Docket #0017 Date Filed: 12/18/2020

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
Debtors.	(Jointly Administered)
ANNETTE LEAZER; GORDON D. NISWENDER; JOY DEAN NISWENDER; H.L. WILLETT ESTATE; SAGLIO ENERGY LLC; OVERLAND OIL & GAS ADVISORY LLC; OVERLAND MINERALS AND ROYALTIES LLC; OVERLAND ENERGY PARTNERS FUND I LLC; OVERLAND ENERGY PARTNERS FUND II LLC; J A INVESTMENTS; BRIGHTON SOUTH, LLC; ATOMIC CAPITAL MINERALS, LLC; ACM FUND II LLC; TIMNATH LANDS LLC; RAWAH RESOURCES LLC; THUNDER RIDGE RESOURCES LLC; TRG OIL AND GAS; J MOODY; VAL MOODY; AND ALASKAN OIL AND RESOURCES, LLC,	Adv. Pro No. 20-50963 (CSS)
Plaintiffs,	**Re: A. D.I. 4**
v.	
EXTRACTION OIL & GAS, INC.; 7N, LLC; 8 NORTH, LLC; AXIS EXPLORATION, LLC; EXTRACTION FINANCE CORP.; MOUNTAINTOP MINERALS, LLC; NORTHWEST CORRIDOR HOLDINGS, LLC; TABLE MOUNTAIN RESOURCES, LLC; XOG SERVICES, LLC; AND XTR MIDSTREAM, LLC,	
Defendants.	

[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: December 18, 2020

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NATURE AND STAGE OF THE PROCEEDINGS

Extraction Oil & Gas, Inc. ("Extraction") and its above-captioned affiliates (with Extraction, the "Debtors") filed their petitions under Chapter 11 of the Bankruptcy Code on June 14, 2020. On October 26, 2020, Plaintiffs filed the *Complaint* [A.D.I. 1] against the Debtors alleging, generally, various underpayments of royalties owed to the Plaintiffs under oil and gas leases with Debtors. Three days later, Plaintiffs filed the *Amended Complaint* [A.D.I. 4] to address an issue in the case's caption. In lieu of an answer to the Amended Complaint, Debtors files this Motion to Dismiss.

SUMMARY OF ARGUMENT

1. Debtors file this Motion to Dismiss under Rule 12 of the Federal Rules of Civil Procedure as made applicable by Rules 7001 and 7012 of the Federal Rules of Bankruptcy Procedure, seeking entry of an order dismissing with prejudice certain of Plaintiffs' claims against the Debtors. Specifically, the Court should enter an order dismissing the majority of Plaintiffs' claims.

2. All of Plaintiffs' claims must be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to allege sufficient non-conclusory facts to state a plausible claim for relief. Plaintiffs' allegations are inadequate because they fail to provide any more than legal conclusions, threadbare labels, or formulaic recitations of the elements of the causes of action. The allegations of underpayment do not suffice to put Defendants on notice of the claims against them. Instead, Plaintiffs generally allude that "some" leases do not allow for certain deductions, but fail to plead which leases are at issue and how Defendants breached any of the obligations in those leases.

3. Furthermore, Plaintiffs' fraud claim must be dismissed because (1) Plaintiffs did not plead fraud with particularity and (2) some portion of the claims are barred by a statute of limitations. Portions of the breach of contract claims must be dismissed because they are barred by a statute of

limitations. Portions of the implied covenant claims must be dismissed because they are barred by a statute of limitations. The conversion claims must be dismissed because (1) royalty payments are not convertible, (2) some portion of the conversion claims are also barred by a statute of limitations. The constructive trust portion of the trusts claims must be dismissed because a constructive trust is a remedy, not a cause of action. The unjust enrichment claims must be dismissed because (1) an express contract governs and (2) some portion of the unjust enrichment claims are also barred by a statute of limitations. The accounting claims must be dismissed because (1) plaintiffs did not plead demand and refusal and (2) an adequate remedy at law exists: monetary damages. Similarly, the injunction claims must also be dismissed because an adequate remedy at law exists: again, monetary damages. Finally, every claim against a debtor that is not Extraction must be dismissed because the Amended Complaint contains no allegations of wrongful conduct on the part of these defendants, and none of Plaintiffs' claims are based upon alleged wrongful conduct of these parties.

STATEMENT OF FACTS

Plaintiffs are lessors or overriding royalty interest owners under various oil and gas leases with Extraction. *Amended Complaint* at ¶ 19. According to Plaintiffs, the oil and gas leases govern the payment of Plaintiffs' royalty interests. *Id.* ¶ 22. Plaintiffs attach three examples of such purported leases, but do not identify which Plaintiffs they benefit and which leases Defendants failed to comply with. Plaintiffs claim Extraction has underpaid the Plaintiffs' royalties since December 1, 2013—roughly seven years ago. *Id.* at ¶ 20. Plaintiffs allege these underpayments were the result of improper deductions or royalty calculations. *See id.* at ¶ 22–24. Plaintiffs also claim "that the prohibited deductions, failure to pay market price for Royalties on oil and gas, and

other calculation errors have resulted in the estimated underpayment of Royalties to Plaintiffs of $1,199,233.55, not including any interest or penalties." *Id.* at ¶ 52.

LEGAL STANDARD

Debtors bring this Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) because Plaintiffs have failed to state multiple claims for which relief can be granted. "When presented with a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court conducts a two-part analysis." *Freed v. St. Jude Med., Inc.*, 364 F. Supp. 3d 343, 348 (D. Del. 2019) (citing *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009)). "First, the court separates the factual and legal elements of a claim, accepting 'all of the complaint's well-pleaded facts as true, but [disregarding] any legal conclusions.'" *Id.* (quoting *Fowler*, 578 F.3d at 210–11). "Second, the court determines 'whether the facts alleged in the complaint' are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Id.* (quoting *Fowler*, 578 F.3d at 211). "A plausible claim does more than merely allege entitlement to relief; it must also demonstrate the basis for that 'entitlement with its facts.'" *Id.* (citing *Fowler*, 578 F.3d at 211). "Thus, a claimant's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Id.* at 348–49 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Finally, "[i]n assessing the plausibility of a claim, the court must 'construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff must be entitled to relief.'" *Id.* at 349 (quoting *Fowler*, 578 F.3d at 210).

