Docket #0023 Date Filed: 9/23/2020

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

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| 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. | |
| GRAND MESA PIPELINE, LLC, | Case No. 20-50816 (CSS) |
| Defendant. | **Re: Docket No. 19** |

**RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR ABSTENTION**

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**-AND-**

[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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Dated: September 23, 2020

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## INTRODUCTION

Grand Mesa invited Extraction to file this adversary proceeding in its objection to Extraction's motion to reject the parties' Transportation Agreement, insisting Extraction should "have commenced an adversary proceeding" to contest real covenant issues related to the Transportation Agreement.[1] After seeing Extraction's briefing, Grand Mesa has apparently changed its mind and no longer wants the Court to adjudicate this dispute. Specifically, Grand Mesa asks the Court to permissively abstain from this proceeding despite: (1) its representation concerning the necessity and propriety of an adversary proceeding; (2) its agreement to respond to the motion for summary judgment; (3) multiple requests to Extraction for extensions to the deadline to respond to the motion for summary judgment; (4) participation in meet-and-confers regarding issues related to the adjudication of the motion to reject without raising this issue; and (5) participation in multiple scheduling conferences with the Court regarding briefing schedules and a hearing on the issues raised in this adversary proceeding without raising this issue.

Grand Mesa's gamesmanship should not be rewarded and is reason enough to reject Grand Mesa's motion. *See In re Maxus Energy Corp.*, 597 B.R. 235, 247 (Bankr. D. Del. 2019), leave to appeal denied, 611 B.R. 532 (D. Del. 2019) ("Permissive abstention is not formulaic and involves an ***equitable consideration of the circumstances*** and weighing of the factors.") (emphasis added). Regardless, the vast majority of the non-exhaustive factors listed by Grand Mesa in its motion also weigh in favor of the Court denying Grand Mesa's motion to abstain.

[1] *Objection of Grand Mesa Pipeline, LLC to Debtors' 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* [Dkt. 363 in the chapter 11 case] at 6.

## ARGUMENT

### I. PERMISSIVE ABSTENTION IS NOT WARRANTED.

Most of the twelve permissive abstention factors listed by the Third Circuit weigh in favor of Extraction and the denial of Grand Mesa's motion. *See In re Cubic Energy, Inc.*, 603 B.R. 743, 755 (Bankr. D. Del. 2019) (outlining the twelve factors).

#### A. The First Factor Strongly Favors Extraction.

The first factor concerning the "effect or lack thereof on the efficient administration of the estate" strongly favors Extraction. *See id.* (citing *In re Maxus Energy Corp.*, 560 B.R. at 124). Extraction's rejection motion must be timely considered to maximize the estate's value.

The very reason this adversary proceeding was filed is because Grand Mesa wants to avoid rejection of its executory contract and the claims process—and its status as an unsecured creditor—on the basis of an alleged real covenant. Thus, Grand Mesa's posturing affects the claims resolution process and the "bankruptcy court has an inherent responsibility to exercise its jurisdiction to effectuate one of the core features of the bankruptcy process itself—the claims resolution process." *In re Welded Constr., L.P.*, 609 B.R. 101, 113 (Bankr. D. Del. 2019). Indeed, "[p]ermitting the dispute to be litigated across the country only for the outcome to then be brought back and applied in the Court is anything but efficient where the dispute implicates the claims resolution process." *Id.* (citing *In re Venoco, LLC*, 596 B.R. 480, 493 (Bankr. D. Del. 2019)). Without resolution of the adversary issues, a cloud is cast over the restructuring because it may be unclear whether the contract can be rejected and whether Grand Mesa has a resulting claim.

In fact, Grand Mesa likely hopes for this outcome in the belief that preventing timely adjudication will give it negotiating leverage due to delay in the state court proceedings—where a final, non-appealable judgment could take months, if not years. This is especially egregious given

the other adversary proceedings addressing similar issues of Colorado law because "[g]ranting [Grand Mesa's] [m]otion would require two separate courts to consider a similar set of operative facts [and legal issues] concerning related defendants and with respect to similar issues. This would neither conserve judicial resources nor avoid . . . inconsistent rulings—traditional arguments for abstention." *In re Maxus Energy Corp.*, 597 B.R. at 247.

**B. The Third Factor Strongly Favors Extraction.**

The third factor concerning the "difficulty or unsettled nature of the applicable state law" strongly favors Extraction. *In re Cubic Energy, Inc.*, 603 B.R. at 755.

***First***, the law is settled, and this adversary proceeding entails application of this settled law to the unambiguous plain language of the contract at issue. Colorado has consistently applied the traditional common law elements for covenants that run with the land to decide similar cases since before it was a state. *See Hayes v. New York Gold Min. Co.*, 2 Colo. 273, 279 (1874) (concluding a promise affected "the quality and value of the premises demised, and [was] therefore within the definition of real covenants which run with the land"). ***Second***, although traditional and formal, the law is not difficult. The Court need only assess the Transportation Agreement's legal relationship to, and effect upon, Extraction's mineral estates and whether the contract conveyed to Grand Mesa some interest therein. The Court routinely resolves more difficult questions of law, and bankruptcy courts have adjudicated these same issues in the rejection context. *See generally In re Sabine Oil & Gas Corp.*, 550 B.R. 59, 61 (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).

