Docket #0028 Date Filed: 2/16/2021

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
EXTRACTION OIL & GAS, INC., *et al*.,[1]	Case No. 20-11548 CSS
Reorganized Debtors.	(Jointly Administered)
ANNETTE LEAZER, TOM 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, Plaintiffs, v. EXTRACTION OIL & GAS, INC. Defendant.	Adv. Pro No. 20-50963 (CSS) **Re: D.I. 25**

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

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

Plaintiffs Annette and Tom Leazer, Gordon D. and Joy Dean Niswender, the 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) (collectively, the "*Plaintiffs*") through undersigned counsel, file this Brief in Opposition to Defendant's [Partial] Motion to Dismiss Plaintiffs' Second Amended Complaint [A.D.I. 25][2] and Brief in support thereof [A.D.I. 26] (the "*Partial Motion to Dismiss*").

Dated: February 16, 2021

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[2] Herein, references to "A.D.I." refer to a docket number in Adversary Proceeding No. 20-50963; references to "D.I." refer to a docket number in the main bankruptcy case, 20-11548.

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INTRODUCTION

After timely filing their proofs of claims, Plaintiffs initiated this adversary action to recoup their property, being royalties derived from their oil and gas rights that Defendant/Debtor Extraction Oil & Gas, Inc. ("*Extraction*") produced without complete and accurate payment therefor.

After Extraction filed its petition for bankruptcy on June 14, 2020, Extraction immediately filed its "First Day Motions," one of which recognized Extraction's need to continue paying royalties to royalty owners, such as Plaintiffs, because the royalties were not property of Extraction's bankruptcy estate. *See*, *Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing Payment of (A) Mineral Payments, (B) Working Interest Disbursements, and (C) Joint Interest Bills and (II) Granting Related Relief* [D.I. 12] (the "*Royalty Motion*"). The Court granted Extraction's motion [D.I. 241], and Extraction continued to pay Plaintiffs. However, during the pendency of bankruptcy and for months or years prior thereto, Extraction severely underpaid royalties to Plaintiffs in violation of various oil and gas leases and the laws of Colorado. Plaintiffs' claims were preserved in Extraction's Plan of Reorganization.

In their initial complaint [A.D.I. 1] (the "*Complaint*") filed on October 26, 2020, Plaintiffs brought eleven claims for relief against Extraction related to the royalty underpayments and nonpayments: (1) declaratory relief with respect to the validity, scope, and extent of the leases and underpayments owed to the Plaintiffs, (2) declaratory relief to declare that the payments owed are not property of the estate, (3) fraud and misrepresentation, (4) breach of contract, (5) breach of implied covenants , (6) conversion, (7) constructive and resulting trust, (8) unjust enrichment, (9) accounting, (10) preliminary injunction, and (11) permanent injunction.

Plaintiffs amended the complaint [A.D.I. 4] (the "*Amended Complaint*") three days later upon direction from the Court to make a correction to the caption.

On December 18, 2020, Extraction filed a motion to dismiss [A.D.I. 16] (the "*First Motion*").

On January 19, 2021, following a stipulation[3] among the parties to extend the deadline to respond to Extraction's First Motion, Plaintiffs filed their Second Amended Complaint [A.D.I. 24] ("*Sec. Am. Compl.*"). The Sec. Am. Compl. was filed as a matter of course in response to Extraction's First Motion to cure *perceived* deficiencies in the initial pleading, make a technical correction by including Tom Leazer, husband of Plaintiff Annette Leazer, as a plaintiff, and make clarifications as to which claims applied to all Plaintiffs and which apply to specific Plaintiffs. The claim clarifications "added" four claims, duplicating the existing breach of contract, conversion, preliminary injunction, and permanent injunction claims for the purpose of showing specifically how each claim applies to certain Plaintiffs in additional ways.

On February 2, 2021, Extraction filed its Partial Motion to Dismiss, seeking to dismiss with prejudice Plaintiffs' fraud, breach of implied covenants, conversion, trust, unjust enrichment, accounting, and injunction claims, and to dismiss Tom Leazer and the "new" breach of contract, conversion, and injunction claims. Extraction does not challenge Plaintiffs' declaratory relief and breach of contract claims (Claims One, Two, and Four), which will proceed to resolution irrespective of the Court's ruling on Extraction's Partial Motion to Dismiss.

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[3] The Stipulation extended the deadline to January 18, 2021, which fell on Martin Luther King, Jr. Day, a court holiday.

