-one (31) horizontal wells, for a total of thirty-two (32) horizontal wells, for the production of oil, gas, and associated hydrocarbons from the Codell and Niobrara Formations, in an approximate 2,720-acre drilling and spacing unit proposed for Sections 13, 14, 23, and 24, Township 2 North, Range 69 West, 6th P.M. ("Application Lands").

C.R.C.P. 121 § 1-15 ¶ 8 Certification: Counsel for 8 North conferred in good faith with counsel for Boulder and counsel for Longmont regarding this motion on December 6, 2017. Boulder and Longmont oppose the relief sought herein.

I. Factual and Procedural Background

A. Introduction

1. Applicant is a limited liability company duly authorized to conduct business in the State of Colorado, and has registered as an operator with the Colorado Oil and Gas Conservation Commission ("Commission").

2. Applicant is an Owner with a right to drill in the Application Lands

3. On February 19, 1992 (amended August 20, 1993), the Commission entered Order No. 407-87, which, among other things, established 80-acre

drilling and spacing units for the production of oil, gas and associated hydrocarbons from the Codell-Niobrara Formations.

4. On or about May 16, 2017, the Commission entered Order No. 407-405, which, among other things, established an approximate 320-acre wellbore spacing unit for the S½ of Section 18, Township 2 North, Range 68 West, 6th P.M., and authorized the drilling of one horizontal well within the unit (to accommodate the planned Williams #3A-19H Well), for production of oil, gas, and associated hydrocarbons from the Niobrara Formation, with the treated interval of the wellbore to be located no closer than 460 feet from the boundary of the unit, without exception being granted by the Director of the Commission. Portions of the Application Lands are subject to Order No. 407-405.

B. *8 North's Application*

1. On September 19, 2017, 8 North, by its attorneys, filed a verified application in Docket No. 171200774 requesting an order to authorize the drilling of up to thirty-two (32) horizontal wells within an approximate 2,720-acre drilling and spacing unit proposed for the Applications lands, for the production of oil, gas, and associated hydrocarbons from the Codell and Niobrara Formations, with the treated intervals of the wellbore of any permitted wells to be located not less than 460 feet from the unit boundaries and not less than 150 feet from the treated interval of any well being drilled or producing from the same formation without exception being granted by the Director, to be drilled from no more than three (3) multi-well pads on the surface of the drilling unit, or on adjacent lands with consent of the landowner, and the wellbores may enter the Codell and Niobrara Formations anywhere within the unit, without exception being granted by the Director.

2. On November 15, 2017, Boulder filed a protest to 8 North's Application in Docket No. 171200774 alleging that (1) public issues raised by the Application reasonably relate to significant adverse impacts to the public health, safety, and welfare of Boulder and Longmont's citizens; (2) the requirements of Rule 508 have not been satisfied; (3) the Application fails to allege facts that satisfy the standard set by the Colorado Court of Appeals in *Martinez v. Colorado Oil and Gas Conserv. Comm'n*, 2017 COA 37 (March 23, 2017) ("*Martinez*"); (4) the Application is premature because the proposed unit for which the additional wells are being requested has not yet been established; and (5) current market conditions are not favorable and therefore not economically beneficial to move forward with development.

3. On November 27, 2017, Longmont filed a protest to 8 North's Application in Docket No. 171200774 joining Boulder's protest and separately alleging that any surface operations contemplated in connection with the Application be located as far as possible from planned school and park locations.

II. Protestants Fail to State a Claim Upon which Relief can be Granted.

A. *Standard of Review*

Commission Rule 519 incorporates C.R.C.P. 12(b)(5), which states that dismissal of a complaint is appropriate where the complaint, here the Protests, fails to state a claim upon which relief can be granted.

In ruling on a C.R.C.P. 12(b)(5) motion to dismiss, "all averments of material fact must be accepted as true, and all of the allegations in the complaint must be viewed in the light most favorable to the plaintiff." *Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377, 386 (Colo. 2001). Motions to dismiss are "viewed with disfavor and are rarely granted under our 'notice pleadings.'" *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992).

