Docket #0441 Date Filed: 08/13/2020

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
EXTRACTION OIL & GAS, INC. *et al.*,[1]	)	Case No. 20-03167 (CSS)
Debtors.	)	(Jointly Administered)
	)	**Re: Docket Nos. 141, 360 and 429**

DEBTORS' MOTION FOR LEAVE TO FILE REPLY TO THE OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO STAGE 2 PROCESS PROCEDURES

The above-captioned debtors and debtors in possession (collectively, the "Debtors") hereby submit this motion for leave (this "Motion for Leave") to file a reply (the "Reply"), attached hereto as **Exhibit B**, in response to the *Objection of the Official Committee of Unsecured Creditors to Stage 2 Process Procedures* [Docket No. 429] (the "Objection"). In support of this Motion for Leave, the Debtors state:

Jurisdiction and Venue

1. The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference from the United States District Court for the District of Delaware, dated February 29, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), and the Debtors confirm their consent pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Extraction Oil & Gas, Inc. (3923); 7N, LLC (4912); 8 North, LLC (0904); Axis Exploration, LLC (8170); Extraction Finance Corp. (7117); Mountaintop Minerals, LLC (7256); Northwest Corridor Holdings, LLC (9353); Table Mountain Resources, LLC (5070); XOG Services, LLC (6915); and XTR Midstream, LLC (5624). The location of the Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.

(the "Bankruptcy Local Rules") to the entry of a final order by the Court in connection with this Motion for Leave to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein is section 105(a) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code").

Background

4. On June 14, 2020 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 the Bankruptcy Code. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code [Docket No. 79]. These chapter 11 cases have been consolidated for procedural purposes only and are jointly administered pursuant to Bankruptcy Local Rule 1015(b) [Docket No. 79]. No request for the appointment of a trustee or examiner has been made in these chapter 11 cases.

5. An Official Committee of Unsecured Creditors (the "Committee") was appointed in these chapter 11 cases on June 30, 2020 [Docket No. 155].

6. On June 25, 2020, the Debtors filed the *Corrected Debtors' Motion for Entry of an Order (I) Approving Submission Proposal Guidelines in Connection with a Combination Transaction and (II) Granting Related Relief* [Docket No. 141] (the "Motion").

7. On July 20, 2020, the Court entered the *Order (I) Approving Initial Submission Proposal Guidelines in Connection with a Combination Transaction, and (II) Granting Related Relief* [Docket No. 299] (the "Initial Proposal Submissions Guidelines Order").

8. On July 31, 2020, in accordance with the Initial Proposal Submissions Guidelines Order, the Debtors filed the *Notice Of: (I) Filing Of Stage 2 Process Procedures; (II) Objection Deadline With Respect To Stage 2 Process Procedures; And (III) Stage 2 Hearing* [Docket No. 360] which provided, among other things, that objections or responses to the Stage 2 Process Procedures (as defined in the Initial Proposal Submissions Guidelines Order) were due to be filed on or before 4:00 p.m., prevailing Eastern Time, on August 12, 2020 (the "Stage 2 Process Procedures Objection Deadline").

9. In an effort to resolve the Committee's concerns regarding the Stage 2 Process Procedures, the Debtors agreed to extend the Stage 2 Process Procedures Objection Deadline for the Committee to August 13, 2020, at 12:00 p.m., prevailing Eastern Time.

10. On August 13, 2020, the Committee filed the Objection.

RELIEF REQUESTED

11. Pursuant to Bankruptcy Local Rule 9006-1(d), the Debtors request entry of an order, substantially in the form attached hereto as **Exhibit A**, authorizing the Debtors to file and serve the Reply, attached hereto as **Exhibit B**, beyond the deadline set forth in Local Rule 9006-1(d), to the Objection and in support of the Stage 2 Process Procedures.

BASIS FOR RELIEF REQUESTED

12. Pursuant to Bankruptcy Local Rule 9006-1(d), "[r]eply papers . . . may be filed and, if filed, shall be served so as to be received by 4:00 p.m. Prevailing Eastern Time the day prior to the deadline for filing the agenda." Bankr. L.R. 9006-1(d). The agenda for the hearing related to the Stage 2 Process Procedures was due on August 12, 2020. Accordingly, pursuant to Bankruptcy Local Rule 9006-1(d), the deadline to file the Reply was 4:00 p.m., prevailing Eastern Time on August 11, 2020 (the "Reply Deadline"). Because the Committee's Objection was filed on August

13, 2020, with the consent of the Debtors, and in an effort to reach resolution with the Committee, the Debtors could not file the Reply prior to the Reply Deadline.

