IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re: EXTRACTION OIL & GAS, INC., *et al.*, Debtors.	Bankruptcy Case No. 20-11548 (CSS) (Jointly Administered)
PLATTE RIVER MIDSTREAM, LLC, DJ SOUTH GATHERING, LLC, AND PLATTE RIVER HOLDINGS, LLC, Appellants, v. EXTRACTION OIL & GAS, INC., Appellee.	Civil Action No. 20-1532 (CFC)

APPELLEES' RESPONSE TO *EMERGENCY* MOTION TO STAY PENDING APPEAL

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Appellee Extraction Oil & Gas, Inc., ("Extraction") respectfully submits this response to Platte River Midstream, LLC ("PRM"), DJ South Gathering, LLC ("DJ South"), and Platte River Holdings, LLC's ("PRH", collectively "Movants") Emergency Motion to Stay Pending Appeal [Dkt 4]. Extraction does not believe that oral argument would aid the Court in the disposition of this motion:

INTRODUCTION

Extraction and its affiliates engage in the exploration and production of oil in Colorado. In 2017 and 2018, Extraction entered into two Transportation Services Agreements ("TSA") with Movants for the transportation of oil from Extraction's wells to downstream facilities. The rates in the TSAs were approved by the Federal Energy Regulatory Commission ("FERC").

When Extraction entered into restructuring in June 2020, it sought to "reject," or breach, the TSAs. *See* 11 U.S.C. §365(a). The bankruptcy court granted Extraction's rejection motion over the Movants' objections.

Movants ask this Court to issue a stay pending appeal. Their request is meritless. The bankruptcy court carefully considered and correctly rejected each of Movants' arguments, meaning that they have failed to show ***any*** likelihood—let alone a ***strong*** likelihood—of success on the merits. Moreover, Movants never acknowledge that their purported irreparable harm—their own potential bankruptcy—is a catastrophe of their own making because they refuse to accept

alternative revenue streams. Even if Movants' bankruptcy were an absolute certainty, this would not rise to the level of irreparable harm. Finally, accepting Movants' equities argument would turn bankruptcy policy on its head and would open the floodgates to countless similar claims by disappointed parties whose contracts have been rejected. Accordingly, Movants have failed to satisfy any of the stay factors, and their motion should be denied.

LEGAL BACKGROUND

When a debtor in bankruptcy is a party to an executory contract—a contract with remaining obligations on both sides—the Bankruptcy Code generally permits the debtor either to "assume" the contract, or to "reject" the contract, "repudiating any further performance of its duties." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019); *see also* 11 U.S.C. §§ 365(a), (d)(2). If approved by the bankruptcy court, rejection "constitutes a breach" of the contract. 11 U.S.C. § 365(g). The counterparty then "has a claim against the estate for damages resulting from the debtor's nonperformance." *Mission Prod.*, 139 S. Ct. at 1658. "By thus giving the counterparty a pre-petition claim, Section 365(g) places that party in the same boat as the debtor's unsecured creditors, who in a typical bankruptcy may receive only cents on the dollar." *Id.* Courts evaluate a debtor's rejection decision "under the deferential 'business judgment' rule," under which the debtor merely needs to demonstrate that rejection of the contract will benefit its estate. *In re*

Bildisco, 682 F.2d 72, 79 (3d Cir. 1982) *aff'd*, 465 U.S. 513 (1984). A court must approve the debtor's decision unless it is the product of "bad faith, or whim, or caprice." *In re Trans World Airlines, Inc.*, 261 B.R. 103, 121 (Bankr. D. Del. 2001).

PROCEDURAL BACKGROUND

Before the bankruptcy court, Extraction filed a motion to reject the TSAs. Movants objected, arguing that Extraction could not reject the TSAs because they contained covenants that run with the land, or real covenants. Movants also argued that because of FERC's regulation of the TSAs, the court should apply a more exacting standard—namely, one that considered the public interest—instead of Extraction's business judgment in approving rejection.