**C. The Fourth Factor Favors Extraction.**

The fourth factor concerning the "presence of a related proceeding commenced in state court or other non-bankruptcy court" favors Extraction. *See In re Cubic Energy, Inc.*, 603 B.R. at

755. Grand Mesa concedes there is no pending non-bankruptcy case. Thus, this factor weighs against abstention. *See id.* at 756 ("Nor do considerations of outside laws and proceedings weigh in favor of abstention. There are no related proceedings in state or non-bankruptcy court.").

**D. The Fifth Factor Favors Extraction.**

The fifth factor concerning the "jurisdictional basis, if any, other than § 1334" favors Extraction. *In re Venoco, LLC*, 596 B.R. at 492. This proceeding arises from the chapter 11 case and seeks a declaratory judgment that the Transportation Agreement does not create real covenants in order to support Extraction's motion to reject the contract (and in response to Grand Mesa's objection); it is a core proceeding under 28 U.S.C. § 157. Moreover, "even if the adversary proceeding is non-core, the relationship to the Chapter 11 case is [of] such strength that the advantage remains with Debtors." *Id.* at 493.

**E. The Sixth Factor Strongly Favors Extraction.**

The sixth factor concerning the "degree of relatedness or remoteness of the proceeding to the main bankruptcy case" strongly favors Extraction. *See In re Cubic Energy, Inc.*, 603 B.R. at 755. As mentioned, this adversary proceeding was filed at Grand Mesa's insistence to facilitate the Court's resolution of Grand Mesa's objection to the rejection of its executory contract. The issues in this adversary proceeding are closely related to the underlying chapter 11 case.

**F. The Eighth Factor Favors Extraction.**

The eighth factor concerning the "feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court" favors Extraction. *See In re Cubic Energy, Inc.*, 603 B.R. at 755. It is not feasible or efficient to sever this proceeding from the motion to reject. *See In re Sabine Oil & Gas Corp.*, 547 B.R. 66, 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) ("[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.").

**G. The Tenth, Eleventh, and Twelfth Factors all Favor Extraction.**

The tenth, eleventh, and twelfth factors concerning "(10) likelihood that the commencement of the proceeding in a bankruptcy court involves forum shopping by one of the parties, (11) existence of a right to a jury trial, and (12) presence in, the proceeding of non-debtor parties" all favor Extraction. *See In re Cubic Energy, Inc.*, 603 B.R. at 755. Extraction is unquestionably not forum-shopping; the adversary proceeding was filed, in part, at Grand Mesa's insistence. Indeed, it is Grand Mesa who is engaged in forum-shopping, having belatedly concluded this Court is not its preferred forum to adjudicate these issues. Moreover, Grand Mesa concedes it has no right to a jury trial and that there are no non-debtor parties whose presence would support permissive abstention.

**H. The Ninth Factor is Either Neutral or Favors Extraction.**

The ninth factor concerning the "burden of the court's docket" is either neutral or favors Extraction. *See id.* at 755. "The question of docket burden is neutral, as the burden would eventually fall on *some* court and [the] Court can not ascertain the degree of burden the [Colorado] court would suffer would this Court abstain." *Id.* at 756 (emphasis in original). It is difficult to ascertain whether COVID-19 has placed a greater stress on this Court's dockets, or those of Colorado state courts. Certainly, Debtors defer to the Court regarding the burden of its docket and the effect of this proceeding on the Court's docket. At this point, however, this Court has the benefit of filed pleadings, resolved scheduling disputes, and a scheduled hearing that includes application of the same state law at issue here. No Colorado court has these benefits.

**I. Two Factors Do Not Favor Extraction.**

The seventh factor concerning the "substance rather than form of an asserted 'core' proceeding" likely weighs in favor of abstention because of this proceeding's state law focus. *See id.* at 755. The second factor concerning whether "state law issues predominate" likely also weighs in favor of abstention, but is likely of minor significance. *See In re Venoco, LLC*, 596 B.R. at 493 ("Clearly, state law issues predominate, which favors the Defendants. The Court is, however, very accustomed to deciding state law issues which somewhat reduces the significance of this factor.").

**CONCLUSION**

Grand Mesa insisted on the filing of this adversary proceeding in its objection to the motion to reject its contract. The Debtors complied with that request. The Debtors initiated this adversary proceeding weeks ago. Since that time, Grand Mesa has engaged in an expedited adjudication of these issues, including multiple status conferences before the Court. Not once did it raise abstention. Instead, it waited until less than two weeks before the hearing currently scheduled to address the issues raised in this proceeding. The Court should not reward Grand Mesa's gamesmanship. The factors for permissive abstention weigh in favor of the Court exercising jurisdiction over this proceeding. Grand Mesa's motion should be denied.

Dated: September 23, 2020
Wilmington, Delaware

*/s/ Richard W. Riley*

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

**CERTIFICATE OF SERVICE**

I, Richard W. Riley, do hereby certify that on September 23, 2020, I caused a copy of the foregoing document to be served on the parties listed on the attached service list by CM/ECF notification and electronic mail.

*/s/ Richard W. Riley*
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