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September 14, 2020

BY E-FILING

The Honorable Christopher S. Sontchi
Chief Judge
United States Bankruptcy Court for the District of Delaware
824 North Market Street
Wilmington, DE 19801

Re: *In re: Extraction Oil & Gas, Inc., et al.*, Case No. 20-11548 (CSS)

Dear Chief Judge Sontchi:

My firm, along with Holland & Hart, represent Platte River Midstream, LLC and DJ South Gathering, LLC (together, the "Movants"). We are writing in connection with discovery disputes with the Debtors and to request an order (1) compelling the Debtors to complete their production of documents and remove the "highly confidential" designation from documents, and (2) compelling the Debtors to search for and produce documents in the possession of their investment bankers, Petrie Partners Securities LLC and Moelis & Co. LLC (the "Bankers"). As the Debtors have failed to comply with the expedited schedule they agreed to, the Movants also request an adjournment of the September 30 hearing to allow the parties to complete discovery.

Summary of Dispute

At the hearing on September, 1, 2020, the Court granted the Debtors' request for an expedited hearing on the Rejection Motion on September 30, 2020 (the "Rejection Hearing").[1] The Court, however, warned the Debtors that if they did not timely provide discovery to the Movants (and other midstream counterparties), the Court would not force an expedited hearing. Unfortunately, that is precisely what has occurred.

[1] The hearing on September 30 will include hearings on 7 different rejection motions and related motions for summary judgment in separate adversary proceedings. The Movants understand that the other midstream contract counterparties will be filing letters raising their own scheduling and discovery concerns.

Following the September 1 hearing, the Movants and Debtors agreed to a highly expedited schedule for document discovery, depositions, and briefing. This schedule required, among other things, responses and objections to interrogatories on September 7, the substantial completion of document production on September 9, fact and expert depositions taking place between September 11-18, and Movants' objections to rejection and summary judgment being due on September 18. Due to the expedited schedule, even minimal delays result in significant prejudice.

On September 9, the deadline for the *substantial completion* of document productions, the Debtors did not produce a single document. On September 10, the Debtors made a partial production of documents consisting almost entirely of mineral leases, right of way agreements, and other title documents and correspondence with surface and mineral owners, but no documents about the Debtors' decision to reject the Movants' transportation agreements.

On September 12 and 13, the Debtors made a supplemental production of 40 heavily redacted documents with all but 2 designated as "highly confidential" so that they cannot be reviewed by Movants' employees.[2]

Amazingly, *this production still does not contain <u>any</u> email communications* about the Debtors' purported rejection analysis, alternatives, or negotiations of the TSAs, notwithstanding the multiple meet and confers regarding search terms for email archives of specific custodians.

The Debtors, moreover, have refused to *even search* for responsive documents from the Bankers notwithstanding that their Retention Applications state that each of Petrie and Moelis would play an important role in the evaluation of the Movants' transportation agreements, the go forward business plan, restructuring negotiations, and capital transactions.

With depositions scheduled to be completed by September 18, these failures to adhere to the agreed upon schedule is highly prejudicial. The Movants should not be compelled to defend against the Rejection Motion after being deprived of relevant and potentially critical documents to their defense.

<u>Background</u>

On August 11, 2020, the Debtors moved to reject their midstream transportation agreements with the Movants (the "TSAs"). <u>See</u> 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 (D.I. 412) (the "Rejection Motion"). In the Rejection Motion, the Debtors state that they "have undertaken extensive review of their executory contracts and unexpired leases of real property . . . and [that they] have determined in their business judgment that the costs incurred under the Contracts and Leases constitute an unnecessary drain on the Debtors' already limited resources and/or more cost-efficient alternatives

[2] This over-designation abuse is exemplified by the Debtors' designation of multiple documents *created by Movants* as "highly confidential." *See, e.g.,* XOGPRM0000499632-635, XOGPRM0000499636-639.

exist." *Id.* at ¶ 7-8 (emphasis added). The Movants requested documents and communications supporting these statements.

On September 1, 2020, the Court set September 30 as the hearing on the Debtors' motions to reject 7 different midstream contracts and oral argument on 5 different motions for summary judgment in related adversary proceedings.[3]

The parties stipulated to a discovery and briefing schedule with the following critical dates: September 7 as the deadline to respond and object to discovery requests, September 9 for the substantial completion of document production, September 11-16 for fact depositions, and September 18 as the deadline for Movants to object to the Rejection Motion and summary judgment.[4]

During several meet and confers, the parties discussed search terms and custodians for electronic materials, including emails.

Relief Requested

Production of Documents

The Court should compel the Debtors to complete their document production immediately. The Movants' ability to prepare their defense to the Rejection Motion, including preparing for depositions, preparing their expert, and drafting responses to the Rejection Motion and summary judgment, is dependent upon receiving the Debtors' production. It is highly prejudicial for the Debtors to fail to comply with the expedited schedule they have forced upon Movants.