In order to adjudicate Movants' covenants claim, Extraction sought declaratory judgment that the TSAs did not contain covenants that run with the land, and simultaneously sought summary judgment. In a thorough 45-page opinion, the bankruptcy court held that under Colorado law, the TSAs did not contain real covenants. *See* Exh.G.

The bankruptcy court also granted debtor's motion to reject the TSAs in another thorough opinion. The court reemphasized that the TSAs contained no real covenants. Exh.H.12. Even assuming such covenants existed, the court alternatively held the TSAs could be rejected because they are creatures of contract, not real property. *See id.* 13-18. Thus, under Supreme Court precedent, "any covenant

running with the land still exists (as the contract still exists), but it is unenforceable." Ex.H.16. The court also determined that the ordinary business judgment rule applied and that it was satisfied. Exh.H.3-10. Here, too, the court alternatively considered Movants' heightened standard *arguendo*. Indeed, it spent a third of the opinion determining that the decision to reject the TSAs also satisfied this heightened standard. Exh.H.21-31. Movants sought a stay before the bankruptcy court, which was denied. They now seek a stay pending appeal.

ARGUMENT

When presented with a motion to stay, courts consider "(1) whether the appellant has made a *strong showing* of the likelihood of success on the merits; (2) will the appellant suffer irreparable injury absent a stay; (3) would a stay substantially harm other parties with an interest in the litigation; and (4) whether a stay is in the public interest." *In re Revel AC, Inc.*, 802 F.3d 558, 565 (3d Cir. 2015) (emphasis added). The first two factors are "the most critical," and a strong likelihood of success is "the more important piece of the stay analysis . . . ." *S.S. Body Armor I., Inc. v. Carter Ledyard & Milburn LLP*, 927 F.3d 763, 772 (3d Cir. 2019) (citations omitted). A stay "is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citation

omitted). Thus, the issuance of a stay is always a matter of judicial discretion. *Id.* at 433.[1]

I. LIKELIHOOD OF SUCCESS ON THE MERITS

In their attempt to force the Debtors to assume uneconomic contracts, Movants regurgitate several arguments the bankruptcy court carefully considered and rejected in its cumulative 90 pages of rulings. Though Movants broadly attack almost all the court's conclusions, their arguments boil down to contending they are likely to succeed on three issues: (1) the TSAs contain covenants that run with the land; (2) even if they do not, the contracts cannot be rejected; and (3) the business judgment rule does not apply. All three arguments fail.

A. The TSAs Do Not Contain Covenants that Run with the Land

Colorado law disfavors the creation of covenants running with the land as a derogation of the common law's preference for the free alienability of land. *Nelson v. Farr*, 354 P.2d 163, 166 (Colo. 1960) ("[A]s a fundamental principle of law of real property, restrictions on the alienation and use of land are not favored, and all doubt should be resolved in favor of the free use of property.'"). Real covenants restrain the free alienation of land by "burdening" the land with contractual obligations enforceable against successive landowners via privity of estate, even

[1] "[T]he District Court applies a clearly erroneous standard to the Bankruptcy Court's findings of fact and a plenary standard to its legal conclusions." *In re L.A. Dodgers LLC*, 465 B.R. 18, 28 (Bankr. D. Del. 2011).

though the new landowners never had privity of contract with the original parties. *See Cloud v. Ass'n of Owners*, 857 P.2d 435, 440 (Colo. App. 1992). Thus, to create a covenant running with the land, the parties must intend to create such a covenant and the covenant must objectively touch and concern the land with which it allegedly runs. *Reishus v. Bullmasters, LLC*, 409 P.3d 435, 440 (Colo. App. 2016). Real covenants also require privity of estate between the original covenanting parties at the time of the real covenants alleged creation. *See Taylor v. Melton*, 274 P.2d 977, 982 (Colo. 1954); *Farmers' High Line Canal & Reservoir Co. v. N.H. Real Estate Co.*, 92 P. 290, 293 (Colo. 1907). Movants allege that the court committed three errors in its covenants analysis, but each argument is baseless.