STATEMENT OF RELEVANT FACTS

Plaintiffs are twenty-one individual persons or entities with rights and interest in oil and gas that, in most cases, are subject to oil and gas leases ("*Leases*"). Sec. Am. Compl. at ¶¶ 8-19, 21. They are royalty owners and/or overriding royalty owners (Sec. Am. Compl. at ¶¶ 21, 23), meaning they are entitled to payment of royalties, which are a portion of the proceeds derived from the production of their oil and gas rights. Sec. Am. Compl. at ¶¶ 21, 23. The royalty amount and method of calculating said amount due to Plaintiffs are determined by the terms of the Leases and/or the law of Colorado.[4]

Extraction owns the Leases and/or operates wells that produce the oil and gas owned by Plaintiffs. Sec. Am. Compl. at ¶¶ 20-23. As such, Extraction is a "Payor" under Colorado statute (C.R.S. § 34-60-118.5) and is required to pay royalties to Plaintiffs on the production of their oil and gas rights pursuant to the Leases and the law. Extraction understands its obligations under the Leases and Colorado law. Per Extraction, its entities "operate or have working interests in approximately 1,500 oil and gas wells. In connection with these interests, the Debtors are obligated, pursuant to their oil and gas leases and certain other agreements, to remit to the lessors of the oil and gas leases and holders of certain other interests, claims, or rights to payment […] the amounts to which such parties may be entitled under the oil and gas lease or other operative documents (the "*Royalties*")." Royalty Motion at ¶ 8.

Extraction knows royalties are paid pursuant to the express terms of the Leases and applicable law, and that failure to properly pay royalties exposes Extraction to contract, conversion,

[4] The leases at issue are expressly identified in the Second Amended Complaint. Sec. Am. Compl. at ¶¶ 8-19. To the extent there are additional leases at issue, they are in Extraction's possession and specifically known to Extraction. Sec. Am. Compl. at ¶ 22. In some instances, a lease does not or may not exist, in which case Colorado law governs payment due to Plaintiffs.

and other liability for damages to royalty owners. Per Extraction, "the Royalties […] are governed by the terms of oil and gas leases […], and, commonly, state statutory frameworks […]. Failure to pay the Royalties […] when due could expose the Debtors to enforcement actions and actions by the owners of the Royalties […] for breach of contract, conversion, or other claims for damages for breach of the relevant oil and gas lease or other document creating such payment." Royalty Motion at ¶ 10. Further, "the amount of Royalties owed to holders of Mineral and Other Interests in a given month is subject to variation due to many factors, including the specific terms of the Mineral and Other Interests[.]" Royalty Motion at ¶ 11.

Extraction knows it does not own the royalties paid to Plaintiffs, meaning Extraction also knows it does not own the money derived from Plaintiffs' oil and gas that it has failed to pay Plaintiffs. Per Extraction, Extraction and its entities "arguably have only legal title, not an equitable interest, in the proceeds of the oil and gas sales attributable to the Mineral and Other Interests," and "courts in this district have interpreted section 541(d) to 'expressly' provide that 'property in which a debtor holds only bare legal title is not property of the estate.'" Royalty Motion at ¶¶ 18-19.

Plaintiffs brought claims related to Extraction's failure to properly pay royalties owed under the Leases and according to Colorado law and tortious behavior related thereto. *See, e.g.,* Sec. Am. Compl. at ¶ 24. Plaintiffs and Extraction agree that Extraction has paid a portion of the royalties due to Plaintiffs. However, for each dollar owed to Plaintiffs from the production and sale of their oil and gas rights, Extraction has failed to pay Plaintiffs the full dollar. It is the unpaid portion of each dollar owed that Plaintiffs seek to recoup through this lawsuit and stand to lose should their claims be dismissed.

Despite exiting Bankruptcy on January 20, 2021, Extraction continues to preserve the unpaid royalties for Plaintiffs pending resolution of this case. *Sixth Amended Joint Plan of Reorganization of Extraction Oil & Gas, Inc. and Its Debtor Affiliates pursuant to chapter 11 of the Bankruptcy Code* [D.I. 1505] (the "*Plan*") at 38. ("As to certain disputed Royalty and Working Interests, until a court, arbiter, or other tribunal determines that the holder of a Royalty and Working Interest is entitled to payment, such Royalty and Working Interest shall be treated as a Disputed Claim, and the Debtors shall reserve the amount in dispute in the Disputed Claim Reserve. To the extent a court, arbiter, or other tribunal determines that the holder of the Royalty and Working Interest is entitled to recovery, such amount shall not be deemed property of the Estates.").

