Docket #0001 Date Filed: 9/8/2020

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
EXTRACTION OIL & GAS, INC., *et al.*,[1]	Case No. 20-11548 (CSS)
Debtors.	(Jointly Administered)
EXTRACTION OIL & GAS, INC.,	
Plaintiff,	Adversary Proceeding
v.	
ROCKY MOUNTAIN MIDSTREAM LLC,	Adv. Proc. No. 20-_____ (CSS)
Defendant.	

COMPLAINT FOR DECLARATORY JUDGMENT

Extraction Oil & Gas, Inc. ("Extraction") files this Complaint for declaratory judgment against Defendant Rocky Mountain Midstream LLC ("Rocky Mountain"). As the basis for its complaint, Extraction states the following:

Nature of the Action

1. In connection with the Debtors' chapter 11 cases, this adversary proceeding seeks a declaration that certain covenants (if any) contained in the agreements between Rocky Mountain and certain of the Debtors do not "run with the land."

[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.

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Jurisdiction and Venue

2. The United States Bankruptcy Court for the District of Delaware has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157, 1334, and 2201. The proceeding arises from the above-captioned chapter 11 cases and seeks a declaratory judgment that certain covenants (if any) contained in the agreements between Rocky Mountain and certain of the Debtors do not run with the land. This is a core proceeding under 28 U.S.C. § 157(b)(2).

3. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

4. Extraction consents to the entry of a final order or judgment by this Court.

Parties

5. Debtors are debtors-in-possession in the above-captioned bankruptcy proceedings by virtue of filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1532, on June 14, 2020 (the "Petition Date").

6. Defendant Rocky Mountain, upon information and belief, is a Texas limited liability company with its principal place of business at One Williams Center, Tulsa, Oklahoma 74172.

Factual Allegations

A. The Gas Gathering, Processing, and Purchase Agreements.

7. On February 8, 2019, Extraction and Rocky Mountain entered into a Gas Gathering, Processing, and Purchase Agreement (the "East Greeley Agreement"). A true and correct copy of the East Greeley Agreement is attached as **Exhibit A**.

8. On March 6, 2018, Extraction and Discovery DJ Services LLC entered into a Gas Gathering, Processing, and Purchase Agreement (the "Broomfield Agreement"). A true and

correct copy of the Broomfield Agreement is attached as **Exhibit B**. Rocky Mountain is successor-in-interest to Discovery DJ Services LLC under the Broomfield Agreement.

9. When referred to collectively, the East Greeley Agreement and the Broomfield Agreement shall be referenced as the "Gathering Agreements."

10. The Broomfield Agreement became [redacted] unless terminated by either party. Ex. B § 7. After that initial primary term, the Broomfield Agreement continues year to year until terminated. *See id.*

11. Similarly, the East Greeley Agreement became [redacted] unless terminated by either party. Ex. A § 7.1. After that initial primary term, the East Greeley Agreement continues year to year until terminated. *See id.*

12. Under the Broomfield Agreement, Rocky Mountain [redacted] and will use commercially reasonable efforts to service gas exceeding the MDQ. Ex. B § 2.5. The Delivery Points(s) are [redacted] the Broomfield Agreement. Ex. B § 4.1. Pointedly, unless the contract states otherwise elsewhere, a party's sole remedy for the breach of the contract of any other claim arising out of or in relation to the contract [redacted] *Id.* (Ex. A) § XII(d) (emphasis in original).

13. Similarly, under the East Greeley Agreement, Extraction [redacted] Ex. A § 2.5(b). The Delivery Point(s) are [redacted] to the East Greeley Agreement [redacted] *Id.* § 4.1. If Extraction ever chose not to deliver this volume of gas, or failed to do so, Extraction was obligated to pay a contractual fee. *See id.* § 2.5(c). Otherwise, and unless provided for differently elsewhere in the contract, a party's sole remedy for the breach of the contract of any other claim arising out of or in relation to the contract [redacted] *Id.* (Ex. A) § XII(d) (emphasis in original).

14. Under both Gathering Agreements, until Extraction's gas is delivered to the Delivery Point(s), it remains under Extraction's control and possession. Ex. A (Ex. A) § X(c); Ex. B (Ex. A) § X(c). Rocky Mountain only gains control and possession once gas is delivered at the Delivery Point(s). Ex. A (Ex. A) § X(d); Ex. B (Ex. A) § X(d).

15. Under both Gathering Agreements, Extraction agreed [redacted] Ex. A (Ex. A) § XVI(d); Ex. B (Ex. A) § XVI(d).

16. The instant dispute is necessitated by allegations that the Gathering Agreements created a real property interest called a covenant running with the land and whether that renders the Gathering Agreements incapable of rejection in bankruptcy.

17. Specifically, the Gathering Agreements purported to render [redacted] into [redacted] Ex. A § 2.4; Ex. B § 2.4. The contracts also recite that Extraction [redacted] Ex. A § 2.4; Ex. B § 2.4.

18. ***First***, the referenced dedications state, in relevant part:

[redacted]

Ex. A § 2.1; *see also* Ex. B § 2.1 (containing identical language but referencing Rocky Mountain's predecessor-in-interest).

19. Under the East Greeley Agreement, the Dedicated Interests are defined as:

[redacted]

Ex. A (Ex. A) § I(bb).