First, Movants claim the court wrongly determined that the Platte River TSA lacked the requisite intent to create a real covenant. They do ***not*** dispute that the TSA lacks express language of intent; they merely contend that such language is not necessary. They are incorrect. As the court noted, "[I]n the [Colorado] cases that have recognized a covenant running with the land, the covenants were in express terms." *TBI Explr. v. Belco Energy Corp.*, 220 F.3d 586 (5th Cir. 2000). This makes sense 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." *Id.* Thus, any ambiguity concerning an intent to create a real covenant must be resolved "against

the restriction and in favor of free and unrestricted use of property." *MidCities Metro. Dist. No. 1 v. U.S. Bank Nat'l. Ass'n*, 12-CV-03322-LTB, 2013 WL 3200088, at *3 (D. Colo. June 24, 2013). Accordingly, the court correctly concluded that the Platte River TSA lacked any language manifesting a clear intent to create a real covenant.

Second, Movants argue that the court incorrectly analyzed whether the covenants touch and concern the land, claiming Colorado applies a less "restrictive" standard than that employed by the court. Mot.9. Movants do not cite a single Colorado case in support. Such a skeletal argument falls woefully short of a "strong showing" of likely success on the merits. *See Tracey v. Recovco Mortg. Mgmt. LLC*, 451 F. Supp. 3d 337, 342 (D.N.J. 2020) ("Allegations contained . . . without citation to the law [are] insufficient" to show likelihood of success on the merits); *Cent. Jersey Freightliner, Inc. v. Freightliner Corp.*, 987 F. Supp. 289, 295 (D.N.J. 1997) (holding that plaintiffs cannot establish a likelihood of success on the merits when they "have cited no authority to support their contention").

Movants also contend that the TSAs touch and concern the land. The TSAs "dedicated" and "committed" certain of Extraction's interests to the performance of the TSAs. Specifically, Extraction committed to provide certain volumes of produced crude petroleum for exclusive shipping services. *See* Exh.G.27. Extraction also committed certain interests "in Crude Petroleum of all formations in,

under or attributable to the Dedication Area" to the provision of these services. Exh.G.7. (Dedication area means lands within specified townships in Colorado). Movants claim these dedications and commitments touch and concern the land "because they both benefit and burden Extraction's real property interests," Exh.G.25, and they accuse the court of "ignor[ing]" that fact. Mot.14.

The court did nothing of the sort. Rather, the court correctly held that "Colorado generally follows the traditional common law approach to the touch and concern element." Exh.G.26 (citing 3 Tiffany Real Property § 854 (3d ed. 2015)). Under this approach, courts focus on the land itself—*i.e.*, the estate in real property with which the covenant allegedly runs—and the covenant's objective effect on that land. Covenants only touch and concern the land if they "'closely relate to the land, its use, or enjoyment.'" *Reishus*, 409 P.3d at 440 (quoting *Cloud*, 857 P.2d at 440). In other words, real covenants must "operate[] to benefit the ***physical use*** of the land." *Bigelow v. Nottingham*, 833 P.2d 764, 767 (Colo. App. 1991), *rev'd in part sub nom. on other grounds Haberl v. Bigelow*, 855 P.2d 1368 (Colo. 1993) (emphasis added). If not, a covenant is a personal covenant, not a real covenant. Exh.G.26.

The court correctly found that the "dedicated and committed interests are used to identify the particular minerals that are subject to, set apart for, pledged or committed to the parties' contractual obligations." Exh.G.3. That is, the dedications

and commitments do not closely relate to the use or enjoyment of Extraction's mineral estates; they only identify the personal property (*i.e.*, the produced crude) that is subject to the parties' contractual obligations. Exh.G.27-28. Because these commitments do not directly affect the use or enjoyment of the purportedly burdened real property, "they cannot serve to satisfy the touch and concern the land element." Exh.G.3.