ARGUMENT

Plaintiffs' causes of action fail to state claims upon which relief can be granted as a matter of law and without reliance on any facts other than those alleged in Plaintiffs' Amended Complaint.

Plaintiffs' claims suffer from various pleading deficiencies, are barred in large part by statutes of limitation, or as a matter of black-letter law.

I. ALL OF THE CLAIMS MUST BE DISMISSED BECAUSE PLAINTIFFS FAILED TO PUT DEFENDANTS ON NOTICE OF THE CLAIMS AGAINST THEM.

All of Plaintiffs' claims are deficient because they are not coupled with well-pleaded facts and "[a] plausible claim does more than merely allege entitlement to relief; it must also ***demonstrate the basis for that 'entitlement with facts.'"*** *Freed*, 364 F. Supp. 3d at 348 (emphasis added) (quoting *Fowler*, 578 F.3d at 211). In other words, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *In re Allergan Erisa Litig.*, 975 F.3d 348, 353 n.9 (3d Cir. 2020) (quoting *Santiago v. Warminster Twp.*, 629 F.3d 121, 128 (3d Cir. 2010)).

Plaintiffs' allegations are largely conclusory and insufficient to put the Defendants on notice of the claims against them. It is axiomatic that under the Rule 8 notice pleading standard, Plaintiffs must "provide enough information to put each defendant on notice of the allegations and damages sought separately against each defendant." *In re Openpeak, Inc. Charles M. Forman, Trustee v. Gittleman*, 2020 WL 7295703, at *8 (Bankr. D.N.J. Dec. 10, 2020). Aside from sweeping declarations that Defendants underpaid Plaintiffs' Royalty Interests, and attaching three examples without any explanation as to which Plaintiff they apply to, Plaintiffs generally refer to "some" Royalty Agreements (or "some" Plaintiffs, "some" instances) throughout the complaint without alleging which Plaintiffs or which Royalty Agreements are at issue. *See, e.g.*, *Amended Compl.* ¶¶ 24, 34, 38, 39, 42. This plainly fails to meet even the low notice pleading threshold.

The core allegation that "Extraction has underpaid Plaintiffs on their Royalty Interests since December 1, 2013, by making prohibited deductions that are not authorized by the operative Royalty Agreements and/or paying on prices that are not authorized by the operative Royalty

Agreements" is nothing more than a legal conclusion. *See Amended Complaint* at ¶ 20. The Third Circuit has already held that similar pleadings are not factually sufficient. In *Allergan*, the Third Circuit considered a similar pleading that broadly alleged that "Allergan and several of its pharmaceutical industry peers colluded to fix generic-drug prices in violation of federal antitrust laws, creating excess revenues as a result of anticompetitive behaviors and putting Allergan at risk of criminal prosecution and civil and criminal penalties[.]" *In re Allergan Erisa Litig.*, 975 F.3d at 353. The plaintiffs also claimed the defendants, "as Allergan insiders, knew or should have known that the Company was conspiring to raise its profits in violation of antitrust laws." *Id.* Despite these glancing references to factual predicates, the Third Circuit held that "the plaintiffs' complaint [was] deficient" because of a failure to allege "any facts to back up their assertion that Allergan participated in an unlawful price-fixing conspiracy." *Id.*

The same thing is true here. Plaintiffs feint at factual support, but they never do the hard work of actually alleging "any facts to back up their assertion[s]." *See id.* Instead, all of Plaintiffs' allegations are conclusory claims that fail to provide Debtors the bare minimum of notice required under the Federal Rules of Civil Procedure.

First, Plaintiffs allege that "certain" royalty agreements prohibited ***various*** deductions based on ***three*** identified leases. *See Amended Complaint* at ¶ 22 n. 3. Plaintiffs did not make any specific allegations concerning other leases. *See id.* Moreover, Plaintiffs make the conclusory allegation that Debtors deducted "various costs related to transportation" from various royalty payments; nowhere do Plaintiffs provide any other factual support for this claim. *See id.* For example, Plaintiffs do not adequately identify the supposed costs deducted, which lease was violated, or when the violations supposedly occurred. Nowhere are Debtors placed on notice of the specific factual allegations against them, rendering the pleading insufficient. *See Callaremi*

Lincoln-Mercury, Inc. v. Picon Auto Grp. LLC, No. 17CV6819KSHCLW, 2018 WL 5342721, at *6 (D.N.J. Oct. 29, 2018) (observing that notice pleading "require[s] the pleader to put the defendant on notice of the claim against it").

Second, Plaintiffs make various allegations concerning take-or-pay fees. *See Amended Complaint* at ¶¶ 25–33. The material allegations are:

> On information and belief, Extraction repeatedly deducted these Take-or-Pay Fees from Plaintiffs' RIs. Extraction did not identify these deductions for Take-or-Pay Fees in the Royalty Statements provided to Plaintiffs; instead Extraction intentionally withheld such deduction information by reporting to Plaintiffs lesser per barrel oil prices than the prices for which Extraction actually sold the oil production at issue.[1]

If, however, Plaintiffs have some "information and belief," then they should plead "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *In re Allergan Erisa Litig.*, 975 F.3d at 353 n.9 (quoting *Santiago*, 629 F.3d at 128). The only thing that Plaintiffs pleaded was pure speculation that Extraction might not have paid Plaintiffs a full amount based on comparison of Debtors' reported oil prices to other materials. *See Amended Complaint* at ¶ 27–28. Plaintiffs, however, do not plead any facts that suggest their suspicions are actually well-founded; this is the exact sort of pleading that the United States Supreme Court has held fails to cross the line from "conceivable to plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009) (citations omitted). Even if the Court accepts Plaintiffs' contentions as true, the only thing they plausibly suggest is that Extraction was not able to market its oil as well as its competitors for a brief period of time—which, incidentally, is exactly what happened.

