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)

OPPOSITION OF NADER TAVAKOLI, ACTING SOLELY AS PLAN ADMINISTRATOR TO TOTAL E&P USA, INC.'S MOTION FOR A TRIAL DATE

Nader Tavakoli, solely in his capacity as the Plan Administrator of Cobalt International Energy, Inc., et al. (the "Plan Administrator"), hereby files this Opposition to Total E&P USA, Inc.'s *Motion for Setting a Trial Date (Doc. No. 1327*) (the "Motion"), and in support thereof, respectfully states as follows:

I PRELIMINARY STATEMENT

1. Prior and subsequent to the filing of this bankruptcy case, Total E&P USA, Inc. ("Total") entered into business transactions with Cobalt International Energy, Inc. and certain of its affiliates (collectively, the "Debtors") (Debtors and Total are collectively referred to as the "Parties") where, among other things, the Parties had owned working interests in oil leases operated by Debtor Cobalt International Energy, L.P. ("Cobalt LP") and where Total purchased from Debtors certain interests in oil and gas leases, wells, and equipment. In the purchase of the

[1] The Reorganized Debtors in these 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). The Reorganized Debtors' service address is: 945 Bunker Hill Road, Suite 625, Houston, Texas 77024.

North Platte Assets (discussed below), Total was joined by Statoil Gulf of Mexico LLC, now known as Equinor Gulf of Mexico LLC ("Equinor"). These transactions have spawned disputes which have given rise to two contested matters that are as yet unresolved.

2. The first contested matter arises out of claims made by Total that it had an ownership interest in inventory the Court authorized the Plan Administrator to sell (the "Remaining Inventory Ownership Dispute") [Docket Nos. 894, 925, 976]. The second contested matter involves administrative claims by Total and Equinor for post-closing adjustments to the purchase price arising from the post-petition sale of the North Platte Assets (the "Post Closing Adjustment Dispute") [Docket Nos. 846, 847, 1036]. The Parties have engaged in extended settlement discussions, but unfortunately, no deal has been struck so these contested matters need to be resolved.[2]

3. The Plan Administrator and Total agreed to a discovery schedule pursuant to a Joint Motion for Agreed Scheduling Order ("Joint Motion") [Docket No. 1310] (since modified) and to set for hearing the Remaining Inventory Ownership Dispute and Post Closing Adjustment Dispute. Given the matters upon which Total is now seeking discovery, it has become apparent that Total seeks now to raise issues which have not been raised in and are not properly the subject of either of the two contested matters and also seeks to assert claims which in order to be properly before the Court, must be raised by an adversary proceeding.

4. Total's current Motion, whose content consists of a single page, asks the Court to set a trial date for July 20, 2020, but fails to disclose what matter or matters are the subject of the

[2] The Plan Administrator has been able to resolve numerous other hotly-contested matters, effectively preserving the estates' resources and efficiently administering these cases. Following that approach, since 2018 the Plan Administrator attempted multiple times in good faith to negotiate with Total on the claims at issue in this contested matter. Despite the Plan Administrator's success in resolving all other post-confirmation matters, Total remains the sole hold-out, by continuously "moving the goal post", this time by raising specious claims and deposition topics in an attempt to coerce a litigation advantage.

request and fails to identify the issues that the Court is being asked to resolve. The Plan Administrator, who acts in the best interests of the estates and their creditors, welcomes the opportunity to have adjudicated the two contested matters but does not want to face a trial by ambush or any scenario where there is ambiguity as to what issues are before the Court for trial and be required to defend claims, albeit specious in content, that are improperly raised. The Plan Administrator's overarching motivation is preserving the estate's assets and, to that end, managing this litigation efficiently. In contrast, Total's tactics to gain a litigation advantage as evidenced by its improper deposition topics and spurious, unsupported claims that are not before the Court is emblematic of Total's course of conduct throughout these cases and should not be sanctioned by this Court.