Third, Movants incorrectly argue that Colorado law does not require privity of estate. The cases Movants cite, however, stand for the opposite proposition. In each case, the defendants argued the covenants at issue did not run with the land because there was no privity of estate. *See Taylor*, 274 P.2d at 982; *Farmers'*, 92 P. at 294. In both cases, the Colorado Supreme Court held that the covenants ran with the land, not because privity of estate was not required, but because privity of estate ***existed*** in each case. *See Taylor*, 274 P.2d at 982; *Farmers'*, 92 P. at 293 ("There was, and is, and always will be, privity of estate between the owner or owners of the canal and the owner or owners of the land described in said schedule."). In fact, real property treatises cite both *Taylor* and *Farmers* for the proposition that Colorado requires privity of estate between the parties to the contract. *See* 3 Tiffany Real Property §851 n. 27 (3d ed. 2015) (citing *Taylor* for the proposition that privity of estate between the parties at the time of the covenant's creation is required); 9 Powell on Real Property §60.04 n. 123 (citing *Farmers* for the proposition that either mutual

or horizontal privity are required for a covenant to run with the land). In each of Movants' other cited cases privity of estate was not at issue, and so it was simply not discussed. *See* Exh.G.37-38.

Movants also argue they are likely to prevail on their claim that privity of estate existed when the TSAs were executed. Not so. Under Colorado law, "[p]rivity of estate requires that the covenants that allegedly run with the land be accompanied by a contemporaneous conveyance of some interest in the land with which the covenant runs." Exh.G.38 (citing *Taylor*, 274 P.2d at 988). Here, the relevant land is Extraction's mineral estates. But as the court explained in detail, none of the purported property interests identified by Movants—an equity interest in a pipeline, the sale of a subsidiary, and surface access rights or rights-of-way—are interests in the mineral estate. Exh.G.39-44.

Movants are unlikely to prevail on any of the three requirements for creating a real covenant. Under Colorado law, all elements must be satisfied, or no covenant exists. See *Cloud*, 857 P.2d at 440. Accordingly, Movants are exceedingly unlikely to prevail on this claim.[2]

[2] Though the issue of covenant creation is one of state law, the court's ruling is consistent with that of other courts that have addressed this issue. *See In re Southland Royalty Co. LLC*, No. 20-10158 (KBO), 2020 WL 6685502, at *9 (Bankr. D. Del. Nov. 13, 2020) (Wyoming law); *In re Chesapeake Energy Corp.*, No. 20-33233, 2020 WL 6325535, at *7 (Bankr. S.D. Tex. Oct. 28, 2020) (Texas law); *In re Sabine Oil & Gas Corp.*, 550 B.R. 59 (Bankr. S.D.N.Y. 2016) (Texas law), *aff'd*, 567 B.R. 869 (S.D.N.Y. 2017), *aff'd*, 734 F. App'x 64 (2d Cir. 2018).

B. The TSAs Can Be Rejected, Even if They Contain Real Covenants

Even assuming *arguendo* that the TSAs created covenants running with the land, they are still executory contracts subject to rejection under 11 U.S.C. §365(a). Bankruptcy courts ***routinely*** allow the rejection of agreements that create covenants that run with the land when they are otherwise rejectable. For example, a debtor may reject an unexpired lease, even though a lease is both a conveyance of an estate in real property and a contract. *See In re Arden & Howe Assocs., Ltd.*, 152 B.R. 971, 974 (Bankr. E.D. Cal. 1993).[3] Indeed, a debtor may reject unexpired leases even though leases ***always*** contain covenants that run with the land. *See Excel Willowbrook, LLC v. JP Morgan Chase Bank, Nat. Ass'n*, 758 F.3d 592, 602 (5th Cir. 2014) (concluding a covenant to pay rent in a lease is a covenant that runs with the land); *Shaffer v. George*, 171 P. 881, 882 (Colo. 1917) ("It is the accepted rule of law that covenants to pay rent and to yield up the premises in a required condition are covenants which run with the land.").These cases demonstrate that the TSAs can be rejected even if they contain real covenants.

Movants attempt to sidestep this conclusion by insisting that the dedications gave them a property—as opposed to a contractual—right, but this is simply not so.

