Docket #0026 Date Filed: 2/2/2021

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
Reorganized Debtors.	)	(Jointly Administered)

ANNETTE LEAZER; TOM LEAZER; GORDON NISWENDER; JOY 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. GALE MOODY; VALERIE MOODY; AND ALASKAN OIL AND RESOURCES, LLC,	)	Adversary Proceeding Adv. Proc. No. 20-50963 (CSS) **Re: D.I. 24 & 25**
Plaintiffs,	)	
v.	)	
EXTRACTION OIL & GAS, INC.,	)	
Defendant.	)	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

[1] The Reorganized 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 Reorganized Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.

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NATURE AND STAGE OF THE PROCEEDINGS

Extraction Oil & Gas, Inc. ("Extraction") filed its petition under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") on June 14, 2020. On October 26, 2020, Plaintiffs filed the *Complaint* [A.D.I. 1] against Extraction and its affiliated debtors (collectively, the "Debtors") alleging, generally, various underpayments of royalties owed to the Plaintiffs under oil and gas leases with each of the Debtors. Three days later, Plaintiffs filed the *Amended Complaint* [A.D.I. 4] to address an issue in the case's caption. On December 18, 2020, the Debtors filed the *Defendants' Motion to Dismiss* [A.D.I. 16]. On January 19, 2021, Plaintiffs filed the *Second Amended Complaint* [A.D.I. 24] to respond to issues raised in *Defendants' Motion to Dismiss* and withdrawing all claims against defendants other than Extraction. Due to the *Second Amended Complaint*'s failure to address deficiencies outlined in *Defendants' Motion to Dismiss*, the creation of new deficiencies in the amendments, and the addition of causes of action inappropriately raised in the *Second Amended Complaint*, Extraction files this *Motion to Dismiss the Second Amended Complaint*.

SUMMARY OF ARGUMENT

1. Extraction files this *Motion to Dismiss the Second Amended Complaint* under Rule 12 of the Federal Rules of Civil Procedure (the "Federal Rules"), as made applicable by Rules 7001 and 7012 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), seeking entry of an order dismissing with prejudice certain of Plaintiffs' claims against Extraction.

2. Many of Plaintiffs' claims are subject to dismissal with prejudice as a matter of law. ***First***, each of Plaintiffs' tort claims (Counts Three and Seven) are barred by Colorado's economic loss rule. ***Second***, Plaintiffs' fraud claims are not pleaded with requisite particularity. ***Third***, Plaintiffs' breach of implied covenant claims are entirely duplicative of Plaintiffs' breach of contract claim. ***Fourth***, Plaintiffs' conversion claims fail as a matter of Colorado law. ***Fifth***,

Plaintiffs' constructive trust claims are not recognized causes of action under Colorado law. ***Sixth***, Plaintiffs' unjust enrichment claims are barred because an express contract governs their subject matter. ***Seventh***, Plaintiffs' accounting claims are barred because (1) Plaintiffs did not plead an accounting demand and refusal and (2) an adequate legal remedy exists which precludes this equitable relief. ***Eighth***, Plaintiffs' request for injunctive relief is barred because an adequate legal remedy exists which precludes this equitable relief. ***Ninth***, Plaintiffs did not have Extraction's written consent or leave of the Court to add Tom Leazer as a plaintiff or to add four new claims (Counts Five, Eight, Thirteen, and Fifteen) that were not raised in the *First Amended Complaint*.

STATEMENT OF FACTS

Plaintiffs allege they are lessors or royalty interest owners under various oil and gas leases with Extraction. *See Second Amended Complaint* at ¶ 8–19. As pleaded, the oil and gas leases govern the payment of Plaintiffs' royalty interests. *Id.* at ¶ 21. Plaintiffs claim Extraction underpaid the Plaintiffs' royalties for years but allege the specific amount of time for the underpayments is unknown. *Id.* at ¶ 24. Notably, this "unknown" timeframe is a conspicuous departure from prior pleadings, wherein Plaintiffs admitted they had knowledge by a specific date: December 1, 2013. *See Amended Complaint* at ¶ 20. Plaintiffs also allege various underpayments occurred—in violation of the leases—due to Extraction's: failure to sell all oil and gas produced; taking prohibited deductions; failing to pay market price; making title errors; and failing to recognize certain royalties. *See Second Amended Complaint* at ¶ 21–54. Plaintiffs claim "the produced but unsold oil and gas, prohibited [d]eductions, failure to pay market price, title errors, and nonpayments, and associated calculation errors have resulted in the estimated underpayment of [r]oyalties to Plaintiffs of more than $2,000,000 . . . ." *Id.* at ¶ 60.

LEGAL STANDARD

Extraction seeks relief under Federal Rule 12(b)(6) because Plaintiffs have failed to state 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)).

