IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
COBALT INTERNATIONAL ENERGY, INC., *et al*.[1]	)	Case No. 17-36709 (MI)
Reorganized Debtors.	)	(Jointly Administered)

PLAN ADMINISTRATOR'S RESPONSE TO REQUEST FOR STATUS CONFERENCE, MOTION FOR ENTRY OF SCHEDULING ORDER, AND MOTION TO COMPEL DEPOSITIONS FILED BY TOTAL E&P USA, INC.
(Relates to Docket No. 1307)

Nader Tavakoli, solely in his capacity as Lead Member and Chairman of the Plan Administrator Committee of Cobalt International Energy, Inc., *et al.* (the "Plan Administrator") files this response (the "Response") to the *Request for Status Conference, Motion for Entry of Scheduling Order, and Motion to Compel Depositions* [Docket No. 1307] (the "Discovery Motion"), filed by TOTAL E&P USA, INC. ("TEP USA"), and responds as follows:

INTRODUCTION

1. TEP USA has inappropriately and disingenuously manufactured an alleged discovery "dispute" regarding potential depositions as to which there is no pending notice, and has simultaneously cast settlement aspersions at the Plan Administrator when it is TEP USA that has spurned settlement discussions, including rejecting settlement discussions a few days before it filed the Discovery Motion. The parties have agreed to a scheduling order, and that is the only portion of the Discovery Motion that is properly before the Court. There are no pending

[1] The Reorganized Debtors in the Chapter 11 Cases, along with the last four digits of each Reorganized Debtor's federal tax identification number, are: Cobalt International Energy, Inc. (1169); Cobalt International Energy GP, LLC (7374); Cobalt International Energy, L.P. (2411); Cobalt GOM LLC (7188); Cobalt GOM # 1 LLC (7262); and Cobalt GOM # 2 LLC (7316).

deposition notices, and nothing to "compel"; rather, TEP USA is seeking an advisory opinion regarding issues it believes might come before the Court in the future *if* it serves deposition notices as it indicates in the Discovery Motion it intends to do, *if* the Plan Administrator objects and declines to appear or produce a witness, and *if* the parties attempt to resolve any potential dispute and are unable to do so. Why TEP USA is seeing a non-appearance ghost is somewhat of a mystery, as the Plan Administrator has never indicated that he would not appear (if and when a deposition notice is served), and has never indicated that he would not produce a corporate representative. There is simply no basis for the unfounded speculation that is the genesis for this misguided Discovery Motion, and, other than entry of the agreed scheduling order, all other anticipatory and baseless relief should be denied.

BACKGROUND

2. On April 5, 2018, the Court entered that certain *Order (I) Confirming the Fourth Amended Joint Chapter 11 Plan of Cobalt International Energy, Inc. and Its Debtor Affiliates and (II) Approving the Sale Transaction* [Docket No. 784] (the "Confirmation Order," and the Chapter 11 Plan attached thereto, the "Plan").[2]

3. The Plan became effective on April 10, 2018 (the "Effective Date"). The Administrative Claims Bar Date is the first Business Day that is 30 days following the Effective Date. The Purchaser Claims were filed on May 9, 2018.

4. The Confirmation Order provides in relevant part that "[a]ny right of a Purchaser to a post-closing adjustment under the applicable Sale Transaction Documentation shall be paid in full as an Administrative Claim pursuant to sections 503(b) and 507(a)(2) of the Bankruptcy Code." Confirmation Order ¶ 132.

[2] Capitalized but undefined terms herein shall have the same meaning as ascribed to them in the Confirmation Order, including, where applicable, by reference to the definitions in the Plan.

5. TEP USA asserts that it has rights to post-closing adjustments as a Purchaser under that certain Asset Purchase Agreement between TEP USA, Cobalt International Energy, L.P. ("CIE LP"), and Statoil, dated March 12, 2018, in respect certain assets related to the North Platte discovery (the "North Platte APA"). *See* Confirmation Order, Preamble ¶s; *Notice of Filing of Successful Bid Documents* [Docket No. 594] (attaching the North Platte APA).

6. In addition, TEP USA asserts an ownership interest in certain inventory that was sold by the Plan Administrator in June of 2018, with the proceeds held in a segregated account by the Plan Administrator, pursuant to the Order Authorizing Plan Administrator to Sell Remaining Inventory (Docket No. 925) (the "Inventory Sale Order").

7. As acknowledged by TEP USA, the parties stayed discovery in this case over a year ago to pursue settlement discussions. The settlement characterizations in the Discovery Motion are simply untrue; the Plan Administrator has pursued settlement in good faith, only to be met with improper tactics by TEP USA, including TEP USA abruptly ending an in-person meeting in the summer of this year, with only 5 minutes of discussion, even though the Plan Administrator and his financial advisor traveled across the country for the meeting and a pre-agreed agenda had been exchanged by email. Ironically, TEP USA also declined an invitation to discuss settlement November 15, 2019, a few days before TEP USA filed the Discovery Motion.

