WHITEFORD, TAYLOR & PRESTON LLC

THE RENAISSANCE CENTRE, SUITE 500
405 NORTH KING STREET
WILMINGTON, DE 19801-3700
MAIN TELEPHONE (302) 353-4144
FACSIMILE (302) 661-7950

DELAWARE*
DISTRICT OF COLUMBIA
KENTUCKY
MARYLAND
MICHIGAN
NEW YORK
PENNSYLVANIA
VIRGINIA

WWW.WTPLAW.COM
(800) 987-8705

RICHARD W. RILEY
COUNSEL
DIRECT LINE (302) 357-3265
DIRECT FAX (302) 357-3286
RRiley@wtplaw.com

September 14, 2020

BY E-FILING AND EMAIL
The Honorable Christopher S. Sontchi
United States Bankruptcy Court
824 N. Market Street, 5th Floor
Wilmington, DE 19801

Re: In re Extraction Oil & Gas, Inc., *et al*. (Case No. 20-11548); Adversary Proceeding No. 20-50813; Adversary Proceeding No. 20-50816; Adversary Proceeding No. 20-50833; Adversary Proceeding No. 20-50839; Adversary Proceeding No. 20-508130

Dear Chief Judge Sontchi:

The Debtors are grateful to the Court and its staff for holding a status conference to address discovery issues. As the Court will recall from the September 1, 2020 status conference, a hearing is set on September 30, 2020 for consideration of the Debtors' motions to reject contracts pursuant to section 365 of the Bankruptcy Code with the following midstream counterparties:

- Grand Mesa Pipeline, LLC ("Grand Mesa");
- Elevation Midstream, LLC ("Elevation");
- REP Processing, LLC ("REP"); and
- Platte River Midstream, LLC/DJ South Gathering, LLC ("Platte River") (collectively, the "Counterparties").[1]

It is of paramount importance to the Debtors and their estates that these rejection motions be adjudicated as promptly as possible. The discovery issues arise in the context of these motions

[1] The Debtors filed an adversary proceeding relating to midstream agreements with Rocky Mountain Midstream, LLC, ("RMM") on September 8, 2020 (Adv. Proc. No. 20-11548). That same day Debtors filed a motion for summary judgment (Adv. Dkt. 3). The Debtors, however, do not intend to submit to the Court issues relating to this adversary proceeding or the related motion to reject at the September 30, 2020 hearing. The parties are currently working out a mutually agreeable schedule regarding these issues.

**Whiteford, Taylor & Preston LLC is a limited liability company. Our offices outside of Delaware operate under a separate M

and the related adversary proceedings. This letter addresses the procedural and legal background relevant to discovery. Then, it charts out the areas of discovery disagreement, if any, between the Debtors and each counterparty. Finally, it identifies the particular discovery disputes on which the Court's guidance would be welcome. To assist the Court, the Debtors have also attached as **Exhibit A** a chart setting forth the relevant docket numbers, agreed briefing schedule and discovery status by counterparty.

Procedural Background Relevant to Discovery

First, Counterparties argue that their contracts cannot be rejected because they contain covenants that purportedly run with the land under Colorado law. When the Bankruptcy Court for the Southern District of New York addressed an identical issue in 2016—to wit, rejection of a midstream agreement with a covenant that purportedly ran with the land—it noted "bifurcating the motion to reject and further [adversary] 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." *In re Sabine Oil & Gas Corp.*, 550 B.R. 59, 73 (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). Since *In re Sabine*, bankruptcy courts addressing this issue have engaged in simultaneous adjudication of the covenant issue raised in an adversary proceeding through motions for summary judgment with a motion to reject the underlying executory contract. *See, e.g.*, *In re Alta Mesa Res., Inc.*, 613 B.R. 90, 98–99 (Bankr. S.D. Tex. 2019) (deciding a declaratory judgment claim related to covenants running with the land under a midstream contract on a motion for summary judgment); *cf. In re Chesapeake Energy Corporation, et al.*, Case No. 20-33233 (July 31, 2020 Hearing Tr.) at 20:21–22:19 (discussing resolution of a near-identical covenant running with the land issue and noting that since "everybody agrees that this is just a purely legal issue and you agree to the form of the documents" then the proceeding could be done in a single hearing in the underlying bankruptcy case without discovery). Accordingly, Debtors have filed adversary proceedings[2] seeking a declaratory judgment that each contract does not contain an enforceable covenants running with the land and have filed summary judgment motions to adjudicate these claims.[3]