"[I]f a complaint is vulnerable to 12(b)(6) dismissal, a district court must permit a curative amendment, unless an amendment would be inequitable or futile." *Conley v. St. Jude Med., LLC*, No. 1:20-CV-00286, 2020 WL 5087889, at *8 (M.D. Pa. Aug. 28, 2020) (quoting *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 235 (3d Cir. 2008)). "An amendment is futile if the amended complaint would not survive a motion to dismiss for failure to state a claim upon which relief could be granted." *Id.* (quoting *Alvin v. Suzuki*, 227 F.3d 107, 121 (3d Cir. 2000)). An amendment is also futile when a plaintiff had an opportunity to correct pleading deficiencies but failed to do so. *See Boyd v. Tempay*, No. CIV.A. 07-377-JJF, 2008 WL 5156307, at *5 (D. Del. Dec. 4, 2008) (holding an amendment was futile because "Boyd was given an opportunity to correct his pleading

deficiencies, to no avail") (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). When such standards are not met, the Court is right to dismiss the subject claims with prejudice. *See Conley*, 2020 WL 5087889, at *8.

ARGUMENT

Many of Plaintiffs' causes of action fail to state claims for which relief can be granted. These claims suffer from various pleading deficiencies or are simply not cognizable under black-letter Colorado law. The Court should dismiss these claims with prejudice.

I. EVERY TORT CLAIM IS BARRED BY THE ECONOMIC LOSS RULE

The Court should dismiss Plaintiffs' tort claims—Counts Three and Seven—because Colorado's economic loss rule precludes recovery on these theories. Colorado has long recognized the economic loss rule and it governs the tort claims as pleaded.

A. Colorado Has Adopted the Economic Loss Rule

Colorado's Supreme Court has expressly adopted the economic loss rule.[1] *See Town of Alma v. AZCO Const., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000). That rule states that "a party

[1] In 2019, the Colorado Supreme Court addressed whether a statutory claim for civil theft was barred under the economic loss rule and held the judge-made economic loss rule could not trump the availability of the purely economic remedy available under the statute. *See Bermel v. BlueRadios, Inc.*, 440 P.3d 1150, 1159 (Colo. 2019). The Court also added dicta, in a footnote, that courts should "generally" be wary of precluding intentional tort claims that happen to overlap with contractual duties. *See id.* at 1154 n. 6. Some courts have broadly interpreted this dicta as suggesting that the economic loss rule is *per se* inapplicable to intentional torts. *See McWhinney Centerra Lifestyle Center LLC v. Poag & McEwen Lifestyle Centers-Centerra LLC*, No. 19CA0438, 2021 WL 126572, at *11 (Colo. App., 2021). The better reasoning is found in those cases that harmonize *Bermel* with its predecessor cases, conduct the ordinary economic loss rule analysis, and refuse to apply the rule when the intentional tort arises independently of any contractual duty. *See, e.g.*, *Valentine v. PNC Fin. Servs. Grp., Inc.*, No. 118CV01934CMASKC, 2019 WL 5790696, at *8 (D. Colo. Aug. 1, 2019) (citation simplified) (concluding fraud claims could not be asserted because of economic loss rule); *Satcom Sol. & Res. LLC v. Pope*, No. 19-CV-02104-CMA-GPG, 2020 WL 4511773, at *14 (D. Colo. Apr. 20, 2020), *report and recommendation adopted*, No. 19-CV-02104-CMA-NRN, 2020 WL 2188922 (D. Colo. May 6, 2020) (acknowledging *Bermel* but conducting ordinary economic loss rule analysis for conversion); *Good Funds Lending, LLC v. Westcor Land Title Ins. Co.*, No. 19-CV-00861-RM-MEH, 2020 WL 1514669, at *14 (D. Colo. Mar. 30, 2020) (conducting economic loss rule analysis for fiduciary duty claim).

suffering only economic loss[2] from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law." *Id.* In other words, a "breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie." *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282, 290 (Colo. App. 2009), *as modified on denial of reh'g* (June 11, 2009) (quoting *Town of Alma*, 10 P.3d at 1262)). "Contract obligations arise from promises the parties have made to each other, while tort obligations generally arise from duties imposed by law to protect citizens from risk of physical harm or damage to their personal property." *Id.* (quoting *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 72 (Colo. 2004)). Thus, Colorado courts have identified three policy interests that the economic loss rule serves:

> (1) to maintain a distinction between contract and tort law; (2) to enforce expectancy interests of the parties so that they can reliably allocate risks and costs during their bargaining; and (3) to encourage the parties to build the cost considerations into the contract because they will not be able to recover economic damages in tort.[3]

B. The Economic Loss Rule Bars Plaintiffs' Tort Claims

"The key to determining the availability of a contract or tort action [under the economic loss rule] lies in determining the source of the duty that forms the basis of the action." *Hamon Contractors, Inc.*, 229 P.3d at 290 (quoting *Town of Alma*, 10 P.3d at 1262). As mentioned, "breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie." *Id.* (quoting *Town of Alma*, 10 P.3d at 1262). Three factors "aid in determining whether the duty allegedly breached is independent of the parties' contract: (1) whether the relief sought in tort is the same as the contractual relief; (2)

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[2] "Economic loss is defined generally as damages other than physical harm to persons or property." *Town of Alma*, 10 P.3d at 1264.