[1] *Amended Complaint* at ¶ 30–31.

Third, the same thing is true for allegations concerning transportation costs and taxes, which are even more threadbare. *See Amended Complaint* at ¶ 34–38. No attempt was made to provide a scintilla of factual support for these allegations. *See id.*

Fourth, the "pricing scheme" allegations are deficient, too. *See Amended Complaint* at ¶ 39–44. First, Plaintiffs state only that "[s]ome" Plaintiffs are paid Royalties on oil and gas pursuant to Royalty Agreements that state that Royalties shall be paid based on "market", "field" or "field-wide prices." Again, this fails to place Defendants on notice of the claims against them. Moreover, these allegations boil down to the claim that unidentified leases between unidentified Plaintiffs and Extraction call for royalties higher than what Extraction paid because Extraction does not pay "market" prices. *See id.* These claims are, again, based on pure speculation. *Compare id.* at ¶ 40–41 *with id.* at ¶ 27–28. Plaintiffs may have pleaded a "conceivable" claim, but they failed to plead a "plausible" entitlement to relief. *See Iqbal*, 556 U.S. at 683.

Allergan demonstrates how each of the above conclusory statements fall short. In *Allergan*, the court summarized the factual allegations as follows:

> (i) the market for generic drugs is highly competitive; (ii) the prices for several generic drugs increased markedly over a brief period of time; (iii) certain members of Congress sought to investigate the increases; (iv) in connection with that investigation, Allergan was asked to provide information about price increases for certain generic drugs it manufactures; (v) several months later, Allergan received a subpoena from the DOJ requesting information about the marketing and pricing of some of its generic products and communications with competitors regarding the same; and (vi) over a year after receiving the subpoena, the DOJ brought price-fixing charges against at least one unnamed party – but not Allergan – related to generic drugs, and the DOJ was 'expected to remain active in pursuing generic-drug price fixing[.]'

In re Allergan Erisa Litig., 975 F.3d at 353–54. The Third Circuit was not persuaded that this alleged a factual entitlement to relief; specifically, the court held that, "[c]onsidered holistically, and taking all reasonable inferences in the plaintiffs' favor, those allegations fail to support a

plausible inference that Allergan conspired with other generic-drug manufacturers to fix prices." *Id.* at 354. The Third Circuit even identified certain factual-esque allegations that were "not well-pled facts but [were] instead conclusions entitled to no deference." *Id.* at 355 (citing *Iqbal*, 556 U.S. at 679). For example, one allegation the court ignored was that (i) "Allergan and several of its pharmaceutical industry peers colluded to fix generic drug prices in violation of federal antitrust laws . . . putting Allergan at risk of criminal prosecution and civil and criminal penalties . . . ." *Id.*

Plaintiffs' pleadings are at least as deficient as those in *Allergan*. Debtors cannot even identify which plaintiff alleges which Defendant took what actions at which time. *See generally Amended Complaint*. Plaintiffs should have identified, at minimum, the specific underpayments under each particular lease; the Defendant alleged to be responsible; when the costs were allegedly deducted; and the minimal factual basis—if Plaintiffs even have any—supporting the aforementioned allegations. *See Diff Scale Operation Research, LLC v. Maxlinear, Inc.*, No. CV 19-2109-LPS-CJB, 2020 WL 6867103, at *2 (D. Del. Nov. 23, 2020) (holding a complaint was inadequate because it did "not identify who committed the alleged infringement, or where, when, and why the alleged infringement occurred"). The Plaintiffs' failure to do so means the factual allegations are not "'enough to raise a right to relief above the speculative level,' which 'requires more than labels and conclusions.'" *Geness v. Admin. Office of Pennsylvania Courts*, 974 F.3d 263, 269 (3d Cir. 2020) (quoting *Twombly*, 550 U.S. at 555).

In sum, "Plaintiffs have a responsibility in drafting a [c]omplaint to put individual defendants on notice of their alleged misconduct, and on notice of which [p]laintiff alleges injury as a result of that misconduct." *Adger v. Carney*, No. CV 18-2048-LPS, 2020 WL 1475422, at *6 (D. Del. Mar. 26, 2020). Debtors cannot prepare a defense in response to the Amended Complaint and have no notice of what they allegedly did wrong to whom. The Court should therefore dismiss

all claims.[2] *See Ibrahim v. New Jersey Attorney Gen.*, No. CV183461KMCLW, 2020 WL 4016017, at *3 (D.N.J. July 14, 2020) ("Defendants state that they are 'wholly unable to identify, grasp, and respond to the claims against them – if any claims do in fact exist.' Their perplexity is understandable. The amended complaint fails to plead facts sufficient to put Defendants on notice of actions [that] could result in liability. These counts, I find, fail to meet the minimal pleading requirements of Fed. R. Civ. P. 8(a).") (internal citations omitted).

II. THE FRAUD CLAIMS MUST BE DISMISSED BECAUSE (1) PLAINTIFFS DID NOT PLEAD WITH PARTICULARITY AND (2) SOME CLAIMS ARE BARRED BY A STATUTE OF LIMITATIONS.

The Court must dismiss Plaintiffs' fraud claims (Count III). ***First***, Plaintiffs did not plead their fraud claims with particularity. ***Second***, every claim for alleged fraud prior to October 26, 2017 is barred by the governing statute of limitations.