LEGAL STANDARD

"A motion filed under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint's factual allegations." *Telecomm Innovations, LLC v. Ricoh Co.*, 966 F. Supp. 2d 390, 392 (D. Del. 2013) (citations omitted). "A complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Id.* (quotations omitted). "[A] court must accept all well-pleaded factual allegations in the complaint as true, and view them in the light most favorable to the plaintiff. In this regard, a court may consider the pleadings, public record, orders, exhibits attached to the complaint, and documents incorporated into the complaint by reference." *Id.* at 393 (citations omitted). The court's determination is not whether the non-moving party will ultimately prevail but whether that party is entitled to offer evidence to support the claims." *Id.* (quotations omitted). "This […] simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." *Id.* (quotations omitted).

ARGUMENT

Plaintiffs asserted fifteen claims for relief, each of which Plaintiffs supported with factual allegations sufficient to show they are entitled to such relief. The perceived deficiencies Extraction raises regarding various claims fail to support its requests for dismissal for the reasons below.

I. THE ECONOMIC LOSS RULE DOES NOT BAR PLAINTIFFS' FRAUD (CLAIM 3) OR CONVERSION (CLAIM 7) CLAIMS

Extraction misstates Colorado law, which does not apply the economic loss rule to intentional torts such as fraud and conversion. The Colorado Supreme Court recently held that the economic loss rule does not bar a claimant from bringing a civil theft (tort) claim when the theft also constitutes a breach of contract. *See Bermel v. Blueradios, Inc*., 440 P.3d 1150 (Colo. 2019). Indeed, the *Bermel* court made clear the economic loss rule is disfavored and has only been applied to limited situations involving negligence – never fraud or conversion. *Id*. at 1154 ("[S]ince adopting the economic loss rule, we have applied it only to bar common law tort claims of negligence or negligent misrepresentation."). Relying on *Bermel*, the Colorado Court of Appeals went a step further in *McWhinney Centerra Lifestyle Ctr. LLC v. Poag & McEwen Lifestyle Centers-Centerra LLC*, 2021 COA 2, where the court reversed a district court's order dismissing the plaintiffs' tort claims of fraudulent concealment, intentional interference with contractual obligations, and intentional inducement of breach of contract, holding "the economic loss rule generally does not bar these types of common law intentional tort claims." *Id.* at ¶ 1. The *McWhinney* court explained that "the economic loss rule generally should not be available to shield intentional tortfeasors from liability for misconduct that happens also to breach a contractual obligation." *McWhinney*, 2021 COA at ¶ 74. Despite this binding precedent, Extraction urged the Court to follow non-binding decisions out of Colorado's federal district court. (Partial Motion to Dismiss at 4, n. 1).

However, even if Colorado law were as Extraction wished, the economic loss rule would not bar Plaintiffs' fraud and conversion claims. Extraction asks the Court to "conduct the ordinary economic loss rule analysis and refuse to apply the rule when the intentional tort arises independently of any contractual duty." (Partial Motion to Dismiss at 4, n. 1). But Extraction fails to recognize that Plaintiffs' fraud and conversion claims arise, or may arise, independent of any contractual duty.

A. Plaintiffs' Fraud Claim Cannot Be Precluded by the Economic Loss Rule.

Plaintiffs' fraud claim arises under a statute, not the leases. The Sec. Am. Compl. expressly references Extraction's statutory duties and obligations under Colo. Rev. Stat. § 34-60-118.5, Colorado's statute that outlines the obligations of oil and gas operators related to "payment from proceeds derived from the sale of oil, gas, or associated productions from a well in Colorado," including the timing of payment and information required to be reported to royalty owners. Sec. Am. Compl. ¶ 78. Plaintiffs claim that Extraction engaged in fraudulent conduct by knowingly omitting and/or misrepresenting such statutorily required information. Sec. Am. Compl. ¶¶ 78-84. None of the leases place reporting obligations on Extraction, placing the fraud claim well outside the realm of the contracts at issue. As the Colorado Supreme Court held in *Bermel*, "it would be particularly inappropriate to apply the economic loss rule to bar statutorily imposed liability for intentionally wrongful conduct." *Bermel*, 440 P.3d at 1153-54.

B. Plaintiffs Are Allowed to Plead Torts in the Alternative, Should a Contract Fail.

The mere existence of breach of contract claims does not preclude Plaintiffs from pleading tort claims in the alternative. "[A] party may plead alternative remedies and should be allowed to recover the most favorable relief to which he is entitled by law." *Beals v. Tri-B Associates*, 644 P.2d 78, 80, (Colo. App. 1982); *see also Super Valu Stores, Inc. v. District Court*, 906 P.2d 72, 80

(Colo. 1995) ("A party can and is encouraged to plead alternative theories.") (citing C.R.C.P. 8(e)(2)).