To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not provide detailed factual allegations, and the court must accept factual allegations as true. *Id.* at 555. The plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Id.* Further, a plaintiff must allege enough facts to nudge his claims "across the line from conceivable to plausible." *Id.* at 570. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Allegations that are mere "formulaic recitation of the elements" of a protest are not entitled to the assumption of truth. *Id.* at 681. *See also Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016) (Colorado Supreme Court adopting the plausibility standard set forth in *Twombly* and *Iqbal*).

The Commission has strictly applied the standards set forth in *Warne v. Hall* to protests. Indeed, in dismissing protests, Commission Staff has stated, "[t]he tenant that a Hearing Officer must accept as true all of the allegations contained in the protest is inapplicable to legal conclusions and only a protest that states a plausible claim for relief survives a motion to dismiss. While notice pleading is still the norm, and allegations can still be made on information and belief, the allegations must be factual. Conclusory allegations are not entitled to an assumption that they are true." *See* Hearing Officer Order Granting Motion to Dismiss Protest in Docket No. 160800342 (citing *Warne*, 373 P.3d at 9, 21-24, and 27).

These standards are equally applicable to Boulder's and Longmont's Protest. In other words, taking all of Protestants' factual allegations as true and drawing all inferences in favor of Protestants, the Protests fail to allege a plausible basis on which the Application could be denied. Rather, the Protests contain mere formulaic recitations and legal conclusions couched as factual allegations, and such requires that Protestant's Protests be dismissed as they contain only legal conclusions and fail to provide any factual basis on which the Application could be denied.

B. *Analysis*

The Colorado legislature, by enacting the Colorado Oil and Gas Conservation Act ("Act"), declared it to be in the public interest to "foster the responsible, balanced development, production, and utilization of the natural resources of oil and gas" and to protect against waste. C.R.S. §§ 34-60-102(1)(a)(I), (II). To accomplish this legislative goal, the Commission is granted broad authority to establish drilling units with multiple wells in order to prevent or assist in preventing waste and protect correlative rights. C.R.S. §§ 34-60-116(1), (4). Further, the Commission is obligated to protect the public and private interests against waste in the production and utilization of oil and gas and to safeguard, protect, and enforce the co-equal and correlative rights of owners and producers in a common source or pool. C.R.S. § 34-60-102(1)(a)(I)-(III). Each drilling and spacing unit established by the Commission, therefore, should prioritize the orderly development of the reservoir, and the protection of the interests of the parties within the lands affected by the Application, and each applicant must demonstrate that its proposed unit satisfies this threshold. In modern unconventional resource development, in order to protect correlative rights (that is the opportunity to obtain one's just and equitable share, § 34-60-103(4), C.R.S.), drilling and spacing units with multiple wells are necessary. Without such units and multi-well development, it is less economic, and in some cases uneconomic, to develop unconventional reservoirs like the Codell and Niobrara Formations. Thus, not only is the establishment of drilling and spacing units necessary to protect correlative rights, but multi-well units are necessary to prevent waste.

Protestants have not offered any supportable factual or legal justification for their attempts to disrupt and delay 8 North's development of its interests. Furthermore, the minerals underlying the Application Lands should not be held captive simply because Protestants wish to delay and prevent development of the Application Lands. 8 North should be permitted to develop its mineral interest through the authorization of additional wells proposed by the Application, and Protestants' Protests should be dismissed.

i. Issues related to public health, safety, and welfare are not relevant to the authorization of additional wells and are not valid grounds for a protest.

The authorization of additional wells under Section 34-60-116, C.R.S., and Commission Rule 503.b.(1) entails a technical evaluation of downhole reservoir characteristics. Applications seeking the establishment of downhole drilling and spacing units implicate waste and the protection of correlative rights, not public health, safety, and welfare.