As mentioned above, the production the Debtors have made to date *does not contain a single email* about the Rejection Motion, and, other than 40 total documents produced on Saturday and Sunday, does not contain any of the analysis the Debtors purportedly conducted prior to filing the Rejection Motion. As of the submission of this letter, the Debtors still have not produced the following categories of documents:

- Communications concerning their decision to reject the TSAs (RFP Nos. 2, 3, and 16[5]);
- Documents referring or relating to the interpretation or enforcement of the TSAs (RFP No. 4);
- Communications referring or relating to the rejection of the TSAs (RFP No. 7);
- Documents or communications concerning the Debtors' decision to enter into the TSAs, including alternatives to transportation (RFP No. 8);

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[3] As the Court will hear at the scheduling conference, the Debtors have not maintained the same schedules for the different rejection or summary judgment motions, leading to discovery not even having begun for two midstream companies subject to rejection motions.

[4] A copy of the email setting forth the agreement on this schedule is attached hereto as Annex A.

[5] All references to RFPs are references to the first set of RFPS served on Debtors unless otherwise specified.

- Communications concerning the Debtors' consideration of alternatives to transportation (RFP Nos. 10 and 11);
- Documents or communications relating to the negotiation of the TSAs, including the negotiation of the dedication areas (RFP Nos. 12 and 13);
- Communications concerning the total financial commitments in the TSAs (RFP Nos. 14 and 15);
- Communications concerning permits or agreements restricting the Debtors' transportation of oil in the dedication areas subject to the TSAs (RFP No. 17);
- Communications relating to Debtors' relationship with PRM, DJ South and PRH (RFP No. 2 of Second Set)
- Communications or documents relating to Debtors' estimates of annual production for PRM Interests and DJ South Interests (RFP No. 5 and 6 of Second Set)
- Documents or communications referring or relating to whether the TSAs were intended to create covenants running with the land (RFP Nos. 18 and 19); or
- Communications describing the prevailing rates for transportation (RFP No. 21).

These documents are directly relevant to the Rejection Motion, specifically the Debtors' business judgment and available alternatives.

Additionally, for the documents produced on September 12 and 13, the Debtors heavily redacted such documents and designated *all but 2* as "highly confidential" – including documents created by Movants – thereby limiting any review to professionals only. This over designation of documents is unduly prejudicial, particularly when the Movants' client's expertise is needed to evaluate and understand the production. The Court should order the removal of the blanket designation of "highly confidential" on these documents.[6]

Documents in the Possession of the Bankers

The Court should compel the Debtors to search for and produce relevant documents in the possession of the Bankers as they are highly likely to be in the possession of documents related to the Rejection Motion, including but not limited to the Debtors' analysis and decision to reject the TSAs.

First, with respect to Petrie, the Debtors represented in the Application for Entry of an Order (I) Authorizing the Retention of Moelis & Co. LLC and Petrie Partners Securities LLC (D.I. 265) ("Retention Application") that Petrie will play an important role in the Debtors' decision to evaluate and reject the TSAs. Retention Application at ¶ 17. Upon information and belief, Petrie has

[6] The Movants anticipate that the Debtors will argue that it is the Movants' burden to identify each document it disagrees should be designated as highly confidential. This flips the process on its head. It is the Debtors' burden in the first instance to make a good faith determination whether a document should be designated as confidential/highly confidential. It is wholly inappropriate for them to designate virtually all documents as highly confidential without first making this determination.

also been heavily involved in discussions with Transaction Parties, which included the rejection of the TSAs and what alternatives, if any, exist to Movants' pipelines.

With respect to Moelis, the Debtors stated in the Retention Application that Moelis would assist with restructuring negotiations, capital transactions, and the evaluation of the Debtors' business plan, all of which necessarily include an analysis of the Debtors' midstream contracts due to their importance to the Debtors' operations. The revenue the Debtors derive from the oil transported through the Movants' pipeline is substantial, amounting to over $20 million/month for the DJ South pipeline and $40 million/month for the Platte River pipeline.

The Debtors' stated justification for their refusal to *even search* for documents in the Bankers' possession is that engaging in a search is not proportional. This response is meritless. Proportionality under Rule 26(b)(1) analyzes the importance of the discovery "to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1).

The potential harm to the Movants from the rejection of the TSAs and the resulting damages is massive. The Movants spent over $200 million to construct the pipelines for the Debtors which transport almost 1.6 million barrels of oil per month. Rejection of the TSAs would not only result in a loss of their investment in constructing the pipelines, creating a rejection damages claim well over a hundred million dollars, but could also have a significant negative impact on the Debtors' revenues if a true alternative does not exist.

The Debtors, moreover, cannot show that being required to at least *search* for responsive documents is unduly burdensome. Without even conducting this search, the Debtors cannot meet their burden of establishing that "the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *Allied Systems*, 2015 WL 6874790 at *4.

Further belying the Debtors' argument is that the Debtors have apparently agreed to search Petrie professionals for responsive documents with Grand Mesa Pipeline, LLC, another midstream provider that is the subject of a motion to reject. This fact alone establishes that Petrie professionals are custodians with potentially relevant documents.