A. Plaintiffs Failed to Plead Fraud with Particularity.

The Plaintiffs' fraud claims fail as a matter of law because Plaintiffs did not plead fraud with particularity. Federal Rule of Civil Procedure 9(b) "requires a plaintiff to plead (1) a specific false representation of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his damage." *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 284 (3d Cir. 1992), *as amended* (May 27, 1992) (citing *Christidis v. First Pennsylvania Mortg. Tr.*, 717 F.2d 96, 99 (3d Cir. 1983)). Although courts should be "sensitive" to concerns that alleged defrauders may be in sole possession of relevant facts before discovery, "even under

[2] Plaintiffs' First and Second claims for relief, which seek declaratory judgments (i) determining the validity, scope and extent of their claims for unpaid Royalties and the amounts owed to Plaintiffs and (ii) that Debtors have no right to distribute any proceeds allegedly belonging to Plaintiffs on account of the Royalty Interests. Because Plaintiffs have failed to state a claim that they are entitled to any additional royalty payments, the Court should also dismiss these claims for relief.

a more relaxed application of the rule, plaintiffs must accompany such an allegation with a statement of facts upon which their allegation is based." *Id.* (citing *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 645 (3d Cir. 1989)). In other words, "[t]o avoid dismissal in these circumstances, a complaint must delineate at least the nature and scope of plaintiffs' effort to obtain, before filing the complaint, the information needed to plead with particularity." *Id.* The pleadings must be sufficient "to place the defendant on notice of the 'precise misconduct with which [it is] charged.'" *DiMare v. MetLife Ins. Co.*, 369 F. App'x 324, 329 (3d Cir. 2010) (quoting *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007)).

Plaintiffs' complaint falls woefully short of the above requirements. ***First***, Plaintiffs fail to allege that any defendant made specific false representations. Plaintiffs instead bluntly allege that "Defendants made uniform misrepresentations and/or omissions on the reports and monthly Royalty Statements." *Amended Complaint* ¶ 71. Plaintiffs do not (1) identify which Defendants took which action; (2) the nature of ***any*** alleged misrepresentation or omission; (3) the dates of ***any*** alleged misrepresentation or omission; or (4) any facts supporting the alleged misrepresentations or omissions. *See id.* Put simply, Plaintiffs fail to allege the "who, what, when, where, and how" of their fraud claim, which is required under Rule 9(b)'s standard of particularity. *See United States ex rel. Bookwalter v. UPMC*, 946 F.3d 162, 176 (3d Cir. 2019) (quoting *United States ex re. Moore & Co., P.A. v. Majestic Blue Fisheries*, 821 F.3d 294, 307 (3d Cir. 2016))).

Nor do Plaintiffs allege that this information is exclusively in Debtors' control. Indeed, Plaintiffs state the reports upon which their claims are based were publicly available. *See id.* at ¶ 70. Plaintiffs also do not allege that they relied upon the alleged misrepresentations, let alone make allegations concerning which Plaintiffs relied on which alleged misrepresentation. *See*

generally id. Accordingly, Plaintiffs have failed to meet the Rule 9(b) pleading standard and Count III must be dismissed.

B. The Statute of Limitations Bars Portions of the Fraud Claims.

Even if Plaintiff had adequately pled their fraud claims, every claim for alleged fraud prior to October 26, 2017 is barred by the statute of limitations. *See* Colo. Rev. Stat. § 13-80-101 (noting actions for fraud and misrepresentation are governed by a three-year statute of limitations). "When the complaint shows on its face that the claim was brought more than three years after the alleged fraud and the defendant has affirmatively pled the statute of limitations, the burden is on the plaintiff to show the statute has been tolled." *First Interstate Bank of Denver, N.A. v. Berenbaum*, 872 P.2d 1297, 1301 (Colo. App. 1993) (citing *Hansen v. Lederman*, 759 P.2d 810 (Colo. App. 1988)). Thus, if the Amended Complaint shows that Plaintiffs "knew or should have known of the alleged fraud" prior to October 26, 2017, the fraud claims are time barred. *See id.* This is because "[t]he limitations period commences when the defrauded person has knowledge of facts which, in the exercise of proper prudence and diligence, would enable the person to discover the fraud perpetrated against the person." *Id.* (citing *Hansen*, 759 P.2d at 810).

Plaintiffs claim Extraction underpaid them royalties since December 1, 2013. *Id.* at ¶ 20. Plaintiffs also concede Extraction consistently filed quarterly reports that "report the amount of oil produced and sold and the amount of Royalties withheld and distributed." *Id.* at ¶ 70. Indeed, these reports are the basis of Plaintiffs' fraud claims. *See id.* at ¶ 71. Finally, Plaintiffs alleged—without explanation—that Debtors "made uniform misrepresentations and/or omissions on the reports and monthly Royalty Statements." *Id.* Thus, Plaintiffs have pleaded the exact circumstances that show the statute of limitations bars a significant portion of their fraud claims. Plaintiffs possess the same information now that they always had to support their fraud claims: the

reports. *See id.* at ¶ 70. In other words, every time a monthly report was filed, Plaintiffs were in possession of knowledge that would have enabled a reasonably prudent person to discover the alleged fraud. *See First Interstate Bank of Denver, N.A.*, 872 P.2d at 1301. Accordingly, the Court should dismiss all fraud claims that accrued more than three years ago—*i.e.*, any fraud claim related to a report that was issued prior to October 26, 2017—because they are barred by the applicable statute of limitations.

III. A PORTION OF THE BREACH OF CONTRACT CLAIMS MUST BE DISMISSED BECAUSE THEY ARE BARRED BY A STATUTE OF LIMITATIONS.

The Court must dismiss all breach of contract claims—Plaintiffs' fourth claim for relief—that accrued prior to October 26, 2017 because they are barred by the statute of limitations. Breach of contract actions must be brought within three years after they accrue. *Hersh Companies v. Highline Village Assoc.*, 30 P.3d 221, 224 (Colo. 2001) (citing Colo. Rev. Stat. § 13-80-101(1)(a)). "Claims for breach of contract or warranty accrue upon discovery of the breach or on the date when, in the exercise of reasonable diligence, the breach should have been discovered." *Id.* (citing Colo. Rev. Stat. § 13-80-108(6)).