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[3] Movants allege that *Arden* has been abrogated by statute, but they cite nothing to support that conclusion. Nor can they. The snippet of legislative history proffered by movants refers to an amendment to a completely different provision, 11 U.S.C. §365(h)(1)(ii), which concerns what rights a lessee retains if he opts not to accept the lease as terminated. *See* 140 CONG. REC. 27,465 at 27694 (1994). It thus has no bearing on the general proposition for which *Arden* is cited—namely, that leases can be rejected even if they contain real covenants. In any event, Extraction cited other cases for the same proposition, none of which Movants acknowledge, let alone refute.

Although real covenants impact real property, they "are fundamentally creatures of contract." Exh.H.16-17 (discussing relevant cases); *see also In re Southland Royalty Co.*, 2020 WL 6685502, at *15 (Bankr. D. Del. Nov. 13, 2020) (finding that even if an executory contract contained a real covenant, it could be rejected because "[r]eal covenants are contractual obligations, albeit exceptional forms that bind landowners regardless of their consent"). Contrary to Movants' contention, this is the view held by "generally accepted authority." Mot.11; *see* 7 Thompson on Real Property §61.03(d); 17 Tiffany on Real Property §848; 7 Thompson on Real Property §61.03(d); *Chestnut Real Estate P'ship v. Huber*, 811 A.2d 389, 399 (Md. App. 2002).[4] Real covenants are simply a means of enforcing contractual obligations; rejection is simply a breach of a contract that relieves debtors of future performance obligations. Consequently, contracts containing real covenants can be rejected in bankruptcy proceedings just like any other executory contract.

Movants are also wrong to suggest they are owed a remedy other than damages or that the court misapplied *Mission Product*. The Supreme Court made clear that "[r]ejection 'constitutes a breach of [an executory] contract,' deemed to occur 'immediately before the date of the filing of the petition.'" *Mission Prod.*, 139

[4] The conclusion that debtors can reject contracts containing real covenants is also in keeping with the plain text of the Bankruptcy Code, which movants nowhere acknowledge. Barring certain express exceptions, the Code allows for the rejection of ***any*** executory contract. *See* 11 U.S.C. §365(a); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 521–22 (1984).

S. Ct. at 1657. The question thus becomes what rights Movants would have had if Extraction breached prior to entering restructuring.

Failure to uphold one's contractual obligations under a real covenant results in a claim for a breach of contract or breach of covenant, the primary redress for which is money damages. *See Farmers'*, 92 P. at 294 (discussing damages as a claim for breach of covenant or breach of contract); *see also* James, A Treatise on the Law of Property at 363 ("[T]he only type of enforcement that a court of law can grant for breach of a covenant running with the land is a ***judgment for money damages*** for the breach." (emphasis added)). A breach of a covenant does not give rise to a real property action such as trespass, and, accordingly, it does not give rise to the remedies Movants seek.

If Extraction breached the TSAs prior to entering bankruptcy, the Rejection Counterparties' recourse would have been to sue for damages flowing from ***breach of contract or covenant***. So too here. Movants' contrary arguments fall flat, and they have not demonstrated a likelihood of success on the merits for this claim.

C. The Court Correctly Applied the Business Judgment Rule

Finally, Movants argue that the court erred when it applied the ordinary business judgment rule as opposed to a higher standard considering the public interest. Movants nowhere acknowledge that the court ***did*** consider that higher standard, but found that Extraction still prevailed. *See* Exh.H.21-31. They present

no argument as to any error in the court's alternative analysis, and have waived their right to do so. *See Garza v. Citigroup Inc.*, 881 F.3d 277, 284–85 (3d Cir. 2018).

Movants' failure to address the court's alternative analysis, standing alone, means that they have not demonstrated a strong likelihood of success on the merits. *In re Innovative Commc'ns*, 390 B.R. 184, 188 (Bankr. D.V.I. 2008). Furthermore, the business judgment rule does apply here. Section 365(a), which authorizes rejection, and section 365(g), which provides that rejection constitutes a breach "speak broadly to *any* executory contracts." *See Mission Prod.*, 139 S. Ct. at 1662. The Bankruptcy Code does not apply differing standards to different executory contracts. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-42 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."). Indeed, where Congress did intend to deviate from default principles, it clearly did so. *See, e.g.*, 11 U.S.C. §§ 365(n) (intellectual property rights); 365(h) & (i) (certain leases and timeshare interests); 365(o) (maintenance of capital requirements of a Federal insured depository); 1113 (collective bargaining agreements); 1169 & 1170 (railway leases). The Bankruptcy Code expressly indicates where Congress elected to establish special rules for specific types of contracts. There are not special rules applicable to crude oil pipeline transportation agreements or contracts containing covenants running with the land. Movants have failed to demonstrate a likelihood