Protestants conflate the requirements necessary for the authorization of additional wells under Section 34-60-116, C.R.S., and Commission Rule 503.b.(1) with those necessary for securing Form 2A and Form 2 Permits. Subsequent to the submission of a Form 2A, Location Assessment Permit ("Form 2A") and/or a Form 2, Application for Permit to Drill ("Form 2"), the Director will make a completeness

determination and provide the same to the filing operator. Rule 305.c. Upon receipt, the operator shall notify all relevant parties of their opportunity to submit written comments about the proposed Oil and Gas Location. *Id.* With regard to these comments, Rule 305.e. provides as follows:

> Upon the conclusion of the comment period ... the Director may attach technically feasible and economically practicable conditions of approval to the Form 2 or Form 2A as the Director deems necessary to implement the provisions of the Act or these rules pursuant to Commission staff analysis or to ***respond to legitimate public health, safety, or welfare concerns expressed during the comment period***.

Emphasis added. Similarly, Rule 303.j. provides as follows:

> The Director may withhold approval of any Application for Permit-to-Drill, Form 2, or Oil and Gas Location Assessment, Form 2A, for any proposed well or Oil and Gas Location when, based on information supplied in a written complaint submitted by any party with standing under Rule 522.a.(1), other than a local governmental designee, or by staff analysis, the Director has reasonable cause to believe the proposed well or Oil and Gas Location is in material violation of the Commission's rules, regulations, orders or statutes, or otherwise ***presents an imminent threat to public health, safety and welfare, including the environment, or a material threat to wildlife resources***.

Emphasis added.

Section 34-60-116 contains no requirements that an operator address concerns related to the public health, safety, and welfare, and for good reason. Under Section 34-60-116, C.R.S., and Commission Rule 503.b.(1), an operator must demonstrate that the proposed unit is not smaller than the maximum area to be drained by the proposed wells and will prevent waste, protect correlative rights, and increase the ultimate recovery of oil, gas, and associated hydrocarbons, and the proposed number of wells is necessary for efficient and economic development of the reservoir. It is largely a technical analysis of the downhole characteristics of the underlying pool of resources. Protestant's interpretation is contrary to longstanding Commission precedent and would upset and render void hundreds, if not thousands, of Commission orders approving horizontal well development in the Wattenberg Field.[1]

Furthermore, Protestants' arguments regarding public health, safety, and welfare are mere formulaic recitations of the Act, albeit portions of the Act that do not apply to applications seeking the establishment of drilling and spacing units. They are unsupported, lack any justification, and are not a basis by which to deny 8 North's Application. Therefore, under the *Warne* standard, they must be dismissed.

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[1] This position was reaffirmed by the Commission at the October 30-31, 2017 COGCC Hearing, where the Commissioners repeatedly reiterated that concerns related to public health, safety, welfare, and the environment raised by the City and County of Broomfield and Adams County were not relevant to spacing or additional well applications, and should be raised during the Forms 2/2A processes. See October 30-31, 2017 COGCC Hearing, Docket Nos. 170700471, 170900535, 170900596, 170900598, and 171000749.

Protestants argue that the "public issues raised by the Application reasonably relate to significant adverse impacts to the public health, safety and welfare of citizens," but provide no evidence of any kind as to how or why such an argument warrants consideration by the Commission. Boulder's Protest at ¶¶ 3, 5, 7, and 9, pp. 1-2. Protestants' allegations are direct recitations of the Commission Rules,[2] are simply legal conclusions not factual allegations, and provide no plausible claim for relief. Protestants provide no elaboration about this claim. Protestants do not explain how the proposed number of additional wells creates issues related to public health, safety, and welfare and fail to allege any causality between the Application and the "issues" they allege.

This contention is a bare allegation with no supportive facts or detail. The Commission has the authority to approve additional wells in a drilling unit in order to prevent or to assist in preventing waste, avoid the unnecessary drilling of wells, or to protect correlative rights. C.R.S. § 34-60-116. Protestants merely re-state requirements of Rule 509.a.(2) without even the slightest modicum of detail as to how the authorization of additional wells poses a threat, risk, or issue whatsoever to surface concerns pertaining to public health, welfare, and safety. This is a bare recital of the Rules with no supporting allegations.