II STATEMENT OF FACTS

A Remaining Inventory Ownership Dispute

5. On the Petition Date, the Debtors filed a motion [Docket No. 15] (the "Bid Procedures Motion") seeking Bankruptcy Court approval of certain bidding procedures and a timeline for the sale process of substantially all of the Debtors' assets. On January 25, 2018, the Court entered an order [Docket No. 299] granting the relief requested in the Bid Procedures Motion and scheduling all associated deadlines. Following the auction, Total and Equinor, under a joint bid, were declared the successful bidder for the North Platte ("NP") prospect, and Total was declared the successful bidder for the Anchor prospect and numerous of the Debtors' offshore exploration leases on which Debtors had not drilled wells (the "Explo Leases").

6. Pursuant to the Plan and Confirmation Order, the Debtors entered into Asset Purchase Agreements ("APAs") for their NP Assets,[3] Anchor Assets,[4] and Explo Leases.[5] The definition of "Assets" in each of the NP, Anchor, and Explo APAs included the following subsection:

> all equipment, machinery, fixtures and other real, personal, and mixed property, operational and nonoperational, known or unknown, located on, or used or **held for use in connection with, the Properties** or the other Assets described above as of the Effective Time (except for any Excluded Asset, collectively, the "Equipment")…

NP APA, at p. 21 § 2.1(b)(vi) (emphasis added); Explo APA, at p. 19 § 2.1(b)(vi) (same); Anchor APA, at p. 19 § 2.1(b)(vi) (same).

7. On June 1, 2018, the Plan Administrator filed an emergency motion [Docket No. 894] (the "Remaining Inventory Motion") to authorize the sale of certain inventory (the "Remaining Inventory") and distribute the proceeds in accordance with the Plan. Total opposed the Remaining Inventory Motion, alleging it held an ownership interest in the Remaining Inventory.

8. On June 4, 2018, the Court conducted an initial status conference on the Remaining Inventory Motion. At that status conference, counsel for Total (and initially Equinor) asserted the Remaining Inventory was acquired by Total and Equinor under the NP APA. The Court addressed Total's claim to ownership of the Remaining Inventory under the NP APA, as follows:

> THE COURT: [T]he contract as I read it says . . . held for use in connection with. **That means that if they bought it and then were holding it for that what you bought, you're going to get the equipment**. But I don't think it means that if they bought it and there

[3] The NP APA was executed by and between Cobalt L.P., as seller, and Total and Equinor, as buyers, in which Equinor and Total acquired the Debtors' North Platte Assets. *See* NP APA § 2.1 [Docket No. 594-2, at 18–20].

[4] The Anchor APA was executed by and between Cobalt L.P., as seller, and Total, as buyer, in which Total acquired the Debtors' Anchor Assets. *See* Anchor APA § 2.1 [Docket No. 594-1, at 18–20].

[5] The Explo APA was executed by and between Cobalt L.P., as seller, and Total, as buyer, in which Total acquired the Debtors' Explo Leases. *See* Explo APA § 2.1 [Docket No. 594-4, at 18–20].

> may be some conceivable way where it could be useful on your project that you bought it. It had to either be **used in your project or be held in connection with use on your project**. And there's a difference in those….

Transcript of June 4, 2018 Status conference (the "6/4/2018 Transcript"), pg. 9, lns. 2–11 (emphasis added).

9. After that comment by the Court, Total and Equinor abandoned their argument under the NP APA. Instead, Total switched its claim of ownership to several pre-petition theories and the Anchor and Explo APAs—even though both of these APAs have the same section 2.1(b)(vi) as did the NP APA. This desperate attempt to create a claim where none exists, without alleging any supporting facts, prompted the Court to authorize the Plan Administrator to sell the Remaining Inventory and require Total to "file any statement of ownership listing why it believes it has any rights in the equipment[.]" Transcript of June 18 Status Conference ("6/18/2018 Transcript)", at pg. 15, lns. 11–12.

10. The Parties had a further telephonic status conference on June 18, 2018. The scope of the issues that could be raised and the damages that could be sought in connection with this dispute was specifically addressed.

> MS. METZGER: And your Honor, is that with respect to price as well because I would hate for us to proceed in that manner, the inventory get sold, Total despite how small we may feel their chance is for prevailing that they had an ownership interest, that they'd be able to come back and say they sold it for too low of an amount and now you're going to cover damages greater than –
>
> THE COURT: **No, all they look at is the money in the Registry. We're going to fight over who gets Registry money, period**.