* * *

The Court has permitted the Debtors to pursue an aggressive discovery and litigation schedule with the admonition that the Debtors must provide necessary discovery to the Movants and other midstream counterparties. The Debtors thus far have not heeded the Court's instruction. Unless the Court compels the Debtors to comply with their discovery obligations, the Movants will be forced to defend against the Rejection Motion on a limited record, which the Court specifically stated it would not do at the September 1, 2020 hearing. Accordingly, the Court should compel the Debtors to (i) search and produce documents in the Bankers' possession, and (ii) order the removal of the "highly confidential" designations on the documents and compel the Debtors to complete their production immediately.

Due to the delay caused by the Debtors' failure to complete discovery, the Court should also adjourn the September 30 hearing to a future date.

Respectfully,

/s/ Curtis S. Miller

Curtis S. Miller

CSM/mch
Enclosure

Annex 1

Stipulated Discovery and Briefing Schedule Email

Begin forwarded message:

From: "Aycock, Jamie Alan" <jamie.aycock@kirkland.com>
Date: September 5, 2020 at 8:51:03 AM EDT
To: Chris Chrisman <CAChrisman@hollandhart.com>
Cc: "Miller, Curtis" <CMiller@MNAT.com>, "Gerald, Stephen" <SGerald@wtplaw.com>, "Riley, Richard W." <RRiley@wtplaw.com>, "Young, Kenneth A." <kenneth.young@kirkland.com>, Matt Ochs <MJOchs@hollandhart.com>, "Harvey, Matthew" <MHarvey@MNAT.com>, "Abrams, Marc R." <MAbrams@wtplaw.com>, "Rotman, Anna G." <anna.rotman@kirkland.com>, "Weinhouse, Allyson Smith" <allyson.smith@kirkland.com>, "Barrowes, Brooksany" <brooksany.barrowes@kirkland.com>, "Menefee, Christian" <christian.menefee@kirkland.com>
Subject: [EXT] Re: XOG - Platte River - Proposed Schedule

Chris - We can agree to most of the changes, but not the addition of the Petrie and Morelia domains. They were not involved in looking at the Platte River TSAs. Adding those domains would increase the hit count dramatically and those documents would not be responsive.

Jamie Alan Aycock

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> On Sep 4, 2020, at 6:50 PM, Chris Chrisman <CAChrisman@hollandhart.com> wrote:
>
> Jamie —
>
> Thanks for sending the search terms and revisions to the schedule.
>
> Attached is a Word document with a redline of the search terms. As you'll see, we've proposed adding a few relevant custodians, expanding a few of the searches, and adding an additional search in order order capture responsive documents.
>
> On the schedule, we're fine with nearly all of your proposed revisions. We've proposed to modify the deadlines for designating experts and disclosing reports, and for that

reason, slightly extending the deposition period. We realize that extends the depositions to our response date for the briefs, but we can work with that. Here is a chart for your review.

Deadline	XOG	PR Response	XOG Reply	PR 9/4 5:00 MT Response
Deadline for serving requests for production	8/31	Agreed		
Objections and responses to discovery requests	9/4	9/9	9/7	OK
Designation of any experts with summary of general topics	9/14	None	9/7	9/11
Document production substantially complete	9/16	9/9	Agreed (with one caveat: we are having to restore archived emails related to negotiation of the TSAs and are working as quickly as possible but we may need to revise the search terms or get additional time depending on the volume of the hits)	Ok with XOG's caveat that the parties can supplement if necessary.
Deadline for Debtors to file reply in support of Motion to Reject	9/18	9/23 (per court)	Agreed	
Expert Reports due	9/18	9/11	9/14	9/16
Deadline for Platte River/DJ South to file answering brief to Motion for Summary Judgment and to object to rejection motion	9/21	9/18	Agreed	
Fact and expert depositions	9/21-9/25	9/11-9/16	Agreed (but with experts to be deposed	9/11-9/18 so long as fact witnesses are completed by 9/16.

			at the end of the time period)	
Witness/exhibit lists due	9/27	Agreed		
Deadline for Debtors to file reply brief in support of Motion for Summary Judgement	9/27	9/23 (per court)	Agreed	
Deposition designations and joint stipulations of fact	9/28	Agreed		
Hearing	9/30	Agreed		

Happy to discuss. Thanks —

Chris

Chris Chrisman
Holland & Hart LLP
O 303.295.8013 | M 720.878.4659

<Search Terms for Debtors[15345700v2].docx>

On Sep 4, 2020, at 2:13 PM, Aycock, Jamie Alan <jamie.aycock@kirkland.com> wrote:

External Email

Hi Chris,

As we discussed a couple of days ago, whether we could agree to a schedule along the lines of what you proposed depends in part on whether we can reach agreement on the scope of discovery here. You said that you were open to our proposal that email searches be limited to communications between the select individuals we know were actually involved in the rejection analysis and decision as well as those involved in the communications related to potential alternatives. If you can agree to the following searches for the email portion of discovery, which we believe would be a reasonably proportionate