Protestants have failed to assert any facts that raise a right to relief above the speculative level. Protestants assertions regarding issues pertaining to public health, safety, and welfare are well beyond the purview of consideration by the Commission for the authorization of additional wells, are bare legal conclusions couched as facts, and therefore do not pass the *Warne* plausibility test. *Warne*, 373 P.3d at 595. 8 North respectfully requests that the Protests be dismissed as it should not be used to block efficient and economic oil and gas development. For these reasons, the Protests must be dismissed.

ii. Commission Rule 508 does not apply to the Application and arguments related thereto should be dismissed.

The Application does not specify well site locations nor will approval of the Application automatically result in more than one well site or multi-well site per forty-acre quarter-quarter section. Therefore, the multi-well threshold necessary to trigger the requirements of Rule 508 has not been met and Rule 508 does not apply to the Application. All references thereto are irrelevant and should be dismissed.

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[2] Regarding a protest, Rule 509.a.(2) requires a protestant provide a description of the affected interest, including the following information:

i. That the public issues raised by the application reasonably relate to potential significant adverse impacts to public health, safety and welfare, including the environment and wildlife resources, that are within the Commission's jurisdiction to remedy; and

ii. That the potential impacts were not adequately addressed by the application or by the Proposed Plan; and

iii. That the potential impacts are not adequately addressed by the rules and regulations of the Commission.

Protestants recite this language verbatim, without providing any argument or facts to such effect, further demonstrating a total and complete failure to aver any factual basis for its claim. See Boulder's Protest at ¶ 2, p. 2.

As stated in the Rule, "[t]he provisions of Rule 508 ***only apply*** to applications that would result in more than one (1) well site or multi-wellsite" per quarter-quarter section "or that request approval for additional wells that would result in more than one (1) well site or multi-well site" per quarter-quarter. Rule 508.a. (emphasis added).

As with their argument regarding specification of surface locations, Protestants incorrectly cite to rules intended to address the implications of vertical well development. Rule 508 was promulgated in 1998, more than a decade prior to the prolific use of horizontal well development and multi-well, pad drilling techniques. Unlike in the era of vertical development, and consistent with current technology and industry practice, 8 North will use multi-well pads to consolidate wells to centralized locations.

Regardless, the rule is specific to when Local Public Forums are appropriate and the relevant metric is the number of well *sites* per nominal governmental quarter-quarter, not the number of *wells* proposed per quarter-quarter. The Application does not address well site locations. *See* discussion, *supra*. Thus, there is nothing in the Application which would trigger application of Rule 508. Moreover, because 8 North (or any other operator for that matter) may develop the proposed unit and planned wells from a single, multi-well site in a quarter-quarter section, Rule 508 is inapplicable to the relief requested in 8 North's Application. This premise is not untested. At the September 11-12, 2017 COGCC Hearing, the Commission denied the request of a local jurisdiction for a Rule 508 Local Public Forum on applications seeking to establish a drilling and spacing unit and for additional wells on the basis that Rule 508 did not apply. *See* September 11-12, 2017 COGCC Hearing Minutes at p. 9.

The Application does not specify well sites or surface locations. Moreover, the drilling unit and the proposed wells therein can be drilled from a single, multi-well site in a quarter-quarter section. Therefore, Rule 508 does not apply and any reference thereto is irrelevant and should be dismissed.

iii. The *Martinez* decision does not create a standard with which the Application must comply and arguments to that extent lack merit and should be dismissed.

Protestants broadly assert that the "Application fails to allege facts that satisfy the health, safety and welfare standard set by" *Martinez*. See Protest at ¶ 7, p. 2. At best, this is an improper understanding of the law. The *Martinez* decision has been stayed and does not constitute binding precedent.