of success on this claim. *See also* Exh.H.21-22 (discussing the difference between oil pipeline and other situations where a higher standard applies). Movants have failed to demonstrate a likelihood of success on this claim.

II. IRREPARABLE HARM

Movants' argument that they will be irreparably harmed by rejection of the TSAs fails for several reasons.

As an initial matter, Movants fail to acknowledge that they contributed to their own harm by refusing to accept alternative revenue streams in "walk-up rates."[5] Extraction testified that it could provide Movants with some oil volume using walk-up rates, but Movants said "they will not accept the Debtors as a walk-up shipper." Exh.H.6 n. 12. Movants cannot through obstinacy exacerbate or manufacture their own irreparable harm to justify the extraordinary relief they seek. *See Pharmacia Corp. v. Alcon Labs., Inc.*, 201 F. Supp. 2d 335, 382 (D.N.J. 2002) (finding that extreme delay undercut claim for irreparable harm); *Megatel Mobile, LLC v. TracFone Wireless, Inc.*, No. 17-3837, 2017 WL 4544618, at *2 (D.N.J. Oct. 6, 2017) (irreparable harm undercut by statements that customers would continue to do business with plaintiff). Nor do Movants acknowledge the speculative nature of

[5] Shippers that do not enter into a contract for "firm" or "committed" capacity for transportation on a pipeline are referred to as "uncommitted" or "walk-up" shippers because they have no obligation to the pipeline and can decide to ship or not on a month-to-month basis. At least 10 percent of capacity is generally reserved for uncommitted shippers.

their claims. *Eaton Corp. v. Geisenberger*, -- F. Supp. 3d ----, 2020 WL 5531587, at *19 (D. Del. Sept. 15, 2020) ("The irreparable harm alleged must be actual and imminent, not merely speculative") (citation omitted).[6] As the court explained, Movants "did not analyze whether the pipelines could be sold or whether they could renegotiate new rates and contracts—in other words, [the] testimony was hypothetical and contingent rather than presenting quantifiable evidence." Exh.H.28. Consideration of Movants' speculative future bankruptcy cannot outweigh that of the debtors' actual, pending bankruptcy. Even if Movants' allegations are accepted, however, the specter of their own restructuring cannot justify a stay because this would upend the fundamental policy of bankruptcy law. Situations in which parties find themselves negatively impacted by restructuring "arise in bankruptcy contexts all the time." Exh.H.29. This is because "a central purpose of the [Bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (citation omitted). Thus, "Congress [has] made a determination that

[6] The fact that the court below found Movants' projections about its bankruptcy not credible distinguishes this case from those cited by movants, in which the court specifically credited evidence that bankruptcy was imminent. *See Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 255 (3d Cir. 2011); *Newlife Homecare Inc. v. Express Scripts, Inc.*,No. 3:07CV761, 2007 WL 1314861, at *5 (M.D. Pa. May 4, 2007).

an eligible debtor should have the opportunity to avail itself of a number of Code provisions which adversely alter creditors' contractual and nonbankruptcy law rights." *In re PPI Enters. (U.S.), Inc.*, 228 B.R. 339, 344-45 (Bankr. D. Del. 1998). One of those tools is rejection, which is "vital to the basic purpose to a Chapter 11 reorganization, because [it] can release the debtor's estate from burdensome obligations." *Bildisco*, 465 U.S. at 528).