[3] *Hamon Contractors, Inc.*, 229 P.3d at 290 (quoting *BRW, Inc.*, 99 P.3d at 72).

whether there is a recognized common law duty of care; and (3) whether the tort duty differs in any way from the contractual duty." *Id.* at 293 (citing *BRW, Inc.*, 99 P.3d at 74).

1. The Economic Loss Rule Bars the Fraud Claims

Fraud that arises in the course of a defendant's contractual performance is barred by the economic loss rule. *See Hamon Contractors, Inc.*, 229 P.3d at 295. Indeed, the Tenth Circuit agrees that Colorado's economic loss rule bars recovery on fraud claims that overlap with contractual duties. *See SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 823 F. App'x 559, 570 (10th Cir. 2020) (affirming district court's conclusion that the economic loss rule barred a fraud claim).

Here, Plaintiffs' fraud claims are not independent from the performance of the leases at issue; the relief sought is the same, and the allegedly breached duties are the same. As for relief, in their fraud cause of action, Plaintiffs allege Extraction "is responsible for the underpayments and inaccurate accounting for the royalties." *Second Amended Complaint* at ¶ 81. Plaintiffs admit, however, that these allegations stem from contractual duties and are subject to contractual relief:

> 87. The Defendant breached the Leases by failing to pay the full royalty amount owed due to failing to sell all Plaintiffs' oil and gas produced, allowing Deductions to be taken in the sale of oil and gas to third parties; and selling Plaintiffs' oil and gas interests at below market prices.
>
> 88. By paying less than the amount due under the Leases the Defendant has damaged the Plaintiffs in the aggregate amount of the underpayments.

Id. at ¶ 87–88. Furthermore, the allegedly breached tort duty is the exact same duty Extraction has under the contracts. *Compare id.* at 84 (alleging, for fraud, that "[Extraction] had a duty to properly account to the Plaintiffs by providing the information in the royalty statements on a monthly basis to the Plaintiffs") *with id.* at ¶ 21 (observing that the leases "determine the rights and obligations of Plaintiffs and [Extraction] related to the production and sale of" oil and gas).

This case resembles the leading Colorado case concluding that the economic loss rule bars claims for post-contractual fraud. *See Hamon Contractors, Inc.*, 229 P.3d at 290. In that case, the plaintiff "alleged damages equal to the amount sought by change orders" and certain liquidated damages. *Id.* at 293. When assessing the first factor, the court concluded these damages were consequential damages that arose from the parties' contractual relationship. *See id.* at 294. Turning to the second factor, the court acknowledged that there is an independent common law duty to refrain from fraud or misrepresentation, but the court held that this duty only existed in that case "because of the parties' interrelated contracts." *Id.* Critically, like here, the plaintiff had alleged that the fraud occurred in the course of contractual performance. *See id.* Finally, the court concluded "it is clear that the tort duty . . . does not differ in any way from the contract duty." *Id.* The court explained that the defendants "each had a contractual duty to consider change orders and the causes of delays in good faith" and that this was "precisely" what the plaintiff claimed the defendants did not do. *Id.* The same thing is true here: Plaintiffs' allegations entirely depend upon the contractual relationship between Extraction and Plaintiffs under the leases. For example, the fraud claim alleges that Extraction did not provide information that it was required to provide given its status as an "oil and gas operator" under the leases. *See id.* at ¶ 78.

Indeed, this case resembles a recent federal case which held that Colorado's economic loss rule precluded a fraud claim. *See Valentine*, 2019 WL 5790696, at *8. In that case, the plaintiff's "fraud claims allege[d] that [d]efendants concealed or misrepresented the fact that they were misapplying her loan payments." *Id.* The court concluded these claims were not independent tort claims because they were "predicated upon the nonperformance of a promise or contractual obligation," *i.e.*, the defendants' failure to apply loan payments properly under the relevant contracts. *Id.* (citing *H & H Distributors, Inc. v. BBC Int'l, Inc.*, 812 P.2d 659, 662 (Colo. App.

1990)). The court held, therefore, that the economic loss rule worked to bar the fraud claim. *See id.* Here, Plaintiffs' fraud claims depend entirely on the leases; indeed, they seek recovery of payments allegedly due and owing thereunder. *See Second Amended Complaint* at ¶ 83.

These are the exact circumstances the economic loss rule was designed to address. Plaintiffs improperly blur the "distinction between contract and tort law" in contravention of the economic loss rule, "the expectancy interests of the parties," and their allocation of risk. *Hamon Contractors, Inc.*, 229 P.3d at 290 (quoting *BRW, Inc.*, 99 P.3d at 72). Plaintiffs simply seek to recover funds that they expected pursuant to performance under the leases. *Id.* The Court should dismiss Plaintiffs' fraud claims under the economic loss rule.