With the *Martinez* decision, and consistent with Colorado Appellate Rules, the Court issued a mandate with a copy of the judgement, which provides that "[f]iling a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition." *Martinez*, p. 30; *see* C.A.R. 41. At the May 1-2, 2017 COGCC Hearing, the Commission unanimously directed the Office of the Attorney General to file a petition of certiorari to the Colorado Supreme Court to appeal the decision of the Colorado Court

of Appeals in *Martinez*. *See* May 1-2, 2017 COGCC Hearing Minutes at p. 10. Such petition for certiorari was, in fact, filed on May 18, 2017. *See* audio of July 24-25, 2017 COGCC Hearing, at 19:55, available online at https://www.youtube.com/watch?v=L-PTX5Q2vDE&index=8&list=PLpwAEXLpeKyfmAi7_rlEutylVsh6fHzo7, last accessed on December 6, 2017. Thus, the *Martinez* decision, and therefore any binding, substantive law therein, is stayed, and Protestants' arguments in this regard are meritless and should be dismissed.

iv. Protestants' arguments regarding the timing of the application seeking additional wells is wholly without merit and should be dismissed.

Protestants assert pursuant to Sections 34-60-116(3) and (4), C.R.S., that Docket No. 171200773 cannot be approved unless and until a well is first drilled in the unit to be established by Docket No. 171000694. Boulder's Protest at ¶ 8, p. 2. And, they argue, only after that well is drilled, can 8 North come back to the Commission to apply for additional wells. *Id.* Protestants' argument is entirely without support in the Act.

Section 34-60-116(4), C.R.S., imposes no such drill-first obligation: "The commission, ***upon application, notice, and hearing, may*** decrease or increase the size of the drilling units or ***permit additional wells to be drilled within the established units*** in order to prevent or assist in preventing waste or to avoid the drilling of unnecessary wells, or to protect correlative rights." Emphasis added. The Act's language is clear, that the only precondition to seeking additional wells is application, notice, and hearing.

Even if Protestants' argument had some basis in the actual language of the Act, which it does not, they place form over substance and ask the Commission to create a procedural fiction that ignores the Act's statutory scheme to foster development of the State's oil and gas resources and the Commission's broad authority to issue orders and do whatever is reasonably necessary to ensure responsible and efficient development. Furthermore, there is no timing component to Section 34-60-116(4), C.R.S. To that extent, the Commission may establish a drilling and spacing unit and immediately thereafter, within the same order no less, authorize the drilling of additional wells. Arguments to the contrary ask the Commission to ignore years of precedent and hundreds of orders approving multiple horizontal wells at the time the controlling drilling and spacing unit is established, including recently at the September 11-12, 2017 COGCC Hearing. *See* Order Nos. 535-844 and 535-845 (approving two 1,280-acre drilling and spacing units with one horizontal well in each); see also Docket Nos. 535-846 and 535-847 (approving four horizontal wells in the 1,280-acre drilling and spacing units established by Order Nos. 535-844 and 535-845). Protestants' argument further asks the Commission to ignore the well-established science that recognizes that efficient and economic development of unconventional resources like the Codell and Niobrara Formations depends upon multiple wells within a unit.

v. Protestants' arguments regarding market conditions wholly lack substance and should be dismissed.

Protestants' assertions that current market conditions do not warrant development at this time are not a valid basis for protest. Boulder's Protest at ¶ 10 p. 3. First and foremost, Protestants provide no evidence or basis for its assertion that market conditions are not favorable. They simply state that current market conditions are "widely recognized." *Id.* This is a conclusory allegation and is not entitled to an assumption of truth. Protestants do not provide any supporting facts regarding market conditions; that is, any factual allegations which, if true, would demonstrate that market conditions are unfavorable. For example, Protestants could have alleged facts about its ability to obtain acceptable lease bonuses. Instead, Protestants offer a bare, unsupported *conclusion* about market conditions and dogmatically expects the Commission to simply accept its conclusions as truth.

Furthermore, Protestants' conclusory statement is not only unsupported, but is currently unsupportable. The Commission's own October 30-31, 2017 Staff Report shows clear upward trends for the statewide rig count, Form 2s filed, well spuds, and active wells. Additionally, current market conditions are improved from the price environment in which 8 North's economics is based as provided in its Rule 511 Testimony in its corresponding application for the establishment of a drilling and spacing unit in Docket No. 171000695, which resulted in favorable economics at the time.