6/18/2018 Transcript, at pg. 13, lns 16–25 (emphasis added).

Total's counsel confirmed that the dispute was limited to these amounts.

> THE COURT: Right, but you would only look to the proceeds allocable to the equipment that you claim ownership on and if it turns out that he sells a rig for $250,000 and you say it's really worth a million, you're client is going to be stuck at 250, right?

MR. HARRIS: That's right.

6/18/2018 Transcript, at pg. 14, lns 9–14.

11. Thereafter, on June 25, 2018, the Court entered its *Order Authorizing Plan Administrator to Sell Remaining Inventory* [Docket No. 925] (the "Sale Order"), which limits this dispute to Total's claim of an ownership interest in the Remaining Inventory. The Sale Order provides in pertinent part:

> To the extent [Total] asserts an ownership interest in the Remaining Inventory or the proceeds thereof, as the case may be (other than under the [NP APA]), [Total] shall file a statement with the Court on or before July 9, 2018 disclosing such ownership theories under which [Total] claims such an ownership interest in the Remaining Inventory.

Id. at ¶ 7. The Sale Order expressly held that both Total and Equinor waived any claim upon the Remaining Inventory based on the NP APA,[6] but recognized Total reserved its right to assert any other claim of ownership not based on the NP APA. *Id.* at ¶¶ 4–5.

12. The Sale Order also contained a reservation of rights against the Plan Administrator which provides:

> [Total] and Equinor's rights, if any, against the Plan Administrator or the Cobalt Committee are preserved and not affected by this Order, including their rights, if any, to assert inadequacy of price or breach of duty in the sale; provided, no such rights shall be asserted against any purchaser of the Remaining Inventory.

Id. at ¶ 6.

13. On July 9, 2018, Total filed a two-page Statement of Ownership [Docket No. 976] (the "Total Statement"), stating five conclusory theories of ownership:

i. [P]ursuant to a 2009 Simultaneous Exchange Agreement (the "SEA"), [Total] paid $12 million to acquire, and thereby explicitly did acquire, a 40% ownership interest in the Debtors' entire inventory of equipment.

[6] As a result, Equinor is not a party to the Remaining Inventory Ownership Dispute.

ii. [T]he Debtors periodically confirmed, including in 2017, that the value of [Total]'s ownership interests in the Debtors' "tangible equipment inventory" was $12 million.

iii. [Total] paid an aggregate $206 million to acquire substantially all of the Debtors' interests in the Anchor discovery and certain exploratory leases . . . in the US Gulf of Mexico, including all Equipment "used or held for use in connection with" Anchor and Explo [(the "Anchor and Explo Theory")].

iv. [T]o the extent the Plan Administrator asserts that the SEA or the Anchor and Explo [APAs] fail to expressly include any of the Equipment as a purchased asset, [Total] owns such Equipment pursuant to the covenant of good faith and fair dealing, particularly in light of the Debtors' stated intention to dispose of all of their assets through the bankruptcy sales, and the corresponding expectations of all interested parties [(the "Good Faith and Fair Dealing Claim")].

v. [Total] owns any Equipment to the extent the Debtors' books and records show that [Total] owns such Equipment, and similarly to the extent that the Debtors previously invoiced [Total]— and [Total] thereafter paid—for such Equipment.

14. Notwithstanding the limitations imposed by the Court and expressly agreed to by Total, Total is seeking to raise issues that are not based upon ownership of the Remaining Inventory and is attempting to assert claims far in excess of the amount of the sales proceeds realized from the sale of the Remaining Inventory. Further, Total is seeking discovery to establish claims of breach of duty against the Plan Administrator, a red herring and baseless assertion made purely to harass in light of the remarkable results achieved in these cases for the creditors. A reservation of rights, frequently found in DIP financing orders, is just that—it only allows for the assertion of rights in some subsequent filing. There has never been such a filing nor has the Plan Administrator consented to the assertion of such claims in this contested matter.

B Purchase Price Adjustment Dispute

15. On the Petition Date, the Debtors filed their Bid Procedures Motion, which, among other things, established dates and deadlines for the bidding procedures hearing, bid deadline, auction, and sale hearing. [Docket No. 15].