2. The Economic Loss Rule Bars the Conversion Claims

Recently, courts applying Colorado law have held that the economic loss rule bars conversion claims when those claims overlap with contractual duties. *See Levey v. Wetherall*, No. 119CV02294DDDMEH, 2020 WL 5815895, at *2 (D. Colo. Sept. 29, 2020) ("The economic loss rule bars his claim for conversion because Mr. Levey 'has an enforceable contractual remedy against the person . . . sought to be charged with liability.'") (quoting *Rhino Fund, LLLP v. Hutchins*, 215 P.3d 1186, 1194 (Colo. App. 2008), *as modified on denial of reh'g* (Dec. 24, 2008)).

Plaintiffs have essentially conceded their conversion claims are derivative of the parties' contractual rights and obligations, alleging: "The [l]eases require [Extraction] to pay royalties on all their oil and gas produced by [Extraction]. [Extraction] produced but failed to sell some of Plaintiffs' oil and gas interests. As a result, [Extraction] took their oil and gas without permission or compensation." *Second Amended Complaint* at ¶ 101. As Plaintiffs admit, the allegedly breached duty giving rise to the claim—that Extraction must pay royalties on all produced oil and gas—arises under the relevant contracts. The Court should dismiss Plaintiffs' conversion claims because they are barred by the economic loss rule.

C. Dismissal Should Be with Prejudice

The Court should dismiss Plaintiffs' tort claims with prejudice because amendment is futile, and the amended claims would not survive a motion to dismiss. *See Conley*, 2020 WL 5087889, at *8. The economic loss rule bars Plaintiffs' claims as a matter of law because of the nature of the claims at issue. *See Hamon Contractors, Inc.*, 229 P.3d at 290 (describing the economic loss rule as an issue of law). Repleading cannot change this. Consequently, a fourth operative complaint would be futile and would not survive a motion to dismiss.

II. THE FRAUD CLAIMS WERE NOT PLEADED WITH PARTICULARITY

The Court should dismiss Plaintiffs' fraud claims (Count Three) because Plaintiffs failed to plead fraud with particularity, again. Federal Rule 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 an alleged defrauder might be in sole possession of relevant facts before discovery, "even under 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)). Thus, "[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.*

Plaintiffs' third attempt at an operative complaint fails to satisfy these standards. ***First***, Plaintiffs plead an essential element of their claim in conclusory fashion, bluntly alleging: "Upon information and belief, the Defendants knew their material representations were false or misleading and/or made the representations without any knowledge of their truth or made them with the intent that the Plaintiffs would rely on them." *Second Amended Complaint* at ¶ 82. The conclusory nature of this allegation is underlined by the fact that it references "Defendants" and not Extraction, the only entity against which claims were brought; this allegation was simply copied and pasted from the last complaint without any effort to link the claim to Extraction. Moreover, Plaintiffs did not include any reference to the basis of their alleged information or belief; there is no factual content that has been pleaded to suggest Extraction's alleged knowledge of falsity or the intent that Plaintiffs should rely on the false statements. These deficiencies warrant dismissal. *See PI, Inc. v. Quality Prod., Inc.*, 907 F. Supp. 752, 763 (S.D.N.Y. 1995). In *Quality*, the "fraud claim [was] based only on the defendants' failure to fulfill its contractual obligations and 'upon information and belief' that the defendants falsely represented their intention to fulfill their contractual duties at the time of contracting." *Id.* The court held this was not a sufficient factual allegation and that the plaintiff made only "conclusory allegations." *See id.*

Second, Plaintiffs also failed to plead that they justifiably relied on any Extraction representation. This is an independent pleading deficiency that warrants dismissal because "[a]n essential element of both fraud and negligent misrepresentation is justifiable reliance." *Boyd v. A.O. Smith Harvestore Prod., Inc.*, 776 P.2d 1125, 1129 (Colo. App. 1989) (citing *Morrison v. Goodspeed*, 68 P.2d 458 (Colo. 1937)). Nowhere do Plaintiffs identify—let alone plead with particularity—how or when each specific Plaintiff changed their position as a result of any instance of alleged fraud. *See generally Second Amended Complaint*.

Plaintiffs have failed to satisfy the Federal Rule 9(b) pleading standard in multiple ways and the Court should, therefore, dismiss the fraud claims with prejudice. Plaintiffs are now operating under a third version of their pleading. Indeed, in a prior dispositive motion, Extraction already identified Plaintiffs' failure to plead necessary elements of fraud with particularity. *See Brief in Support of Defendants' Motion to Dismiss* [A.D.I. 17] at 19 (quoting *Shapiro*, 964 F.2d at 284). The Court should dismiss the fraud claims with prejudice because of Plaintiffs' repeated failure to cure their pleading deficiencies. *See Tempay*, 2008 WL 5156307, at *5.

III. THE BREACH OF IMPLIED COVENANT CLAIMS ARE DUPLICATIVE OF THE FIRST SET OF BREACH OF CONTRACT CLAIMS

The Court should dismiss the breach of implied covenant claims (Count Six) because they are duplicative of the first set of Plaintiffs' breach of contract claims. This Court has already held that implied covenant claims[4] should be dismissed when they are "subsumed by the breach of contract claim." *In re Welded Constr., L.P.*, 609 B.R. 101, 130 (Bankr. D. Del. 2019).