13. Bankruptcy Local Rule 9006-1 also provides that a "motion for leave to file a late reply" may be filed, and, if so filed, the Court "will consider the motion for leave at the hearing on the underlying motion papers." Bankr. L.R. 9006-1(d).

14. Section 105(a) of the Bankruptcy Code provides that the Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105(a).

15. The Debtors submit that cause exists to grant the relief requested by this Motion for Leave and approve an extension of time by which the Debtors may file the Reply under Bankruptcy Local Rule 9006-1(d). The Reply will address and clarify the issues raised in the Committee Objection and provide the Court with information and arguments in support of the Stage 2 Process Procedures. Accordingly, the Debtors submit that the relief requested herein is reasonable under the circumstances and should be approved.

NOTICE

16. Notice of this Motion for Leave is being given to: (i) the U.S. Trustee for the District of Delaware; (ii) counsel to the Committee; and (iii) any other party having filed with the Court a request for notice. The Debtors respectfully submit that in light of the nature of the relief requested, no further notice of the relief requested is necessary or required.

NO PRIOR REQUEST

17. No prior request for the relief sought in this Motion for Leave has been made to this or any other Court in connection with these chapter 11 cases.

WHEREFORE, the Debtors respectfully request that the Court: (i) enter an order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested herein to allow the Debtors to file the Reply, attached hereto as **Exhibit B**; and (ii) grant such other and further relief to the Debtors as the Court may deem proper.

Dated: August 13, 2020
Wilmington, Delaware

/s/ Richard W. Riley

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EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
EXTRACTION OIL & GAS, INC. *et al.*,[1]	)	Case No. 20-03167 (CSS)
Debtors.	)	(Jointly Administered)
	)	**Re: Docket Nos. 141, 360, 429 and ___**

ORDER GRANTING DEBTORS' MOTION FOR LEAVE TO FILE REPLY TO THE OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO STAGE 2 PROCESS PROCEDURES

Upon consideration of the *Debtors' Motion For Leave To File Reply To The Objection Of The Official Committee Of Unsecured Creditors To Stage 2 Process Procedures* (the "Motion for Leave")[2], seeking entry of an order, pursuant to Bankruptcy Local Rule 9006-1(d), authorizing the Debtors to file the Reply; and good and sufficient cause appearing therefor;

IT IS HEREBY ORDERED THAT:

1. The Motion for Leave is GRANTED as set forth herein.

2. The Reply attached to the Motion for Leave as **Exhibit B** is deemed filed, and the Court will consider the Reply.

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Extraction Oil & Gas, Inc. (3923); 7N, LLC (4912); 8 North, LLC (0904); Axis Exploration, LLC (8170); Extraction Finance Corp. (7117); Mountaintop Minerals, LLC (7256); Northwest Corridor Holdings, LLC (9353); Table Mountain Resources, LLC (5070); XOG Services, LLC (6915); and XTR Midstream, LLC (5624). The location of the Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.

[2] Capitalized terms used but not otherwise capitalized herein shall have the meanings ascribed to them in the Motion for Leave.

EXHIBIT B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
EXTRACTION OIL & GAS, INC. *et al.*,[1]	)	Case No. 20-11548 (CSS)
Debtors.	)	(Jointly Administered)
	)	**Re: Docket Nos. 141, 360 and 429**

DEBTORS' REPLY TO THE OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO STAGE 2 PROCESS PROCEDURES

The above-captioned debtors and debtors in possession (collectively, the "Debtors") file this reply (this "Reply") to the objection filed by the official committee of unsecured creditors (the "Committee") [Docket No. 429] (the "Objection") to the Stage 2 Process Procedures [Docket No. 360] filed by the Debtors as contemplated by the *Corrected Debtors' Motion for Entry of an Order (I) Approving Submission Proposal Guidelines in Connection with a Combination Transaction and (II) Granting Related Relief* [Docket No. 141] (the "Motion").[2] In support of this Reply, the Debtors respectfully state as follows.

Introduction

1. Approval of the Stage 2 Process Procedures is in the best interests of the Debtors' estates. The Stage 2 Process Procedures will provide certainty to potential merger counterparties in the market and facilitate the Debtors' ongoing efforts to maximize the value of their assets in

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Extraction Oil & Gas, Inc. (3923); 7N, LLC (4912); 8 North, LLC (0904); Axis Exploration, LLC (8170); Extraction Finance Corp. (7117); Mountaintop Minerals, LLC (7256); Northwest Corridor Holdings, LLC (9353); Table Mountain Resources, LLC (5070); XOG Services, LLC (6915); and XTR Midstream, LLC (5624). The location of the Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.