Finally, 8 North's correlative rights are entitled to protection under the Act; therefore, 8 North has the right to produce its mineral interests underlying the Application Lands under current market conditions if it can demonstrate to the Commission that its proposed development is efficient and economic. 8 North has made such a showing for single-well development; and, Protestants' arguments to the contrary should be dismissed.

vi. Neither the Commission Rules nor Colorado statute requires an operator specify the precise surface location of the wells approved for development of the unit.

Longmont states that "any surface operations contemplated in connection with the Application should be located as far as possible from the planned school sites and park" described in its protest. Longmont Protest at ¶ 5, p. 1. Section 34-60-116(4), C.R.S., provides, in relevant part, that "[t]he ***order*** establishing drilling units shall permit only one well to be drilled and produced from the common source of supply on a drilling unit, and shall specify the location of the permitted well thereon." Emphasis added.

As the plain language of the statute makes clear, it is the order, not the application, that specifies the location of the permitted well. To that extent, the Application *does* request a specific well location in the form of unit boundary and interwell setbacks. So even if the Commission were to find that (contrary to the plain meaning of the Act), well locations must be stated in *applications*, not *orders* (or both for that matter), the Application would comply with the Act.

Additionally, Longmont's assertion is contrary to longstanding Commission precedent and would upset and render void hundreds, if not thousands, of Commission orders approving horizontal well development in the Wattenberg Field. To that end, the Commission has explicitly stated that orders authorizing additional wells are not required to include exact legal descriptions for or establish surface locations for wells planned within the unit. See October 30-31, 2017 COGCC Hearing, Docket Nos. 170700471, 170900535, 170900596, 170900598, 170900601, 170900602, 170900603, 170900605, 171000479, 171000749, and 171000752.

Therefore, Longmont's statement that 8 North should locate its surface operations as far as possible from planned Longmont's planned construction is not a basis for a protest and should be dismissed as Longmont has failed to state a claim upon which relief may be granted.

III. Conclusion

Protestants' Protests fail to state a claim upon which relief may be granted and should be dismissed as Protestants fail to provide enough facts to nudge their claims "across the line from conceivable to plausible." Despite Protestants' recitation of Rule 509, Protestants fail to provide any facts to support their conclusory statements that approval of 8 North's Application will result in "public issues" that "reasonably relate to significant adverse impacts to the public health, safety and welfare of citizens." Furthermore, references to Rule 508 are wholly improper and irrelevant as Rule 508 is not triggered. Additionally, because *Martinez* is not binding precedent, it has no applicability to the matters brought forth in the Application. Protestants' arguments pertaining to the timing of the increased density application are entirely inconsistent with the Commission's accepted practices, and Protestants have failed to state a claim up on which relief may be granted regarding market conditions. Finally, Longmont's assertions are not founded in the Rules or governing statutes. Therefore, 8 North respectfully requests that the Commission dismiss the Protests filed by Boulder and Longmont.

WHEREFORE, Applicant respectfully requests the following relief:

A. *Relief Sought:*

1. That the Commission dismiss the Protests, as Protestants have failed to state a claim up on which relief can be granted.

2. For such other findings and orders as the Commission may deem proper or advisable in the premises.

3. Applicant requests that no further testimony, exhibits, arguments, or pleadings be allowed from Protestants in Docket No. 171200774; and for such other relief as the Commission finds just and proper.

DATED this 6th day of December, 2017.

Respectfully submitted,

8 North LLC

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CERTIFICATE OF SERVICE

I hereby certify that, on December 6, 2017, Beatty & Wozniak, P.C. caused *8 North's Motion to Dismiss Protest of Boulder County and City of Longmont* was served to the following as noted below:

VIA EMAIL AND COURIER TO:
Colorado Oil and Gas Conservation Commission
ATTN: James Rouse
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