Plaintiffs allege Extraction breached the implied covenants for the following reasons:

> [Extraction] breached its duties when it, by way of example, failed to adhere to Leases; failed to sell all oil and gas produced; allowed [d]eductions to be taken from the sale of Plaintiffs' oil and gas; failed to market and sell oil and gas at market prices; failed to enter into Third Party Contracts that are customary and not injurious to the interests of Plaintiffs; failed to accurately determine Plaintiffs' mineral acreage; and failed to provide complete and accurate information in the royalty statements.

[4] To be clear, each of the implied covenants implicated by Plaintiffs' claims are secondary to express contractual terms. *See Anderson v. Merit Energy Co.*, No. 07-CV-01025-LTB-BNB, 2008 WL 2484187, at *1 (D. Colo. June 19, 2008) ("[T]he Colorado Supreme Court [has] held that ***absent an express provision*** in an oil and gas lease addressing the allocation of costs, the implied covenant to market obligates the lessee to incur those costs necessary to render the gas marketable-that is, getting the gas to a marketable condition and location.") (emphasis added) (citation omitted); *Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*, 872 P.2d 1359, 1363 (Colo. App. 1994) ("However, the duty of good faith and fair dealing does not obligate a party to accept a material change in the terms of the contract ***or to assume obligations that vary or contradict the contract's express provisions. Nor does the duty of good faith and fair dealing inject substantive terms into the parties' contract.***"); *accord Rogers v. Westerman Farm Co.*, 29 P.3d 887, 908 (Colo. 2001), *as modified on denial of reh'g* (Aug. 27, 2001) (describing the prudent operator implied covenant as a subset of the general implied covenant of good faith and fair dealing). Consequently, if there is an ***express*** provision of the contract that has been allegedly breached, there exists no ***implied*** covenant to breach.

Second Amended Complaint at ¶ 98. The alleged failure to adhere to the terms of the leases is, on its face, duplicative of the breach of contract claim.

The other allegations are also subsumed within Plaintiffs' first breach of contract claim, which alleges that Extraction "breached the Leases by failing to pay the full royalty amount owed due to failing to sell all Plaintiffs' oil and gas produced, allowing [d]eductions to be taken in the sale of oil and gas to third parties; and selling Plaintiffs' oil and gas interests at below market prices." *Id.* at ¶ 87. In other words, Plaintiffs have affirmatively pleaded that their implied covenant claims and breach of contract claims arise from the same facts, concern the same duties, and depend on the same contracts. Indeed, Plaintiffs seek the exact same remedy for the exact same damages for both the contract and implied covenant claims:

> 88. By paying less than the amount due under the Leases the Defendant has damaged the Plaintiffs in the aggregate amount of the underpayments.

Id. at ¶ 88 (breach of contract).

> 99. By breaching its implied covenants, the Defendants have damaged the Plaintiffs in the aggregate amount of the underpayments.

Id. at ¶ 99 (breach of implied covenants). Thus, Plaintiffs have pleaded claims that legally arise from contracts,[5] relate to the same facts as the alleged contract breaches, and seek the same remedies as the alleged contract breaches; essentially, Plaintiffs pleaded the same claim twice.

[5] Colorado law characterizes breach of an implied covenant as arising "from contractual relation[s]" 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).

The breach of implied covenants claim "is subsumed by the breach of contract claim" and it should be dismissed. *In re Welded Construction, L.P.*, 609 B.R. at 130. Indeed, courts routinely dismiss implied covenant claims for this reason.[6] Furthermore, dismissal should be with prejudice because amendment would be futile. *See Conley*, 2020 WL 5087889, at *8.

IV. THE CONVERSION CLAIMS SHOULD BE DISMISSED BECAUSE THEY ARE NOT COGNIZABLE AS A MATTER OF LAW

The Court must dismiss Plaintiffs' conversion claims (Counts Seven and Eight) because they fail as a matter of Colorado law. Plaintiffs have amended their conversion claims to change the alleged conversion from that of royalty payments to the underlying oil and gas in a continued effort to "tortify" their allegations of royalty underpayment.[7] The core allegation underlying Plaintiffs' conversion claims is that Extraction converted Plaintiffs' oil and gas without permission or compensation. *See Second Amended Complaint* at ¶ 101 ("The [l]eases require [Extraction] to pay royalties on all their oil and gas produced by [Extraction]. [Extraction] produced but failed to sell some of Plaintiffs' oil and gas interests. As a result, [Extraction] took their oil and gas without permission or compensation."); *id.* at ¶ 104 ("By making title errors and failing to enter into a lease for all of the mineral acreage owned by said Plaintiffs [Extraction has taken, produced, and sold their oil and gas without permission or compensation.").