That rejection "presents considerable risk to a debtor's contractual counterparties" is a feature, not a bug. *In re Ultra Petrol. Corp.*, No. 20-32631, 2020 WL 4940240, at *9 (Bankr. S.D. Tex. Aug. 21, 2020). By allowing debtors to choose to reject executory contracts notwithstanding the other party's contractual expectations, Congress considered the proper allocation of risk as between the debtor and contractual parties and struck the balance in favor of the debtor. *See* 11 U.S.C. §365(a). Accepting Movants' argument would allow them to use the guise of "irreparable harm" to "upset the delicate balance of interests fashioned by Congress under" the Code. *PPI Enters.*, 28 B.R. at 345 (citation omitted). Moreover, Movants' argument for irreparable harm would apply in every instance where a contract was rejected, *see Ultra Petrol.*, 2020 WL 4940240, at *9, and open the floodgates to stay litigation from numerous rejected parties seeking to frustrate Congress's design.

Moreover, generally "a purely economic injury, compensable in money, cannot satisfy the irreparable injury requirement." *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 255 (3d Cir. 2011) (citation omitted). This requirement applies with equal force within the context of rejection of a services contracts in bankruptcy. To the extent the bankruptcy court's rulings are reversed on appeal, any economic damages due to non-performance of the contracts will be cured with the assumption of the contracts pursuant to the Bankruptcy Code. *See* 11 U.S.C. § 365(b)(1). For these reasons, Movants cannot sustain a showing of irreparable harm here.

A. A Stay Would Significantly Harm Multiple Parties' Interests, and the Balance of the Equities Disfavors a Stay

Despite Movants' naked assertions, Extraction will be harmed by a stay. Extraction is currently restructuring, and forcing it to maintain unsustainable contractual obligations with Movants will immensely strain that process. It will prevent Extraction from effectively implementing its considered business plan, which involves selecting alternative service providers at lower rates and moving some of its crude oil to a more favorable location where it can command higher prices. *See* Exh.H.5-7. For instance, if the DJ South Contract is rejected, Extraction may use an alternative service provider that, unlike DJ South, will take their crude oil to Platteville, where Extraction can sell its oil for a significantly higher price. Exh.H.5. Although Movants argue that alternative infrastructure will take time to construct,

Mot.6, they neglect to note that a stay would prevent that infrastructure from being ***built***, exacerbating the already-existing delay. *See generally* Exh.H.5-11.

Extraction is not the only entity that will be harmed by the issuance of a stay. As courts in the Third Circuit have recognized, "there is a 'great public policy in having bankruptcy 'proceedings continue to an orderly, efficient resolution to maximize and preserve the estate's assets for the sake of the creditors." *In re Montgomery Ward, L.L.C.*, 388 B.R. 61, 628 (Bankr. E.D. Pa. 2008) (denying stay); *In re Bankruptcy Appeal of Allegheny Health, Educ. and Research Found*, 252 B.R. 309, 331 (Bankr. W.D. Pa. 1999). Here, this policy would be thwarted by a stay restricting the debtor from fully implementing its business plan for months, if not years, pending resolution of this appeal, especially because the confirmation hearing for Extraction's restructuring is scheduled for December 21.[7] In the meantime, Extraction and its creditors will be unable to order their business affairs because one set of aggrieved parties has held up the litigation. Movants also fail to recognize that this complex restructuring, which necessitates finding alternative ways for Extraction to provide crude petroleum as a viable business, involves interdependent relationships between multiple parties who work together to transport debtors' oil.

[7] *See In re EXTRACTION OIL & GAS, No. 20-11548,* Notice Of Hearing To Consider Confirmation Of The Chapter 11 Plan Filed By The Debtors And Related Voting And Objection Deadlines, available at https://www.kccllc.net/extractionog/document/201154820111300000000015.

Forcing Extraction to continue contracting with Movants will disrupt the contractual expectations of alternative service providers throughout the restructuring.[8]

In the face of all this, Movants invoke vague concerns over the public interest caused by the short-term use of trucking to transport Extraction's oil. As the court correctly found, however, any such concerns will be short-lived and "the public will [also] benefit from the Debtors' continued production, their workers remaining employed, and potentially additional jobs and contracts from the Debtors having to re-route its oil." Exh.H.30. This factor weighs in favor of not granting a stay, and the equities tip in favor of Extraction.