8. In August of 2019, when the parties decided to move forward with discovery to resolve the outstanding disputes, TEP USA unilaterally served a Rule 30(b)(6) notice on the Debtor, attempting to schedule a corporate representative deposition of the Debtor for September 27, 2019, and a deposition notice for the Plan Administrator for September 24, 2019, without conferring with the Plan Administrator in advance regarding the dates. *See, e.g.,* Discovery Motion, Exhibit C (the "Rule 30(b)(6) Notice"). While the Plan Administrator did not object to

producing a corporate representative, the Plan Administrator did raise issues regarding the timing and scope of the requested deposition, which the parties agreed to discuss. *See* email from Jared Weir to Ryan Hackney, dated September 4, 2019, attached hereto as **Exhibit A** ("The parties will discuss narrowing the scope of Total's 30(b)(6) notice after there is a better understanding of the available documents."). Similarly, the Plan Administrator did not refuse to sit for a deposition; instead the Plan Administrator has consistently indicated that he was still considering the issue. Moreover, the parties also agreed that depositions would occur after documents are produced. *See* **Exhibit A**. As a result of these discussions, TEP USA withdrew the Rule 30(b)(6) Notice and Plan Administrator Notice, and no other deposition notice has been served by TEP USA. Simply put, there are no pending deposition notices in this contested matter.[3]

RESPONSE

9. The parties have agreed on a scheduling order, and the Plan Administrator supports entry of the proposed scheduling order.

10. Other than entry of a scheduling order, there are no pending deposition notices, and nothing to "compel." In order to compel discovery under the Federal Rules of Civil Procedure, as made applicable to this contested matter by Bankruptcy Rules 9014 and 7037, the movant must demonstrate that one of four circumstances is present:

> (i) a deponent fails to answer a question asked under Rule 30 or 31;
>
> (ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

[3] To the extent that TEP USA seeks to pre-ordain or authorize the scope of a corporate representative notice that has been withdrawn, or that not yet been served, the Plan Administrator objects. In the withdrawn Rule 30(b)(6) Notice, TEP USA identified 39 topics, many of which contain massively broad expanders like "all" and "regarding" or "relating to," which the definitions make clear should be interpreted in the broadest manner possible. Certain of the topics have nothing to do with the claims or defenses, *e.g.*, topics relating to settlement issues. If TEP USA elects to serve a new notice with such a broad scope, the Plan Administrator will negotiate the scope with TEP USA, consistent with the process agreed to by the parties. But it is certainly premature to address any such issues now, as there is no pending corporate representative notice pending.

> (iii) a party fails to answer an interrogatory submitted under Rule 33; or
>
> (iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

Fed. R. Civ. P. 37(a)(3)(B).

11. None of these circumstances is present in this case. Nothing in the Federal Rules of Civil Procedure authorizes a party to seek to compel the attendance of a witness who is not even subject to a pending deposition notice, especially when that witness has never indicated that he would not appear. TEP USA has improperly manufactured a discovery issue in the absence of any pending deposition notice.

12. Federal courts do not "sit to decide hypothetical issues or give advisory opinion about issues to which there are not adverse parties before [them]." *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982). "'The basic rationale [behind the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 (5th Cir. 2008) (alteration in original) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). It weeds out "those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review." *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000).

13. TEP USA's request for an advisory opinion regarding potential future deposition notices it intends to serve is misguided, and without any basis under the Federal Rules of Civil Procedure. All relief requested by TEP USA regarding this improperly manufactured discovery issue should be denied.

WHEREFORE, the Plan Administrator respectfully requests that the Court enter the scheduling order agreed upon by the parties, deny all other relief requested by TEP USA in the Discovery Motion, and grant such other and further relief as is just and equitable.

Dated: December 9, 2019

GREENBERG TRAURIG LLP

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Counsel for Nader Tavakoli, solely in his capacity as Lead Member and Chairman of the Plan Administrator Committee of Cobalt International Energy, Inc. et al.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 9, 2019, I caused a copy of the foregoing Response to be served on all parties eligible to receive service through the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas by electronic mail.

/s/ Shari L. Heyen
Shari L. Heyen

EXHIBIT "A"

From: Weir, Jared (Assoc-DAL-LT)
Sent: Wednesday, September 4, 2019 4:09 PM
To: 'RHACKNEY@AZALAW.COM'
Cc: LaVigne, Christopher M. (Shld-Dal-LT)
Subject: In re Cobalt

Ryan,

Chris asked me to summarize today's discussion.

- The parties agree that document production needs to occur before depositions.
- The Debtors intend to serve RFPs and 30(b)(6) Notices on Total this week.
- The parties will shoot for producing documents in mid-October (i.e. the week of October 13th).
- Assuming the documents are produced mid-October, depositions will occur in the last week of October or early November.
- AZA will forward to GT the most recent discussions about discovery search terms. Once the parties agree upon search terms, they will be used by both parties in conducting their searches.
- GT will contact the vendor that has the Debtors' documents to obtain access information.
- AZA will find out about where Total stands on document retention and collection as well as the identification of relevant custodians.
- GT and AZA will provide updates on their clients' documents by email this week.
- GT and AZA will have a call on Wednesday, September 11th at 3:00 p.m. to discuss search terms and other issues related to document production.
- The parties will discuss narrowing the scope of Total's 30(b)(6) notice after there is a better understanding of the available documents.
- As to Total's Third Set of RFPs:
  - RFPs 1 & 2: Total agrees that it merely needs documents sufficient to confirm that the money is actually set aside and being preserved.
  - RFPs 3–7: AZA will provide GT an explanation of how these requests related to matters currently in dispute in this case.

Please confirm that this accurately reflects the discussion or let me know where I am mistaken.

Sincerely,

Jared

Jared Weir
Associate

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