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[6] *See, e.g.*, *Aurora Commercial Corp. v. PMAC Lending Servs., Inc.*, No. 13-CV-00497-LTB, 2014 WL 859253, at *5 (D. Colo. Mar. 5, 2014) (dismissing, under New York law, breach of implied covenant claim as duplicative of a breach of contract claim); *ClinMicro Immunology Ctr., LLC v. PrimeMed, P.C.*, No. CIV.A. 3:11-02213, 2012 WL 3011698, at *9 (M.D. Pa. July 23, 2012) (dismissing, under Pennsylvania law, breach of implied covenant claim "because it is duplicative of Plaintiff's breach of contract claims"); *Murray v. Crawford*, No. CIVA08CV02045-KMTKLM, 2009 WL 1837445, at *6 (D. Colo. June 26, 2009) (applying California law and observing "[w]here breach of an actual term [of a contract] is alleged, a separate implied covenant claim, based on the same breach, is superfluous") (citation omitted); *accord Koloni Reklam, Sanayi, Ticaret LTD/STI v. Viacom, Inc.*, No. CV 16-285-SLR, 2017 WL 726660, at *4 (D. Del. Feb. 23, 2017) (dismissing, under Delaware law, a breach of fiduciary duty claim because it arose under the express terms of a contract).

[7] *Compare Amended Complaint* at ¶ 86–89 (alleging various debtors converted the royalty payments) *and Brief in Support of Defendants' Motion to Dismiss* at 14 (observing that a royalty payment cannot be converted) *with Second Amended Complaint* at ¶ 100–105 (suddenly alleging that Extraction converted oil and gas).

The facts as amended, however, still fail to satisfy the elements required for conversion as a matter of law. Under Colorado law, "[c]onversion is any distinct, unauthorized act of dominion or ownership interest exercised by one person over personal property belonging to another." *Mason v. Farm Credit of S. Colorado, ACA*, 419 P.3d 975, 983 (Colo. 2018).

First, the facts pleaded do not constitute conversion as a matter of law because—as Plaintiffs admit—Extraction has the authority to exercise dominion over the oil and gas in question. Plaintiffs executed oil and gas leases with Extraction. *See Second Amended Complaint* at ¶ 21. "Oil and gas lessees are granted the right and have a duty to explore for, ***and remove***, minerals from the lessor's land." *Maralex Res., Inc., v. Chamberlain*, 320 P.3d 399, 402 (Colo. App. 2014) (emphasis added) (citing *Garman v. Conoco, Inc.*, 886 P.2d 652, 659 (Colo. 1994)). Indeed, Extraction, as lessee, "can—and is indeed expected to—plunder minerals from the lessor's property." *Id.* Thus, Extraction could not have converted the oil and gas because Extraction is authorized to exercise the dominion alleged over the oil and gas pursuant to its leases.

Second, Plaintiffs misconstrue the interest they retained under the leases. Under an oil and gas lease, "[t]he lessor [*i.e.*, Plaintiffs] ***relinquishes its right to the mineral estate*** in exchange for a smaller non-risk and non-cost bearing royalty interest in any minerals discovered." *Garman*, 886 P.2d at 656 (emphasis added) (citing *Wood v. TXO Production Co.*, 854 P.2d 880, 882–83 (Okla. 1992)). Having entered into oil and gas leases with Extraction, Plaintiffs no longer have a possessory interest in the oil and gas upon which to found a conversion claim. *See, e.g.*, *Nature of Gas and Oil "Royalty Interests," Generally*, 38 Am. Jur. 2d Gas and Oil § 181 (observing that "a lessor's royalty interest in an oil and gas lease, as distinguished from a mineral interest, is a nonpossessory interest") (collecting cases).

Third, the nature of the interests that Plaintiffs actually possess belies Plaintiffs' conversion claims. "In Colorado, an oil and gas royalty constitutes an interest ***in real property***." *Fort Lupton State Bank v. Murata*, 626 P.2d 757, 759 (Colo. App. 1981) (emphasis added) (citing *Globe Drilling Co. v. Cramer*, 562 P.2d 762 (Colo. App. 1977)).[8] As mentioned, however, conversion requires unauthorized control over ***personal property***. *See Mason*, 419 P.3d at 983.

Fourth, if failure to pay a royalty under an oil and gas lease worked as Plaintiffs suggest, every breach of an oil and gas lease would give rise to a conversion claim; this is not how Colorado law treats claims for deficient royalty payments. *See, e.g., Atl. Richfield Co. v. Farm Credit Bank of Wichita*, , 1145 (10th Cir. 2000) (considering allegations of a royalty underpayment as a contract under Colorado law). Furthermore, Plaintiffs' allegation that Extraction breached the leases via underpayments does not change the nature of the respective interests that Extraction and the Plaintiffs possess; the leases remain valid and are not terminated. At worst, Plaintiffs' have made out a claim for breach of contract—which, as discussed above, covers this same alleged conduct. The Court should dismiss the conversion claims with prejudice.

V. THE CONSTRUCTIVE TRUST CLAIMS ARE NOT CAUSES OF ACTION

The Court should dismiss Plaintiffs' constructive trust claims (Count Nine). Recently, 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)). Colorado courts also hold that

[8] *Accord Anderson Living Tr. v. WPX Energy Prod., LLC*, 904 F.3d 1135, 1137 (10th Cir. 2018) (applying Colorado law and observing that a "royalty interest in a gas lease is a real-property interest that vests when the developer extracts the gas").