---

[2] The adversary matters are:

- Extraction Oil & Gas, Inc. v. Grand Mesa Pipeline, LLC (Adv. Proc. No. 20-50816);
- Extraction Oil & Gas, Inc. v. REP Processing, LCC (Adv. Proc. No. 20-50813);
- Extraction Oil & Gas, Inc. v. Platte River Midstream, LLC and DJ South Gathering, LLC (Adv. Proc. No. 20-50833); and
- Extraction Oil & Gas, Inc. v. Elevation Midstream, LLC (Adv. Proc. No. 20-50839).

[3] The motions for summary judgment are:

- Grand Mesa (Adv. Proc. No. 20-50816): Plaintiff's Motion for Summary Judgment, Dkt. No. 4; filed Aug. 19, 2020;
- REP (Adv. Proc. No. 20-50813): Plaintiff's Motion for Summary Judgment, Dkt. No. 5, filed Aug. 14, 2020;
- Platte River (Adv. Proc. No. 20-50833): Plaintiff's Motion for Summary Judgment, Dkt. No. 4, filed Aug. 25, 2020; and

Second, Grand Mesa and Platte River also argue that their contracts cannot be rejected on the ground that the Federal Energy Regulatory Commission ("FERC") must first formally determine through a FERC order whether rejection is consistent with the public interest. To that end, Grand Mesa has filed a motion to confirm that the automatic stay does not apply or, in the alternative, for relief from the automatic stay to allow it to file a petition with FERC. [Dkt. 365; filed Aug. 4, 2020]. Further, Grand Mesa and Platte River are casting a wide net in discovery in pursuit of the argument that this Court should decide that rejection would not be consistent with the public interest.

Legal Background Relevant to Discovery

Adversary Proceedings: Although the Debtors appreciate the Court's instruction to reasonably accommodate discovery requests in preparation for the September 30 hearing date, and have done so, Plaintiff Extraction's position is that the motions for summary judgment in the adversary proceedings can and should be adjudicated ***without any*** fact discovery because courts applying Colorado law hold that the covenant running with the land analysis is a purely legal issue. A federal court sitting in Colorado and applying Colorado law stated "[w]hether a covenant runs with the land ***turns on the construction of relevant documents***." *MidCities Metro. Dist. No. 1 v. U.S. Bank Nat. Ass'n*, 12-CV-03322-LTB, 2013 WL 3200088, at *3 (D. Colo. June 24, 2013) (emphasis added) (citing *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Associates*, 867 P.2d 70, 74 (Colo. App. 1993)). The court added that "[i]f a document such as a deed is unambiguous on its face, ***the nature and extent of the interest contained in it must be determined without regard to extrinsic evidence***." *Id.* (emphasis added) (citing *O'Brien v. Vill. Land Co.*, 794 P.2d 246 (Colo. 1990)). Colorado state courts agree. *See Lookout Mountain Paradise Hills Homeowners' Ass'n*, 867 P.2d at 74 ("Whether a covenant runs with the land turns on the construction of relevant documents.") (citing *Cloud v. Ass'n of Owners, Satellite Apartment Bldg., Inc.*, 857 P.2d 435, 437 (Colo. App. 1992)); *Holiday Acres Prop. Owners Ass'n, Inc. v. Wise*, 998 P.2d 1106, 1108 (Colo. App. 2000), as modified on denial of reh'g (July 6, 2000) (stating the "[i]nterpretation and construction of covenants is a question of law"). Moreover, bankruptcy courts analyzing covenant running with the land issues in oil and gas midstream contracts, like the ones at issue here, have also stated the issues "are questions of law." *See In re Badlands Energy, Inc.*, 608 B.R. 854, 861 (Bankr. D. Colo. 2019) (applying Utah law and resolving the covenant running with the land issues before the court on cross-motions for summary judgment).