[2] Capitalized terms used but not defined in this Reply have the meanings ascribed to them in the Motion or the Objection, as applicable.

order to secure the greatest possible value for the benefit of all of the Debtors' stakeholders. The Committee correctly notes that the Debtors are not pursuing a standard section 363 sale process. Obj. ¶ 1. It rightly follows then that the "appropriate and typical" procedures, *id.*, usually implemented for a section 363 sale process are not entirely applicable to the corporate merger process being undertaken by the Debtors (the "M&A Process").

2. Further, the Committee seeks to cast the procedures as something more than what they are. Despite the timing and sequencing concerns asserted by the Committee, by the Motion, the Debtors are *not* seeking approval of any backstop commitment agreement, exit financing commitments, disclosure statement or related dates. Instead, the discrete matter now before the Court is the narrow relief sought in the Motion: whether employing a conventional M&A marketing process is a sound exercise of the Debtors' business judgment. The Committee may not substitute its own judgment for that of the Debtors, especially at the risk of derailing the Debtors' ongoing M&A Process, potentially putting the Debtors' restructuring efforts at risk. The Debtors are not alone on this front, as the Ad Hoc Noteholder Group and the DIP Lenders consulted with the Debtors and support the relief sought in the Motion. Although the Debtors also consulted extensively with the Committee's professionals regarding the Stage 2 Process Procedures, and indeed, agreed to make a number of modifications to address certain of the Committee's concerns, as discussed further herein, a global resolution was not obtained prior to the Committee's objection deadline. Nonetheless, the Debtors will continue to work in good faith with the Committee in advance of the hearing on this matter in an effort to ultimately reach a resolution.

3. For these reasons, the Debtors respectfully request that the Court overrule the Objection and approve the Stage 2 Process Procedures as modified herein.

Reply to the Objection

I. The Stage 2 Process Procedures Are Adequate, Fair, Reasonable, and an Appropriate Exercise of the Debtors' Business Judgment.

4. While the Stage 2 Process Procedures may lack certain "hallmark features" of a Court-supervised ***section 363 sale*** marketing process, the Debtors worked closely with their advisors, comprised of sophisticated and experienced professionals who regularly advise on merger marketing processes, to prepare the proposed Stage 2 Process Procedures to align with what is standard and customary in such practices while still maintaining sufficient flexibility.

5. Courts have made clear that a debtor's business judgment is entitled to substantial deference with respect to the procedures to be used in marketing an estate's assets. *See, e.g.*, *In re Martin*, 91 F.3d 389, 395 (3d Cir. 1996) ("Indeed, under normal circumstances the court would defer to the [debtor's] judgment so long as there is a legitimate business justification."); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999); *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991) ("[T]he debtor in possession can sell property of the estate . . . if he has an articulated business justification") (internal citations omitted); *see also In re Integrated Res., Inc.*, 147 B.R. 650, 656–7 (S.D.N.Y. 1992) (noting that procedures that have been negotiated by a debtor are to be reviewed according to the deferential "business judgment" standard, under which such procedures and arrangements are "presumptively valid").

6. The paramount goal in any proposed marketing process of property of the estate is to maximize the proceeds received by the estate. *See In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998) ("The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate."); *In re Food Barn Stores, Inc.*, 107 F.3d 558, 564–65 (8th Cir. 1997) (holding that, in bankruptcy sales, "a primary objective of the Code [is] to enhance the value of the estate at hand"); *Integrated Res.*, 147 B.R. at 659 ("[I]t is a well-

established principle of bankruptcy law that the objective of the bankruptcy rules and the trustee's duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.") (internal citations omitted).

7. To that end, courts uniformly recognize that procedures intended to enhance the marketing process at hand are consistent with the goal of maximizing the value received by the estate and therefore are appropriate in the context of bankruptcy transactions. *See, e.g.*, *Integrated Res.*, 147 B.R. at 659 (marketing procedures "are important tools to encourage bidding and to maximize the value of the debtor's assets").

A. The Debtors Have Accepted Several Proposed Modifications by the Committee to the Stage 2 Process Procedures. The Remainder Are Unnecessary and Therefore Inappropriate.

8. The Committee requests a variety of changes to the Stage 2 Process Procedures themselves. *See* Obj. ¶¶ 18-22. In efforts to accommodate the Committee, the Debtors agreed to implement the following modifications:

9. Disclosure and Information Sharing (Obj. ¶ 18).[3] The Debtors will continue to ensure a transparent process by:

- instituting weekly (or more frequently, whichever cadence is most appropriate at the time) standing calls to continue to provide timely updates to the Committee professionals regarding the M&A Process; and
- providing copies to the Committee professionals of any participant-wide communications and/or materials (*e.g.*, notice of an extended deadline), as appropriate.