B. A Bond Is Required

Were this Court to stay judgment, Movants would be required to post a supersedeas bond. A supersedeas bond "secures the prevailing party against any loss sustained as a result of being forced to forgo execution on a judgment during the course of an ineffectual appeal." *Innovative Comm'ns*, 390 B.R. at 191 (citation omitted). The "bond must normally be in a sum sufficient to pay the judgment and costs, interest, and damages for delay." *Id.* (citation omitted). Waivers of the requirement occur only in exceptional circumstances, and movant carries the burden

[8] Movants broadly attack Extraction's rejection analysis, but these contentions boil down to disagreement over the court's decision to find Extraction's witnesses credible and Movants' witnesses unreliable. *See* Exh.H.12, 29. Importantly, a bankruptcy court's "findings of fact, based primarily on an evaluation of the credibility and demeanor of witnesses, are highly unlikely to be reversed on appeal as 'clearly erroneous.'" *In re Burkett*, 279 B.R. 816, 817 (Bankr. W.D. Tex. 2002); *In re Blackwell*, 162 B.R. 117, 120 n. 1 (E.D. Pa. 1993); *Yucaipa Corp. Initiatives Fund, ILP v. Piccadilly Rests., LLC*, No. 14–0609, 2014 WL 1871889, at *4 (W.D. La. May 6, 2014).

of demonstrating they exist. *See Montalvo v. Larchmont Farms, Inc.*, No. 06–2704, 2011 WL 6303247 (Bankr. D.N.J. Dec. 15, 2011); *In re Gen. Motors Corp.*, 409 B.R. 24, 30 (Bankr. S.D.N.Y. 2009). Movants have not shown any exceptional circumstances here, and have not come close to carrying their burden. Movants merely repeat their bald assertion that Extraction would not be harmed by the imposition of a stay. As explained *supra*, this argument falls flat, and the court should accordingly impose a bond.

CONCLUSION

For the foregoing reasons, the Court should deny the motion.

CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITS

Pursuant to Bankruptcy Rules 8007(f)(3)(A) and 8015(h), this Motion does not exceed 5,225 words, excluding the coverage page, the corporate ownership statement, the certificate of counsel, the request for oral argument, this certificate of compliance, and the signature block. The text of this response is also in 14-point Time Roman typeface.

Dated: November 24, 2020
Wilmington, Delaware

/s/ Richard W. Riley

WHITEFORD, TAYLOR & PRESTON LLC[9]
Marc R. Abrams (DE No. 955)
Richard W. Riley (DE No. 4052)
Stephen B. Gerald (DE No. 5857)
The Renaissance Centre
405 North King Street, Suite 500
Wilmington, Delaware 19801
Telephone: (302) 353-4144
Facsimile: (302) 661-7950
Email: mabrams@wtplaw.com
rriley@wtplaw.com
sgerald@wtplaw.com

- and -

KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
Christopher Marcus, P.C. (admitted pro hac vice)
Allyson Smith Weinhouse (admitted pro hac vice)
Ciara Foster (admitted pro hac vice)
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900
Email: christopher.marcus@kirkland.com
allyson.smith@kirkland.com
ciara.foster@kirkland.com

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

- and -

Anna Rotman, P.C. (admitted pro hac vice)
Jamie Alan Aycock (admitted pro hac vice)
Kenneth Young (admitted pro hac vice)
609 Main Street
Houston, TX 77002
Telephone: (713) 836-3600
Facsimile: (713) 836-3601
Email: anna.rotman@kirkland.com
jamie.aycock@kirkland.com
kenneth.young@kirkland.com

- and -

George W. Hick (*admitted pro hac vice)*
Andrew C. Lawrence (*admitted pro hac vice)*
Harker Rhodes (*admitted pro hac vice)*
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 879-5000
Email: george.hicks@kirkland.com
andrew.lawrence@kirkland.com
harker.rhodes@kirkland.com

Co-Counsel to Debtors and Debtors in Possession