- Elevation (Adv. Proc. No-20-50839): Plaintiff's Motion for Summary Judgment, Dkt. No. 3, filed Sept. 4, 2020.

Given that these issues are questions of law, the analyses both Colorado courts and Bankruptcy courts have engaged in to determine whether the covenant at issue satisfied the legal test for it to run with the land[4] focused only on interpretation of the contract itself. Specifically:

- **Under Colorado law, satisfaction of the intent element is a legal question**: *See TBI Expl. v. Belco Energy Corp.*, 220 F.3d 586 (5th Cir. 2000) (applying Colorado law and stating "a requirement that real covenants be expressed in specific and unambiguous terms carries force because nonparties and successors-in-interest who did not participate in the negotiations to the principal agreement should be able to determine their respective rights and obligations from the face of the principal agreement"); *accord In re Alta Mesa Res., Inc.*, 613 B.R. 90, 106 (Bankr. S.D. Tex. 2019) (applying Oklahoma law and concluding "[b]ased upon the language of the gathering agreements, original and as amended, the parties expressed the intent to bind successors"); *In re Badlands Energy, Inc.*, 608 B.R. at 870 (resolving the intent element as a matter of law).

- **Under Colorado law, satisfaction of the touch and concern element is a legal question**: *See Cloud*, 857 P.2d at 440 ("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. If a document such as a deed is unambiguous on its face, ***the nature and extent of the interest contained in it must be determined without regard to extrinsic evidence***.") (emphasis added) (citations omitted); *Lookout Mountain Paradise Hills Homeowners' Ass'n*, 867 P.2d at 75 (concluding a covenant touched and concerned the land based entirely off construction of the document, without considering extrinsic evidence); *accord In re Sabine Oil & Gas Corp.*, 550 B.R. at 66 (applying Texas law and concluding "***[b]y the plain terms of the Nordheim Agreements and the HPIP Agreements***, the mineral dedications concern only minerals extracted from the ground, which indisputably constitute personal property, not real property, under Texas law") (emphasis added); *Slawson Expl. Co., Inc. v. Nine Point Energy, LLC*, 966 F.3d 775, 779 (8th Cir. 2020) (applying North Dakota law and concluding there was not a direct benefit to the land based on the construction of the relevant contract); *In re Badlands Energy, Inc.*, 608 B.R. at 868 (applying Utah law and resolving the touch and concern element as a matter of law based upon the construction of relevant documents).

- **Under Colorado law, satisfaction of the privity of estate element is a legal question**. *See Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 92 P. 290, 293 (Colo. 1907) (concluding the parties were in privity of estate because of the ***legal*** relationship the parties had respecting land); *see also In re Sabine Oil & Gas Corp.*, 734 Fed. Appx. 64, 67 (2d Cir. 2018) (applying Texas law and stating "[r]egarding the horizontal privity requirement, there is no meaningful legal distinction between the contract in *Clear*

[4] 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).

Lake and the one at issue here. Neither contract conveyed a property interest in subject land (in this case, the mineral estate). Accordingly, both fail to establish horizontal privity of estate and therefore both fail to create a real covenant"); *In re Badlands Energy, Inc.*, 608 B.R. at 873 (applying Utah law and resolving the privity of estate element as a matter of law based upon the construction of relevant documents); *In re Alta Mesa Res., Inc.*, 613 B.R. at 106 (applying Oklahoma law and concluding horizontal privity was established based on construction of the contract alone); *cf.* Restatement (First) of Property § 534 cmt. d (describing the generally accepted, legal test for privity of estate: "A transfer of an interest in land as a part of a transaction in which a promise respecting the use of land is made is sufficient to create the relationship essential to the running of the burden of the promise.").

Motion to Reject: As the Court is well aware, the decision to reject an executory contract pursuant to section 365(a) is a matter within the "business judgment" of the debtor. *See Mission Prod. Holdings v. Tempnology, LLC*, 139 S. Ct. 1652 (2019). This standard mandates that a court approve a debtor's business decision unless the decision is the product of bad faith, whim or caprice. *See Lubrizol Enters., Inc. v. Richmond Metal Finishes, Inc. (In re Richmond Metal Finishes, Inc.)*, 756 F.2d 1043, 1047 (4th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986). In light of this legal standard, the Debtors stand ready to prove to the Court, and the Counterparties, that there is a "sound business purpose" that justifies rejection here. *See In re Delaware and Hudson Ry. Co.*, 124 B.R. 169, 176 (Bankr. D. Del. 1991).