Additionally, the Debtors have proposed the terms of an appropriate protective order to bridge any confidentiality concerns regarding delivery of certain requested materials and are likewise

[3] The Debtors agree to these enhanced information-sharing rights, *provided* that all information shared, including verbally, is on a professional eyes' only basis absent the Debtors' express consent, given that certain Committee members are counterparties to various of the Debtors' pending adversary proceedings, contested matters, and/or other ongoing litigation.

willing and ready to negotiate on an expedited basis. However, it is simply inappropriate for the Debtors, as part of the Order governing these procedures, to agree to provide the Committee with unfettered access to every single analysis and evaluation—confidential, privileged, or otherwise. That unprecedented step is neither typical nor necessary to ensure the Debtors' transparency in the M&A Process.

10. Form of Firm Proposals (Obj. ¶ 19). The Stage 2 Process Procedures already require that Firm Proposals be approved by the potential counterparty's board of directors, but the Debtors agree to further require that all Firm Proposals must affirmatively state that they will remain open through the deadline for Definitive Transaction Documents to be executed and delivered. However, to require submission of executed Definitive Transaction Documents would be atypical and therefore unreasonable in that such documents would necessarily be incomplete (lacking specific exhibits, for example).

11. Consultation Rights (Obj. ¶ 21). The Debtors recognize that the Committee is an important party in these chapter 11 cases and have already agreed to consult (and have done so extensively) with the Committee regarding this process. Indeed, the Committee is deemed a Consultation Party under the Initial Proposal Submission Guidelines and the Stage 2 Process Procedures, and the Debtors have honored such designation accordingly. Nonetheless, in efforts to alleviate the Committee's concerns and ensure full transparency, the Debtors have agreed to provide the Committee the enhanced consultation rights described above.

12. The Debtors evaluated the Committee's proposed modifications carefully and believe the Committee's remaining concerns are inappropriate for the reasons set forth below.

13. Deposit (Obj. ¶ 20). Deposits are not customary in a merger process and requiring one in these chapter 11 cases may have the impact of chilling bidding.

14. Reciprocal Plan Consent Rights (Obj. ¶ 22). As stated, the Debtors do not dispute that it is appropriate to consult with the Committee regarding the M&A Process. However, the Debtors *do* dispute that it is appropriate for the Committee, *or any other party*, to have a consent right over the ultimate transaction pursued. At the time of filing these chapter 11 cases, it was important to the Debtors that they do so with the requisite stakeholder support. Thus, the Debtors heavily negotiated the successful execution of the RSA with the Ad Hoc Noteholder Group to establish that support. The Committee mischaracterizes the rights afforded to the Ad Hoc Noteholder Group therein as "veto right[s]" over the ultimate Combination Transaction. *See* Obj. ¶ 22. What the RSA actually requires is that the Ad Hoc Noteholder Group fully supports and votes in favor of any plan of reorganization effectuating a Combination Transaction *so long as* the transaction in question is reasonably acceptable to the Required Consenting Senior Noteholders (as defined in the RSA). Importantly, if the Debtors determine in their business judgement that a Combination Transaction *not* reasonably acceptable to the Required Consenting Senior Noteholders is nonetheless in the best interests of their estates, the Ad Hoc Noteholder Group cannot "veto" the transaction, but is merely entitled to terminate the RSA and oppose the transaction, "including by voting to reject any chapter 11 plan implementing such transaction." *See* Docket No. 18, pages 71–72. The Committee's request for a "veto right" would require the Debtors to forego their fiduciary duties—an ask the Debtors are not willing to fulfill. Furthermore, certain members of the Committee have relationships with certain Stage 2 Process counterparties that may influence them to exercise such a "veto right" in a way that would not necessarily be in the best interests of the Debtors' estates.

[*Remainder of page intentionally left blank.*]

Conclusion

For the reasons set forth above and in the Motion, the Debtors respectfully request that the Court (a) approve the Stage 2 Process Procedures, (b) overrule the Objection, and (c) grant such other and further relief as the Court deems just and proper.

Dated: August 13, 2020
Wilmington, Delaware

/s/ Richard W. Riley

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[4] Whiteford, Taylor & Preston LLC operates as Whiteford Taylor & Preston L.L.P. in jurisdictions outside of Delaware.