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) (emphasis added) (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*, 160 P.3d at 276). These "claims" are not causes of action and should be dismissed.

VI. THE UNJUST ENRICHMENT CLAIMS ARE BARRED BECAUSE AN EXPRESS CONTRACT GOVERNS THEIR SUBJECT MATTER

The Court should dismiss Plaintiffs' unjust enrichment claims (Count Ten) because Plaintiffs concede an express, valid contract governs the claims' subject matter. *See Levey*, 2020 WL 5815895, at *2 (holding an "unjust enrichment claim fail[ed] because [a plaintiff] relie[d] on the same facts to establish his unjust enrichment claim as he [did] to allege his breach of contract").

Under Colorado law, "[u]njust 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 pleaded that an express contract governs the subject matter of the unjust enrichment claims, requiring their dismissal. Plaintiffs' unjust enrichment claim is founded on the allegation that Extraction withheld or miscalculated royalties owed to Plaintiffs and they "are entitled to recover the value of the benefit conferred as damages" from Extraction. *Second*

Amended Complaint at ¶ 113–114. Plaintiffs plainly admit an express contract governs the payment and calculation of royalties:

> Plaintiffs are compensated on the production and sale of their oil and gas rights by the payment of royalties by [Extraction] after it sells the oil and gas. Royalties are a portion of the proceeds derived from the sale of the oil and gas ***and are calculated and paid pursuant to the terms of the Leases and Colorado law***.

Id. at ¶ 23 (emphasis added).[9]

Courts routinely hold this forecloses the possibility of relief under an unjust enrichment claim. For example, the Colorado Supreme Court recently considered an unjust enrichment claim against a real estate developer based on the developer's alleged failure to pay maintenance costs. *See Pulte Home Corp., Inc. v. Countryside Cmty. Ass'n, Inc.*, 382 P.3d 821, 825 (Colo. 2016). The Colorado Supreme Court observed that the relevant contracts "directly addressed liability" for the damages sought under the unjust enrichment claim. *Id.* at 833. The Colorado Supreme Court concluded the contracts "expressly address liability for the charges at issue and therefore bar the . . . unjust enrichment claim unless one of the two exceptions applies. Neither does: the [contract] has not been rescinded and no party claims it is defective . . . and the alleged past-due assessments are squarely encompassed in the provisions . . . ." *Id.* (citations omitted).

Here, as Plaintiffs admit, the leases directly address the calculation and disbursement of the royalty payments. Consequently, Colorado law requires the dismissal of the unjust enrichment claims.[10] Dismissal should be with prejudice because, unless Plaintiffs drop their breach of

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[9] *Accord Second Amended Complaint* at ¶ 86 ("Plaintiff's [sic] [l]eases identify the royalty amount owed to Plaintiffs and do not expressly allow their oil and gas interests to be produced and not sold, allow the [d]eductions taken in [Extraction's] sale of oil and gas to third parties; or allow their oil and gas interests to be sold at below market prices.").

[10] *See, e.g.*, *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

contract claim, amendment would be futile. Plaintiffs also failed to cure this deficiency despite Extraction raising it in the prior dispositive motion. *Brief in Support of Defendants' Motion to Dismiss* at 17.

VII. THE ACCOUNTING CLAIMS ARE BARRED BECAUSE PLAINTIFFS DID NOT PLEAD DEMAND AND A LEGAL REMEDY EXISTS

The Court should dismiss Plaintiffs' accounting claims (Count Eleven). Plaintiffs failed to plead that they made the requisite demand for an accounting and were refused. Additionally, an adequate remedy at law exists, which precludes an equitable accounting claim.

First, "[u]nder 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)); *accord 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.") (emphasis added). Plaintiffs did not allege that they demanded an accounting or that Extraction refused to comply with such a demand. *See generally Second Amended Complaint*.

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)); *Valley Fresh Produce, Inc. v. W. Skyways, Inc.*, No. 17-CV-01450-PAB-KLM, 2019 WL 4695668, at *9 (D. Colo. Sept. 25, 2019) (dismissing unjust enrichment claims because an express contract governed).

Second, the Colorado Supreme Court has held that an 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.").

Plaintiffs admit an adequate legal remedy exists, foreclosing their accounting claim. Plaintiffs allege they should recover "more than $2,000,000.00, not including any interest or penalties." *Second Amended Complaint* at ¶ 60. Monetary damages are well-recognized as an adequate legal remedy. *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.").

The extraordinary equitable relief of an accounting is unwarranted and the Court should dismiss the accounting claims with prejudice. Plaintiffs failed to adequately plead demand despite Extraction previously pointing out this deficiency in a prior motion to dismiss. *See Brief in Support of Defendants' Motion to Dismiss* at 19. Furthermore, amendment would be futile because Plaintiffs cannot, by amendment, change the unavailability of their equitable claims.