Plaintiffs' breach of contract claims are founded on the allegation that Debtors "breached the Royalty Agreements by taking prohibited deductions and/or paying on prices lower than required by the Royalty Agreements, resulting in paying Plaintiffs less than required by the Royalty Interests contracted for." *Amended Complaint* at ¶ 79. As discussed, however, Plaintiffs also pleaded that Extraction filed monthly reports concerning the royalties. *Id.* at ¶ 70. In other words, Plaintiffs had access to both the relevant contracts and the rates that Debtors were paying; all the information Plaintiffs needed to discover an alleged breach of contract via reasonable diligence was always contemporaneously available to Plaintiffs. *See id.* Indeed, Plaintiffs have not pleaded that some new information came to light that enabled them to file their complaint

before the Court. *See generally id.* Instead, by Plaintiffs' own admission, Plaintiffs' claims are based on information that has been in Plaintiffs' possession for nearly a decade. This is the sort of situation that statutes of limitations are designed to address. *See Hersh Companies*, 30 P.3d at 223 ("Statutes of limitations serve to . . . discourage unnecessary delay, and forestall the pursuit of stale claims.") (citing *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1096 (Colo. 1996)). All of Plaintiffs' breach of contract claims that accrued prior to October 26, 2017 must be dismissed.

IV. PORTIONS OF THE BREACH OF IMPLIED COVENANT CLAIMS MUST BE DISMISSED BECAUSE THEY ARE BARRED BY A STATUTE OF LIMITATIONS.

The Court must dismiss all of Plaintiffs' breach of implied covenant claims—Plaintiffs' fifth claims for relief—that accrued prior to October 26, 2017 because they are barred by the governing statute of limitations. "Under Colorado law, the nature of the right sued upon determines the applicable statute of limitations." *Aberkalns v. Blake*, 633 F. Supp. 2d 1231, 1234 (D. Colo. 2009) (citing *San Juan Basin Consortium, Ltd. v. EnerVest San Juan Acquisition Ltd. P'ship*, 67 F. Supp. 2d 1213, 1224 (D. Colo. 1999)). "When determining the nature of the action, the substance of the right infringed, not the specific legal theory of recovery determines the nature of the action." *Id.* (citing *Bd. of Comm'rs of Pitkin Cty. v. Timroth*, 87 P.3d 102, 105 (Colo. 2004)).

Plaintiffs allege that Extraction, as operator under the lease contracts, "owes Plaintiffs an implied duty to act as a prudent operator . . . ." *Amended Complaint* at ¶ 82. Similarly, Plaintiffs have also alleged that "***[p]ursuant to the Royalty Agreement*** and under Colorado law, Extraction has a duty of good faith and fair dealing to Plaintiffs." *Id.* at ¶ 83 (emphasis added). In other words, Plaintiffs' actions are contractual. *See In re Ball Four, Inc.*, No. 10-33952 EEB, 2013 WL 5716889, at *7 (Bankr. D. Colo. Oct. 18, 2013) ("Colorado law recognizes that ***every contract***

contains an implied covenant of good faith and fair dealing.") (emphasis added) (citing *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995), *as modified on denial of reh'g* (Jan. 16, 1996); *N. York Land Assocs. v. Byron Oil Indus., Inc.*, 695 P.2d 1188, 1190 (Colo. App. 1984)) ("[T]he standard for determining whether a lessee has complied with . . . the implied covenants ***in oil and gas leases*** generally, is the 'prudent operator standard.'") (emphasis added) (citing *Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272, 273 (1934)). Indeed, courts applying Colorado law characterize the breach of implied promises as arising "from the contractual relation" and as "grounded in contract." *Ins. Co. of N. Am. v. Aspen Alps Condo. Ass'n, Inc.*, 915 F. Supp. 1122, 1126 (D. Colo. 1996) (holding that claims for breach of an implied warranty of fitness were governed by the contract statute of limitations).

The implied covenant claims are contractual, and, thus, they are governed by the contract statute of limitations. Consequently, all claims that accrued prior to October 26, 2017 must be dismissed for the same reasons as the breach of contract claims discussed *supra*.

V. THE CONVERSION CLAIMS MUST BE DISMISSED BECAUSE (1) ROYALTY PAYMENTS ARE NOT SUBJECT TO CONVERSION, AND (2) SOME CLAIMS ARE BARRED BY A STATUTE OF LIMITATIONS.

The Court must dismiss Plaintiffs' conversion claims, their sixth claims for relief. ***First***, as a matter of law, Extraction cannot convert the Royalty Payments. ***Second***, every claim for an alleged conversion prior to October 26, 2017 is barred by the governing statute of limitations.

A. Extraction Cannot Convert the Royalty Payments as a Matter of Law.

The Plaintiffs' conversion claims fail as a matter of law because Extraction cannot convert the Royalty Payments. Specifically, Plaintiffs allege they are "entitled to the proceeds attributable to their Royalty Interests." *Amended Complaint* [D.I. 4] at ¶ 16. However, "***the black letter law***

is that there can be no action for the conversion of money." *Johnson v. Studholme*, 619 F. Supp. 1347, 1350 (D. Colo. 1985) (emphasis added) (collecting authorities).

The doctrine's only exception—that "[a]n action will lie for the conversion of money where there is an obligation to return or otherwise particularly treat *specific money*"—is inapplicable. *See Phelps Oil & Gas, LLC v. Noble Energy, Inc.*, No. 14-CV-02604-REB-CBS, 2016 WL 9735739, at *5 (D. Colo. Aug. 1, 2016), *report and recommendation adopted*, No. 14-CV-2604-REB-CBS, 2016 WL 9735740 (D. Colo. Sept. 28, 2016) (emphasis in original) (citing *Rhino Fund, LLLP v. Hutchins*, 215 P.3d 1186, 1195 (Colo. App. 2008), *as modified on denial of reh'g* (Dec. 24, 2008)). Indeed, *Phelps* entirely disposes of Plaintiffs' conversion claims. In *Phelps*, there were "no allegations regarding any specific sums of money belonging to [plaintiff] and the class members." *Phelps Oil & Gas, LLC*, at 2016 WL 9735739, at *5. Instead, the plaintiffs "broadly allege[d] that they ha[d] been underpaid royalties from the oil and gas leases." *Id.* The Court concluded, however, that "[t]he amount of royalties to which [plaintiff] and the class are entitled, however, is fluid and—as it is relevant here—ultimately dependent on DCP's proceeds, an amount that surely varies based on DCP's own sales." *Id.* "Thus, [the court held that] the situation in this instance is distinguishable from those cases allowing a conversion claim for a specifically identifiable amount of money." *Id.* The same is true here; Plaintiffs do not allege that they are entitled to any specific money. *See generally Amended Complaint* [D.I. 4]. Plaintiffs' conversion claim must be dismissed.