20. Under the Broomfield Agreement, the Dedicated Interests are defined as:

[redacted]

[redacted]

Ex. B (Ex. A) § I(x).

21. Under both Gathering Agreements, the Other Interests are defined as [redacted] Ex. A (Ex. A) § I(uuu); Ex. B (Ex. A) § I (bbb).

22. The dedications are subject to Extraction's reservation of several rights. *See* Ex. A § 2.2; Ex. B § 2.2. One of the rights Extraction reserved was [redacted] Ex. A § 2.2(d); Ex. B § 2.2(d).

23. ***Second***, the other prong of the purported covenant running with the land is Extraction's agreement that any sales, assignments or pledges of any portion of the Dedicated Interests would be made subject to the Gathering Agreement. *See* Ex. A § 2.3; Ex. B § 2.3.

24. Finally, concerning governing law, the Gathering Agreement is governed by Texas law, without regard to its conflict of laws principles. Ex. A (Ex. A) § XIV(b); Ex. B (Ex. A) § XIV(b). However, the real property that is purportedly burdened exists within Colorado. *See* Ex. A (Ex. B); Ex. B (Ex. B).

Claims for Relief

25. The allegations set forth above are incorporated herein by reference.

26. Under Colorado law, a covenant runs with the land only when the parties intend the covenant to run with the land and the covenant touches and concerns the land. *Reishus v. Bullmasters, LLC*, 409 P.3d 435, 440 (Colo. App. 2016). Privity of estate is also required. *See Taylor v. Melton*, 274 P.2d 977, 982 (Colo. 1954); *Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 92 P. 290, 293 (Colo. 1907).

27. Although intent is necessary, it is not sufficient. *See Cloud v. Ass'n of Owners, Satellite Apartment Bldg., Inc.*, 857 P.2d 435, 440 (Colo. App. 1992) ("Even if there is an intent to make a covenant run with the land, the covenant must still 'touch and concern' the land, that is, it must closely relate to the land, its use, or its enjoyment.") (citing *Bigelow v. Nottingham*, 833 P.2d 764 (Colo. App. 1991)).

COUNT I
(Gathering Agreements – Declaratory Judgment Under 28 U.S.C. § 2201(a))

28. The allegations set forth above are incorporated herein by reference.

29. The parties dispute whether the Gathering Agreements create any covenants that run with the land.

30. The Gathering Agreements do not create covenants that run with the land under Colorado law. In particular, Extraction's promise to deliver certain volumes of gas for processing services is not a covenant that runs with the land.

31. First, the Gathering Agreements do not grant Rocky Mountain an interest in Extraction's real property sufficient to satisfy privity of estate under Colorado law. Instead, each Gathering Agreement merely "identif[ies] and delineat[es] the [parties'] contractual rights and obligations." *In re Sabine Oil & Gas Corp.*, 547 B.R. 66, 76 (Bankr. S.D.N.Y. 2016), aff'd, 567

B.R. 869 (S.D.N.Y. 2017), aff'd, 734 Fed. Appx. 64 (2d Cir. 2018). Furthermore, any interest Rocky Mountain potentially has under the Gathering Agreements concerns only personal property. Thus, the parties never shared privity of estate and the covenants within the Gathering Agreements do not run with the land.

32. Second, the covenants in the Gathering Agreements do not "touch and concern" the land. Instead of affecting the use or enjoyment of Extraction's mineral estate, the Gathering Agreements affect only the parties personally. The only interest at issue in the Gathering Agreements is produced gas—not real property.

33. As a result of the facts described in the preceding paragraphs, there exists a controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

34. A judicial declaration is necessary and appropriate so that Extraction may ascertain its rights and obligations regarding the Gathering Agreements.

35. For the foregoing reasons, Extraction is entitled to a judicial declaration that the covenants contained in the Gathering Agreements fail to run with the land.

36. Such a declaration serves the twin interests of judicial efficiency and cost-effectiveness by terminating the substantial and actual controversy between the parties, or resolving some part of it.[2] It will also serve a useful purpose by enabling the Court to determine whether the Gathering Agreements and all obligations thereunder may be rejected under section 365 of the Bankruptcy Code.

[2] On August 11, 2020, Debtors filed the *Second Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief* [Docket No. 412], which included requested relief to reject the Gathering Agreements pursuant to section 365 of the Bankruptcy Code. Bankruptcy courts have expressed a preference for the simultaneous adjudication of the issues raised in this adversary proceeding with a motion to reject the underlying executory contract. *In re Sabine Oil & Gas Corp.*, 547 B.R. at 73 ("[B]ifurcating the motion to reject and further proceedings to finally resolve the underlying property law dispute is an inefficient use of judicial and private resources; it would have been far preferable for the Court to hear the two together.").

Prayer for Relief

WHEREFORE, Extraction respectfully requests that the Court enter judgment in favor of Extraction as follows:

(a) Declaring that the covenants (if any) contained in the Gathering Agreements do not run with the land.

(b) Granting Extraction such other relief as the Court deems appropriate under the circumstances.

Dated: September 8, 2020
Wilmington, Delaware

/s/ Stephen B. Gerald

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

EXHIBIT A

Filed Under Seal

EXHIBIT B

Filed Under Seal