Grand Mesa, Platte River, and REP are seeking broad discovery that goes far beyond the ultimate analysis that undergirds the Debtors' decision to reject and the decision itself. They are seeking interim analysis and communications about the contracts the Debtors seek to reject as well as a wide range of information about alternatives that have been explored, including proposals from alternative service providers and all related communications, and the merger proposals received by the Debtors.

Current Discovery Status

First, the good news: both Grand Mesa and Elevation appear to agree with Extraction's position that the motions for summary judgment filed in each of their respective adversary proceedings can be resolved as a matter of law without fact discovery because no discovery has been sought to date. In the case of Grand Mesa, the agreed deadline to do so has passed. On September 10, Elevation filed a cross-motion for summary judgment on these legal issues (Adv. Dkt. 11).

In contrast, REP and Platte River have insisted on pursuing broad, wide-ranging factual discovery in connection with identical legal issues. Extraction has worked in good faith to accommodate their requests, despite its position that ***no*** discovery is relevant to the adversary proceeding. The following chart may assist the Court in summarizing the current status of discovery:

Counterparty	Adversary/MSJ Discovery on Covenant Running with the Land	Automatic Stay/FERC Discovery	Business Judgment Discovery	Discovery Disputes?
Grand Mesa	None	Yes	Yes	None Raised
Elevation	None	N/A	None	None Raised
Platte River	Yes (ROGs, RFPs, RFAs, 30(b)(6))	Yes (ROGs, RFPs, RFAs, 30(b)(6))	Yes (ROGs, RFPs, RFAs, 30(b)(6))	Yes
REP	Yes (ROGs, RFAs, RFPs, 30(b)(6))	N/A	Yes (ROGs, RFAs, RFPs, 30(b)(6))	Yes

Discovery Issues for the Court's Consideration

1. **Timing of Extraction's Document Production to Platte River**: Platte River served two sets of discovery requests. There were 17 ROGs and 22 RFPs in the first set and 3 RFAs, 8 ROGs, and 7 RFPs, in the second. In response, Extraction has produced more than 125,000 documents (many of which are lease documents, which we warned were voluminous and irrelevant). We anticipate Platte River will complain that Extraction's production arrived a day after the agreed deadline. Indeed, the production was a day late. The parties did not reach agreement on the terms of a protective order until late in the day of the agreed deadline due to issues regarding who at Platte River could review confidential materials. Platte River subsequently pointed out that the documents could have been produced under Local Rule 9018-1(f), which allows for production and review by only outside counsel and its staff, but never suggested this option while the parties were negotiating the protective order. By contrast, Platte River produced just under 900 files on the evening of the substantial completion deadline, which was reproduced the following day to include metadata not included in the first production.

2. **Substance of Debtors' Rog Responses to Platte River**: We anticipate Platte River will complain that Debtors served objections, but not substantive responses, to their ROGs on the agreed deadline. During their meet and confer, the parties agreed to a deadline for ***objections*** to Platte River's paper discovery, not substantive responses, so that each side could know whether the other intended to refuse to produce any discovery in advance of the actual production deadline. In any event, Debtors have now provided substantive responses.

3. **Production from Moelis and Petrie Partners in Response to Platte River's RFPs**: Platte River requested that the documents of Debtors' advisors, Moelis and Petrie, be collected, reviewed and produced. Debtors declined because Moelis and Petrie did not conduct analysis of the contracts proposed to be rejected and did not make the rejection decision. The Debtors are collecting, reviewing, and producing documents and communications of its advisors at Alvarez & Marsal, however, who conducted the relevant analysis. Platte River

has correctly pointed out that Moelis and Petrie were involved in communicating with potential merger parties or other parties interested in making an investment/entering into a transaction with the Debtors. But this merger information is not relevant to any dispute at hand and was not even requested in the document requests that Platte River served. Further, applying the search terms proposed would increase the number of documents to be reviewed by roughly 10,000, which would be a disproportionate burden given the tangential relationship of these emails to the rejection issues.