B. The Statute of Limitations Bars Portions of the Conversion Claims.

Every claim for an alleged conversion prior to October 26, 2017 is barred by the governing statute of limitations. Claims for conversion are subject to a statute of limitations. *See Curtis v. Counce*, 32 P.3d 585, 588 (Colo. App. 2001). Specifically, "[a]ll actions of replevin or for taking,

detaining, or converting goods or chattels," subject to an exception that is not relevant here,[3] are subject to a three-year statute of limitations. Colo. Rev. Stat. § 13-80-101(h). Like fraud, "a cause of action for conversion accrues when the plaintiff has knowledge of facts which, in the exercise of proper prudence and diligence, would enable him or her to discover the facts underlying the claim." *McGee v. Hardina*, 140 P.3d 165, 167 (Colo. App. 2005) (citing *Hansen*, 759 P.2d at 810).

As discussed above, Plaintiffs affirmatively pleaded that Extraction filed monthly reports concerning the royalties. *See Amended Complaint* at ¶ 70. Nothing has changed between those reports and the filing of the complaint and Plaintiffs have not pleaded that any new information suddenly came to light; thus, the reports were all the information a reasonably prudent person needed to discover the facts underlying Plaintiffs' claim. In other words, the conversion claims accrued every time a report issued. *See McGee*, 140 P.3d at 167 (citing *Hansen*, 759 P.2d at 810). All conversion claims accruing more than three years ago are barred.

VI. THE CONSTRUCTIVE TRUST CLAIMS MUST BE DISMISSED BECAUSE THEY ARE NOT CAUSES OF ACTION.

The Court must dismiss Plaintiffs' constructive trust claims, which constitute half of Plaintiffs' seventh claim for relief. Just five months ago, a federal court applying Colorado law held that "a constructive trust 'is not a substantive cause of action that Colorado recognizes' and is instead 'a remedy when other violations of substantive law have been proven.'" *WTI Partners v. Ahn*, No. 18-CV-02269-MEH, 2020 WL 3259067, at *14 (D. Colo. June 16, 2020) (quoting *McNees v. Ocwen Loan Servicing, LLC*, No. 16-CV-1055-WJM-KLM, 2019 WL 1762947, at *1 (D. Colo. Apr. 22, 2019)).

[3] *See Curtis*, 32 P.3d at 588 (holding the exception is inapplicable under similar circumstances).

The district court correctly applied Colorado law which expressly and repeatedly states that constructive trusts "are remedial in nature and are inappropriately pled as a separate cause of action." *Bryant v. Cmty. Choice Credit Union*, 160 P.3d 266, 276 (Colo. App. 2007) (citing *Mancuso v. United Bank of Pueblo*, 818 P.2d 732 (Colo. 1991)); *accord Indian Mountain Corp. v. Indian Mountain Metro. Dist.*, 412 P.3d 881, 887, *as modified on denial of reh'g* (Oct. 20, 2016) (Colo. App. 2016) (holding that constructive trusts "are remedial in nature and are not appropriately pleaded as a separate cause of action") (citing *Bryant v. Cmty. Choice Credit Union*, 160 P.3d 266, 276 (Colo. App. 2007)). The Court must dismiss the constructive trust "claim" insofar as it purports to be a standalone cause of action.

VII. THE UNJUST ENRICHMENT CLAIM MUST BE DISMISSED BECAUSE (1) AN EXPRESS CONTRACT GOVERNS AND (2) SOME CLAIMS ARE BARRED BY A STATUTE OF LIMITATIONS.

The Court must dismiss Plaintiffs' unjust enrichment claims, their eighth claim for relief. ***First***, as Plaintiffs concede, an express contract governs, precluding the quasi-contract claim. ***Second***, every claim for unjust enrichment prior to October 26, 2017 is barred by the governing statute of limitations.

A. An Express Contract Precludes the Unjust Enrichment Claim.

"Unjust enrichment is a claim in quasi-contract based on principles of restitution." *Pernick v. Computershare Tr. Co., Inc.*, 136 F. Supp. 3d 1247, 1268 (D. Colo. 2015) (citing *W. Ridge Grp., LLC v. First Tr. Co. of Onaga*, 414 F. App'x 112, 120 (10th Cir. 2011)). "In general, a party cannot recover for unjust enrichment by asserting a quasi-contract ***when an express contract covers the same subject matter*** because the express contract precludes any implied-in-law contract." *Id.* (emphasis added) (quoting *Interbank Investments, LLC v. Eagle River Water & Sanitation Dist.*, 77 P.3d 814, 816 (Colo. App. 2003)).

Plaintiffs affirmatively plead that an express contract governs. As Plaintiffs allege, the "[t]he Plaintiffs' ***Royalty Agreements*** dictate the terms of their [Royalty Interests]. Each Royalty Agreement expressly or implicitly prohibits certain deductions and/or dictates how the [Royalty Interest] is to be calculated . . . ." *Id.* at 5 (emphasis added). According to Plaintiffs themselves, an express contract governs the subject matter of royalty payments. *See id.* These are the exact circumstances wherein Courts routinely hold that a contract bars an unjust enrichment claim.[4] Thus, the unjust enrichment claim must be dismissed.

B. The Statute of Limitations Bars Portions of the Unjust Enrichment Claims.

"[B]ecause unjust enrichment is a form of relief in quasi-contract or contract implied in law, the time within which to assert such a claim ordinarily is assessed under the three-year statute of limitations for contract actions." *VanPortfliet v. Carpet Direct Corp.*, No. 16-CV-00616-PAB-KMT, 2017 WL 1023380, at *6 (D. Colo. Mar. 15, 2017) (quoting *Sterenbuch v. Goss*, 266 P.3d 428, 437 (Colo. App. 2011)). Plaintiffs filed the original complaint on October 26, 2020. *See Complaint* [A.D.I. 1]. Thus, all conversion claims accruing more than three years before that time are barred. *See id.*; *see also Barnett v. Surefire Med., Inc.*, 342 F. Supp. 3d 1167, 1173 (D. Colo. 2018) (holding Colorado's three-year statute of limitations applied to an unjust enrichment claim).