16. Pursuant to the order approving the Bid Procedures Motion, the final bid deadline for all Sale Transactions was February 22, 2018. [Docket No. 299]. The Debtors received bids from six different parties for certain of the Debtors' Gulf of Mexico assets, and on March 6, 2018, the Debtors held an auction. Following the auction, the Debtors named four successful bidders for different asset packages. [Docket No. 594]. As relevant here, Total and Equinor submitted a joint bid and were declared the successful bidder for the NP prospect.

17. On April 5, 2018, the Court entered the Confirmation Order confirming the Plan. [Docket No. 784]. The effective date of the Plan was April 10, 2018. Pursuant to the terms of the Plan and the Confirmation Order, the Court approved the sale transactions for the Gulf of Mexico assets and instructed the Debtors to transfer the NP assets to Total E&P and Equinor. Confirmation, *id.* at ¶ 78.

18. The NP APA between the Debtors as sellers and Total and Equinor as buyers (the "Buyers") provides that Total purchased one third (1/3) and Equinor purchased two thirds (2/3) of the Debtors' "Assets," as the term is defined in the NP APA, in exchange for $339,000,000. *See* [Docket No. 594-2] at 18–20 & 26, APA, § 2.1, § 3.1.

19. The NP APA defined the phrase "Effective Time" as 12:00 a.m. Central Time on January 1, 2018. *See* [*id.*] at 9, APA, § 1.1. The "Closing Date" for the NP APA was on or about April 6, 2018. *See* [*id.*] at 8 & 27, APA, §§ 1.1 & 4.1.

20. The NP APA provided that the purchase price could be increased by certain amounts:

> 8.9 Accounting Adjustments for Revenues and Expenses.
>
> (a) The Base Purchase Price shall be increased by the following (without duplication): … (ii) the aggregate amount of all Operating Expenses in connection with the ownership, operation and maintenance of the Assets which are paid by or on behalf of Seller, are not subject to

> reimbursement to Seller pursuant to a joint interest billing and are attributable to the period on or after the Effective Time (including any pre-paid charges); … [.]

See [Docket No. 594-2] at 50, APA, § 8.9. Pursuant to § 8.9(a)(iv), the Buyers pre-paid $3,099,603.15 to reimburse the Debtors for amounts paid by them associated with the Assets on and after the Effective Time. [*Id*.] The NP APA further provided that after the closing date the parties would attempt to agree on the post-closing adjustment to the purchase price under Section 8.9. *Id*. at 51–52, § 8.11.

21. Notwithstanding its obligations under Section 8.9, Total was unwilling to pay the Debtors for Operating Expenses attributable to the period after the Effective Time in connection with the ownership, operation and maintenance of the NP Assets which had been paid by the Debtors. Therefore, on May 14, 2018, the Buyers sent a letter to the Debtors claiming they were "entitled to a credit of $2,575,603.63 pursuant to the terms of Section 8.11 of the [NP] APA." The Plan Administrator objected to refunding the costs after the Effective Time as contrary to the terms of the NP APA.

22. On May 9, 2018, Total filed a motion for allowance of administrative expense priority claims requesting the Court order the Debtors to pay "any and all post-closing adjustments in favor of [Total]." *See* [Docket No. 846] at ¶ 9. The same day, Equinor filed a motion requesting an order "allowing the Administrative Claims for any and all post-closing adjustments in favor of [Equinor] under the North Platte APA." *See* [Docket No. 847] at ¶ 18.

23. Equinor is the non-operating, working-interest owner of two-thirds of the NP Assets purchased from Cobalt LP under the NP APA. As the co-buyer under the NP APA with Total, Equinor's administrative claim related to the NP APA purchase price adjustment involves identical factual and legal issues as Total's administrative claim regarding the same.

24. On September 7, 2018, the Plan Administrator responded to the May 9th motions and notified the Court that the Plan Administrator, Total, and Equinor had agreed that the Court should resolve the remaining issues regarding the post-closing adjustments. *See* [Docket No. 1036] at ¶ 1. That is the second issue ripe to be tried by the Court.