4. **Redaction of Analysis Related to Other Contracts:** In most cases, the Debtors analyzed or addressed rejection of multiple contracts together in the same documents and communications. Given the breadth of the Counterparties' requests for information related to the Debtors' analysis and communications related to and leading up to their motion to reject as well as communications with would-be alternative service providers and analysis of their proposals, we must redact highly sensitive information about contracts that are not relevant to the Debtors' rejection of each party's specific contracts. Over the weekend, we produced the various documents that relate directly to the ultimate analysis relied upon and the decision to reject--the documents that actually relate to the Debtors' exercise of business judgment. The Debtors also are willing to produce additional documents related to interim analysis and communications leading up to the motion to reject as we complete the redactions but these documents are not necessary to assess the Debtors' exercise of business judgment.

5. **Timing for Extraction to respond to REP's discovery requests in Adv. Proc. No. 20-50813**: On August 26, REP served discovery requests in the adversary to be answered on September 25. This discovery included 24 RFAs, 13 ROGs, and 36 RFPs. These were served with an agreement already in place that REP would file its response to Extraction's motion for summary judgment on September 18, notwithstanding the 14 day deadline to respond to dispositive motions pursuant to this Court's local rules. When the Court set the motion for summary judgment hearing for September 30, Extraction asked REP to identify the discovery it thought it needed on an expedited basis before REP's motion for summary judgment response. REP identified 20 categories of documents, including categories not sought in the August 26 discovery requests. Subject to a limited number of relevance objections to topics such as merger proposals and business judgment documents produced to all other parties, Extraction agreed to search for and produce responsive non-privileged documents located after a reasonably diligent search. REP also asked for a Rule 30(b)(6) deposition. REP originally noticed the deposition on August 26 and amended their notice on September 8 to add 10 additional topics for a total of 38 broad deposition topics (including, for example, "Extraction's operations"), which collectively cover all of the issues covered in their paper discovery requests. Extraction's CEO, Matt Owen, will be deposed tomorrow on these topics.

   The issue: REP now insists Extraction provide complete responses to REP's entire August 26 written discovery ***prior to*** REP filing its motion for summary judgment response due on September 18. But this discovery is duplicative of the deposition topics, burdensome, and, in

any event, irrelevant to the issues before the Court in the adversary proceeding. Extraction respectfully requests that its deadline to respond to the August 26 discovery remain September 25, as it was noticed.

The Debtors look forward to discussing these issues with the Court at the status conference, reconvening on status on September 25 and proceeding to the September 30th hearing as scheduled.

Respectfully,

/s/Richard W. Riley

Richard W. Riley

cc: Counsel for the following:
REP Processing, LLC
Grand Mesa Pipeline, LLC
Platte River Midstream, LLC and DJ South Gathering, LLC
Elevation Midstream, LLC
Rocky Mountain Midstream

Exhibit A

Briefing Schedule and Discovery Status by Counterparty

Counterparty	Motion to Reject	Adversary	MSJ	Automatic Stay Motion	Response to Automatic Stay Motion	Response to Motion to Reject	Response to MSJ	Reply to Motion to Reject & MSJ	RFP served?	RFA served?	ROGs served?	Deposition sought?
Elevation	Dkt. 377	20-50839	Adv. Dkt. 11	No	N/A	9/23	9/23	9/23 / 9/28	No	No	No	No
Grand Mesa	Dkt. 14	20-50816	Adv. Dkt. 5	Dkt. 364	Dkt. 507	Dkt. 363	9/14	9/23	Yes, only Mot. to Reject	No	No	Yes, but not noticed
REP Processing	Dkt. 14	20-50813	Adv. Dkt. 4	No	N/A	Dkt. 157	9/18	9/23	Yes, only MSJ	Yes, only MSJ	Yes, only MSJ	Yes, only MSJ
Platte River / DJS	Dkt. 412	20-50833	Adv. Dkt. 3	No	N/A	9/18	9/18	9/23	Yes, both	Yes, both	Yes, both	Yes, both