[4] *See, e.g.*, *Pulte Home Corp., Inc. v. Countryside Cmty. Ass'n, Inc.*, 382 P.3d 821, 833 (Colo. 2016) ("These provisions expressly address liability for the charges at issue and therefore bar the Association's unjust enrichment claim unless one of the two exceptions applies. Neither does: the CCR has not been rescinded and no party claims it is defective . . . and the alleged past-due assessments are squarely encompassed in the provisions laid out above . . . . Thus, the court of appeals correctly concluded that the Association does not have a remedy for unjust enrichment.") (internal citations omitted); *Interbank Investments, LLC*, 77 P.3d at 817 ("[T]he contracts contemplated payment from tap fees to be collected over time, and the risk of nonpayment inheres in these as well as in most other contracts. Indeed, the trial court calculated unjust enrichment based on the contracts' reimbursement formula of tap fees collected less certain costs. Accordingly, we conclude that enforceable express contracts cover the same subject matter as plaintiff's unjust enrichment claim."); *W. Ridge Grp., LLC*, 414 F. App'x at 120 (noting unjust enrichment "is not available as a mere alternative legal theory when the subject is covered by an express contract") (citing *Interbank Investments, LLC*, 77 P.3d at 819); *Pernick*, 136 F. Supp. 3d at 1268 (dismissing an unjust enrichment claim because "the conduct giving rise to plaintiff's unjust enrichment claim is covered by the Agreement") (citing *Greenway Nutrients, Inc. v. Blackburn*, 33 F. Supp. 3d 1224, 1261 (D. Colo. 2014)).

VIII. THE ACCOUNTING CLAIMS MUST BE DISMISSED BECAUSE (1) PLAINTIFFS DID NOT PLEAD DEMAND AND REFUSAL, (2) AN ADEQUATE REMEDY AT LAW EXISTS.

The Court must dismiss Plaintiffs' accounting claims, their ninth claims for relief. ***First***, Plaintiffs failed to plead that they made the requisite demand. ***Second***, an adequate remedy at law exists, which precludes an equitable accounting claim.

A. Plaintiffs Failed to Adequately Plead their Accounting Claims Because They Did Not Plead That They Made a Demand on Debtors.

"Under Colorado law, an accounting is an ***extraordinary equitable remedy*** that may be ordered if the plaintiff is unable to determine how much, if any, money is due him or her from another." *Estate of Bogue v. Adams*, 405 F. Supp. 3d 929, 943 (D. Colo. 2019) (emphasis added) (*Andrikopoulos v. Broadmoor Mgmt. Co.*, 670 P.2d 435, 440 (Colo. App. 1983)). It is well-established that "[a] plaintiff ***must plead*** and prove a demand for an accounting and refusal to comply." *Id.* (emphasis added) (citing *Postal Instant Press v. Jackson*, 658 F. Supp. 739, 743 (D. Colo. 1987)); *see also Am. Woodmen's Life Ins. Co. v. Supreme Camp of Am. Woodmen*, 549 P.2d 423, 427 (Colo. App. 1976) ("Usually a demand for an accounting and a refusal to comply with the demand are necessary prerequisites to be pleaded and proved."). Plaintiffs did not allege either that they demanded an accounting or that Defendants refused to comply with such a demand. *See Amended Complaint* [A.D.I. 4] at ¶ 19. Thus, the accounting cause of action must be dismissed.

B. An Adequate Remedy at Law Exists: Monetary Damages.

The Colorado Supreme Court has stated that an equitable accounting is not allowed when there "is a full, complete, and adequate remedy at law." *See Buchhalter v. Myers*, 276 P. 972, 979 (Colo. 1929) ("An equitable accounting was unnecessary. We cannot allow it when under such circumstances there was a full, complete, and adequate remedy at law."). The Tenth Circuit has held the same. *See Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 51 F. App'x 786, 800

(10th Cir. 2002) ("An equitable claim for an accounting is not cognizable where an adequate remedy exists at law.").

Here, Plaintiffs have themselves alleged the monetary remedy they believe is adequate: "$1,199,233.55, not including any interest or penalties." *Amended Complaint* [A.D.I. 4] at 10. Monetary damages are an adequate remedy at law. *See, e.g., MaceRich Real Estate Co. VI v. Holland Properties Co.*, 454 F. Supp. 891, 898 (D. Colo. 1978) ("The only damages found in the evidence are entirely compensable by an award of monetary damages in an action at law. The Court concludes that plaintiff has an adequate remedy at law . . . ."); *Eastcoast Equip. Co. v. Harnischfeger Corp.*, 354 F. Supp. 335, 339–40 (E.D. Pa. 1973) ("Any damages suffered by plaintiff may be compensated for by money damages which are readily ascertainable and, accordingly, plaintiff has an adequate remedy at law."); *McHugh v. Ries*, No. CIV.A. 97-516, 1997 WL 381611, at *2 (E.D. Pa. July 2, 1997) ("Plaintiffs have an adequate remedy at law in the form of money damages."). Accordingly, the extraordinary equitable relief of an accounting is unwarranted and Plaintiffs' accounting claims must be dismissed.

IX. PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF MUST BE DISMISSED BECAUSE AN ADEQUATE REMEDY AT LAW EXISTS.

The Court must dismiss Plaintiffs' preliminary and permanent injunction claims, their tenth and eleventh claims for relief because an adequate remedy at law is available: monetary damages.