VIII. INJUNCTIVE RELIEF IS BARRED BECAUSE AN ADEQUATE LEGAL REMEDY EXISTS

The Court must dismiss Plaintiffs' injunction claims (Counts Twelve, Thirteen, Fourteen, and Fifteen) because an adequate remedy at law exists. Plaintiffs are not entitled to injunctive relief because monetary damages are available to address any harm they would sustain in the absence of an injunction. 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)); *accord 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). In other words, "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)).

Plaintiffs affirmatively pleaded that money damages are sufficient to satisfy their claims. *See Second Amended Complaint* at ¶ 60. Indeed, the injunction claims, themselves, demonstrate that monetary damages are sufficient to remedy any alleged harm to Plaintiffs. For example, in the first request for a preliminary injunction, Plaintiffs claim they "will suffer irreparable harm if [Extraction] is not enjoined . . . from using royalty payments that belong to Plaintiffs." *Id.* at ¶ 122. Plaintiffs' concern is the loss of "money that belongs to Plaintiffs" via commingling. *Id.* The loss of money is, obviously, compensable by money. *See Kos Pharm., Inc. v. Andrx Corp.*,

369 F.3d 700, 727 (3d Cir. 2004) (holding that time and monetary expense did not rise to the level of irreparable harm because "[s]uch costs . . . are compensable by money damages and thus do not constitute irreparable harm as a matter of law"). Similarly, in the second request for a preliminary injunction, Plaintiffs "request a preliminary injunction enjoining [Extraction] from deducting taxes from their royalty payments." *Id.* at ¶ 128. Plaintiffs' concern is, again, that "money that belongs to Plaintiffs" might become commingled with Extraction's assets. *Id.* at ¶ 129. This alleged loss of money is, again, compensable by monetary damages. Next, Plaintiffs' first request for a permanent injunction seeks an order enjoining Extraction from the following:

> [A]llowing Plaintiffs' oil and gas to be taken, produced and not sold, allowing [d]eductions from the sale of Plaintiffs' oil and gas, failing to sell Plaintiffs' oil and gas at below market prices, maintaining title errors, and otherwise failing to pay Plaintiffs as required under their [l]ease and the law; and for [certain plaintiffs] from deducting taxes from their royalty payments.

Id. at ¶ 135. Likewise, the second request for a permanent injunction asks the Court to enjoin Extraction "from deducting taxes from [Plaintiffs'] royalty payments." *Id.* at ¶ 137. Again, this involves alleged failures to make certain payments that can be remedied via money damages.

By Plaintiffs' own admission, an adequate remedy at law exists and, consequently, the Court should dismiss Plaintiffs' claims for injunctive relief. This dismissal should be with prejudice; Plaintiffs cannot, by amendment, change the conclusion concerning the unavailability of these equitable claims as a matter of law.

IX. NEW PARTIES AND CLAIMS WERE IMPROPERLY ADDED WITHOUT EXTRACTION'S WRITTEN CONSENT OR LEAVE OF COURT

The Court should dismiss every party and claim Plaintiffs improperly added to the *Second Amended Complaint*. Specifically: (1) Tom Leazer was added as an additional plaintiff; (2) Count Five—alleging breach of contract as to certain plaintiffs—asserts a new cause of action with a new factual basis; (3) Count Eight—alleging conversion as to certain plaintiffs—asserts a new cause

of action with a new factual basis; (4) Count Thirteen—requesting a preliminary injunction as to certain plaintiffs—asserts a new cause of action with a new factual basis; and (5) Count Fifteen—requesting a permanent injunction as to certain plaintiffs—asserts a new cause of action with a new factual basis. In contravention of the Federal Rules, Plaintiffs had neither Extraction's written permission nor the Court's leave to add these additional claims and parties to the *Second Amended Complaint*. Plaintiffs filed the *Second Amended Complaint* in response to *Defendants' Motion to Dismiss* and, ostensibly, to address the issues raised therein. Plaintiffs, however, go well beyond the scope of addressing the issues raised by adding a brand new plaintiff and brand new claims not previously raised or based upon the facts previously pleaded.

Federal Rule 15 governs the amendment of pleadings. That Rule gives parties the ability to amend their pleadings once as a matter of course under certain circumstances. Fed. R. Civ. P. 15(a)(1). Plaintiffs spent this opportunity on the *Amended Complaint*. Thus, Plaintiffs were only at liberty to amend again if they had "the opposing party's written consent or the [C]ourt's leave." Fed. R. Civ. P. 15(a)(2). Plaintiffs did not have—nor did they seek—Extraction's written consent or the Court's leave to add the plaintiff or causes of action above. Resultantly, the Court should dismiss the additional plaintiff and causes of action.

CONCLUSION

Plaintiffs' *Second Amended Complaint* contains numerous pleading deficiencies, several of which existed in prior versions of Plaintiffs' complaint and were raised in the prior motion to dismiss. Additionally, some of Plaintiffs' causes of action are barred as a matter of law and, therefore, cannot be saved through further amendment. The Court should grant Extraction's motion and dismiss Plaintiffs' deficient claims with prejudice.

Dated: February 2, 2021
Wilmington, Delaware

/s/ Stephen B. Gerald

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