III ARGUMENT

A Matters Not Raised in the Contested Matters Are Not Properly Before the Court

25. The Plan Administrator has no objection to having this Court adjudicate in short order the Remaining Inventory Dispute and the Purchase Price Adjustment Dispute. However, the issues to be decided must be limited to the those raised in these contested matters. Absent consent, issues outside the pleadings cannot be tried. *See Diaz v. Jaguar Rest. Group, LLC*, 627 F.3d 1212, 1215 (11th Cir. 2010) (reversing district court's decision to permit a trial amendment under Federal Rule of Civil Procedure 15 based on erroneous finding of implied consent). The matters can be tried concurrently since some of the same witnesses will be involved, but separate orders should be entered with respect to each dispute so that there is no confusion or inefficiencies should a Party seek to appeal a ruling.

26. With respect to the Remaining Inventory Dispute, the claims involve determining how the proceeds from the underlying sale of inventory, which are held in a segregated account, should be distributed as well as who owns a few pieces of equipment that remain unsold. This is arguably a matter in which the Court is determining an action to recover money or property or render a declaratory judgment, both of which are normally resolved by an adversary proceeding. Bankruptcy Rule 7001(1),(9). The Court raised this procedural issue when the Parties first brought the dispute to the attention of the Court and noted that the matter could proceed as a contested

matter with the consent of the Parties. 6/4/2018 Transcript, at p. 10, lns. 1–9. The Parties did consent to proceeding in that manner, but that consent was limited to the ownership interest issue and not whatever claims Total believes could exist separate and apart from that. Total specified those claims in the Total Statement, and should not be allowed to raise unasserted claims at this time. Notably, the alleged breach of duty claim, while reserved in the Sale Order, is not mentioned in the Total Statement. Were such a claim to be raised in a pleading, the Plan Administrator would move to dismiss and seek a remedy under Bankruptcy Rule 9011 as the Plan Administrator acted solely in a representative capacity and owes no duty to a contract party.

B If Total Seeks to Now Resolve the Purchase Price Adjustment Dispute, Equinor Should be Joined

27. The administrative claims filed by Total and Equinor arise under the same contract and involve identical issues of fact and law. It makes little sense to adjudicate the claims separately. *See*, Bankruptcy Rule 1001 ("These rules should be construed . . . to secure the just, speedy, and inexpensive determination of every case and proceeding."). If the matter proceeded solely as to Total, Equinor could argue that it was not bound by the ruling if the matter was decided in the Plan Administrator's favor and seek a separate hearing.

C The Trial Date Should be Set at a Time that Allows for Resolution of the Plan Administrator's Motion for Summary Judgment

28. The Plan Administrator will soon be filing a motion for summary judgment with respect to the Remaining Inventory Dispute. The five theories of recovery are easily resolved. The first two theories are based upon prepetition claims. Total did not timely file a proof of claim and such claims are precluded by a bar order entered by the Court and the terms of the Plan. The third theory is predicated on the equipment having been used or held for use in connection with the Anchor and Explo leases, and there are simply no facts to support the argument. The fourth

theory of breach of Good Faith and Fair Dealing is unexplained in the Total Statement and appears to involve a claim for damages not ownership so it cannot even be raised in this proceeding. The final theory, that the books of the Debtor reflect Total's ownership, while erroneous, is a prepetition claim and is barred. The Debtor in Possession's records do not support this theory. Proceeding in this manner will result in either the conclusion of this dispute or, at worst, reduce the issues the Court must resolve.

D The Trial Date Should be Set at a Time that Allows for Resolution of Discovery Disputes

29. Total is seeking extensive and exhaustive discovery from the Plan Administrator, including multiple depositions of a person or persons who have no first-hand knowledge of the issues in dispute and with respect to matters outside the scope of the contested matters. The Plan Administrator is preparing a motion for protective order which will seek relief from these abusive tactics.

WHEREFORE, the Plan Administrator respectfully requests that the Court decline to set the disputes for trial on the date that Total has requested and order the parties to prepare a scheduling order that sets forth the issues to be resolved.

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Date: May 15, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 15, 2020, I caused a copy of the foregoing 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.

By: */s/ Shari L. Heyen*
Shari L. Heyen