The Third Circuit has "explained that preliminary injunctive relief is not available when adequate monetary damages are available . . . ." *Goadby v. Philadelphia Elec. Co.*, 639 F.2d 117, 121 (3d Cir. 1981) (citing *A. O. Smith Corp. v. F. T. C.*, 530 F.2d 515, 525 (3d Cir. 1976)); *see also Miller v. Am. Tel. & Tel. Corp.*, 344 F. Supp. 344, 347 (E.D. Pa. 1972) ("An essential prerequisite to the granting of a Preliminary Injunction is the showing by the plaintiffs that they will suffer irreparable injury if the Preliminary Injunction is denied."). Similarly, "[t]he main

prerequisite to obtaining a permanent injunction is a finding that plaintiff will suffer some injury for which he has no adequate remedy." *Simpler Consulting, Inc. v. Wall*, No. CIV.A. 05-452, 2008 WL 763746, at *4 (W.D. Pa. Mar. 21, 2008). Thus, "if a legal remedy would be as effective as an injunction in providing the claimant with relief, there is no need for the court to invoke its equity jurisdiction." *Id.* (citing *LCI Commc'ns, Inc. v. Wilson*, 700 F. Supp. 1390, 1398 (W.D. Pa. 1988)).

Again, Plaintiffs themselves noted a specific monetary remedy: "$1,199,233.55, not including any interest or penalties." *Amended Complaint* [A.D.I. 4] at ¶ 10. By Plaintiffs' own admission, an adequate legal remedy exists, and, "where an adequate remedy at law exists, 'the party seeking redress *must* pursue it.'" *TD Bank N.A. v. Hill*, 928 F.3d 259, 282 (3d Cir. 2019) (emphasis in original). Monetary damages are adequate to remedy Plaintiffs' alleged harm, and Plaintiffs' claims for injunctive relief must be dismissed.

X. EVERY CLAIM AGAINST ANY DEBTOR THAT IS NOT EXTRACTION OIL & GAS, INC. MUST BE DISMISSED.

Plaintiffs do not even ***attempt*** to plead allegations about any named defendant other than Extraction Oil & Gas, Inc., necessitating dismissal of the claims against those debtors.

Under Federal Rule of Civil Procedure 8(a)(2), pleadings must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." The Supreme Court has explained that this requirement is meant to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests . . . ." *Twombly*, 550 U.S. at 545 (quoting *Conley v. Gibson*, 355 U.S. 41, 42 (1957)).

Plaintiffs generically claim that "***Extraction*** has underpaid Plaintiffs on their Royalty Interests . . . ." *Amended Complaint* [D.I. 4] at ¶ 4 (emphasis added). All other debtors are left to guess at the basis, nature, or details concerning the claims against them. *See generally Amended Complaint* [D.I. 4]. Thus, "the tangled nature of Plaintiffs' allegations" renders it impossible to

discern what these other debtors allegedly did wrong. *See Staropoli v. Metro. Life Ins. Co.*, 465 F. Supp. 3d 501, 517 (E.D. Pa. 2020) (concluding a pleading which lumped all defendants together failed to satisfy Federal Rule of Civil Procedure 8(a) and dismissing claims accordingly). In other words, such group pleading "fails to satisfy Rule 8 'because it does not place [d]efendants on notice of the claims ***against each of them***.'" *Mills v. Ethicon, Inc.*, 406 F. Supp. 3d 363, 386 (D.N.J. 2019) (emphasis added) (quoting *Sheeran v. Blyth Shipholding S.A.*, No. CV 14-5482 (JBS/AMD), 2015 WL 9048979, at *3 (D.N.J. Dec. 16, 2015)).[5]

Courts often find claims insufficient for this exact reason. *See, e.g.*, *Japhet v. Francis E. Parker Mem'l Home, Inc.*, No. CIV.A. 14-01206 SRC, 2014 WL 3809173, at *2 (D.N.J. July 31, 2014) ("[I]t is impossible for this Court to read the Complaint and have any idea what Kellerman did to get named in this lawsuit, let alone what she did that would make her plausibly 'liable for the misconduct alleged.' *A fortiori*, then, the Complaint is woefully deficient as to the factual allegations necessary to satisfy the various elements of the claims alleged against her.") (citations omitted); *Stewart v. Evans*, No. 3:CV-09-1428, 2009 WL 2707540, at *5 (M.D. Pa. Aug. 25, 2009) ("Other than Judge Smith, the only Defendants mentioned by name in the Complaint are Commissioner Sullivan, Cindy Henson, and Elissa Slotter. The other Defendants are not mentioned in the Complaint, nor is their alleged role in Plaintiff's claim clearly defined. Consequently, the complaint does not adequately put the defendants 'on notice of the essential elements of the cause of action' and Plaintiff will be directed to file an amended complaint.") (citations omitted). Indeed, earlier this year, the United States District Court of Delaware

[5] *Accord Stransky v. PennyMac Holdings, LLC*, No. CV1815929MASLHG, 2019 WL 4750150, at *6 (D.N.J. Sept. 30, 2019) ("Courts in this district have held 'group pleading' does not satisfy Rule 8 because it does not place the defendants on notice of the claims against them.") (citing *Sheeran*, 2015 WL 9048979 at *3); *Forero v. APM Terminals*, No. CV1813754KMCLW, 2019 WL 6168031, at *5 (D.N.J. Nov. 19, 2019) (dismissing claims because of improper group pleading).

castigated plaintiffs for an inadequate pleading containing the same missteps that Plaintiffs made here. *See Adger*, 2020 WL 1475422, at *6. The court took issue with multiple circumstances in *Adger* that are present (or worse) in this case. *See id.* For example, "[t]wo of the DOC Defendants are not even named anywhere except in the caption." *Id.* Here, the situation is far worse. *See generally Amended Complaint* (referencing only Extraction Oil & Gas, Inc. outside the captioned the list of parties). As in *Adger*, the Amended Complaint "is essentially a 'shotgun pleading' and does not comply" with the Federal Rules of Civil Procedure. *Adger*, 2020 WL 1475422, at *7. The Court should dismiss all claims against any debtor other than Extraction Oil & Gas, Inc.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Amended Complaint.

Dated: December 4, 2020
Wilmington, Delaware

/s/ Stephen B. Gerald

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