Furthermore, there are realistic scenarios where a contract does not govern Extraction's payment obligations with respect to Plaintiffs' conversion claim. Should a Plaintiff's lease fail to remain valid due to, e.g., Extraction's failure to sufficiently produce oil and gas[5] or a breach of implied covenants[6], then Extraction's production and taking of the Plaintiff's oil and gas without right or permission would constitute conversion, i.e., the unauthorized act of dominion or ownership exercised by Extraction over personal property belonging to the Plaintiff. *See Glenn Arms Associates v. Century Mortg. & Inv. Corp.*, 680 P.2d 1315, 1317 (Colo. App. 1984). Such a scenario is sufficiently pled in the Sec. Am. Compl., where Plaintiffs allege that Extraction's non-payment violates both the leases (breach of contract) and Colorado law (among other things, conversion). *See, e.g.,* ¶¶ 23, 27-32. Indeed, Plaintiffs expressly contemplated the invalidity of some leases. Sec. Am. Compl. ¶ 64 ("[…] Uncertainty and insecurity currently exist with respect to the rights, status, and other legal relations between the parties concerning the validity, scope and extent of Plaintiffs' Leases […]."). In fact, Plaintiffs expressly pled an instance where Extraction produced their oil and gas without a lease, for which conversion is the appropriate claim. Sec. Am. Compl. ¶ 52 ("Based on the records available to Plaintiffs J and Valerie Moody, Alaskan Oil and Resources LLC, and J A Investments, the Defendant has produced from but failed to lease

[5] Lease validity is a common dispute in Colorado and other oil and gas producing states among landowners and operators, where the term of the lease "generally requires production of oil or gas in paying quantities in order to extend the lessee's interest[.]" *Garman v. Conoco, Inc.*, 886 P.2d 652, 659 (Colo. 1994). Indeed, it would be surprising if all Plaintiffs' leases remain valid, considering some were signed in the 1970s and 80s.

[6] A breach of implied covenants may result in cancellation of a lease. *See, e.g., Gillette v. Pepper Tank Co.*, 694 P.2d 369, 373-74 (Colo. App. 1984).

additional oil and gas rights they own, resulting [in] taking and producing their oil and gas by the Mickey Wells without permission or compensation."); *see also* Section IV., *infra.*

II. PLAINTIFFS SUFFICIENTLY PLED THEIR FRAUD CLAIM

The Sec. Am. Compl. contains factual allegations that show, rather than speculate, that each element of fraud and/or fraudulent concealment[7] occurred. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level […] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)[.]") (citations omitted).

"Common law fraud has the following elements: one made a false representation of a material fact; the party knew such a representation was false; the party who the representation was made to did not know of its falsity, and; the representation was made with an intent that it be acted upon, and results in damages." *Shaw v. 17 W. Mill St., LLC*, 307 P.3d 1046, 1050 (Colo. 2013) (citation omitted). "Similarly, the elements of fraudulent concealment are: (1) the concealment of a material existing fact that in equity and good conscience should be disclosed; (2) knowledge on the part of the party against whom the claim is asserted that such a fact is being concealed; (3) ignorance of that fact on the part of the one from whom the fact is concealed; (4) the intention that the concealment be acted upon; and (5) action on the concealment resulting in damages." *Ballow v. Phico Ins. Co*., 875 P.2d 1354, 1361 (Colo. 1993) (citation omitted).

Plaintiffs pled the following factual allegations in support of their fraud and fraudulent concealment claims (numbers refer to paragraph numbers in the Sec. Am. Compl.):

[7] It is immaterial that "fraudulent concealment" is not found in the header of any of Plaintiffs' claims. *Dotson v. Bernstein*, 207 P.3d 911, 912 (Colo. App. 2009) ("A complaint may not be dismissed for failure to state a claim so long as the pleader is entitled to some relief upon any theory of law.").

24. The Defendant has underpaid royalties to Plaintiffs on their oil and gas interests for years, but the specific amount of time is unknown due to the Defendant intentionally withholding information related thereto from the Plaintiffs.

25. The Defendant submits royalty payments to the Plaintiffs each month with information related to the production and sale of Plaintiffs' oil and gas rights. The Defendant fails to include sufficient information for Plaintiffs to know whether the Defendant is underpaying the royalties to them and the exact amounts associated therewith.

27. The Defendant has produced Plaintiffs' oil and gas interests but failed to sell all of the oil and gas produced.

28. The Defendant and/or third parties who contract with the Defendant allowed Plaintiffs' gas to be used or lost in the production and transportation thereof, resulting in nonpayment on some of Plaintiffs' oil and gas interests produced by the Defendant.

29. The Defendant entered into contracts with related and/or unrelated third parties for the sale of Plaintiffs' oil and gas ("Third Party Contracts") and allowed said third parties to retain a portion of the oil and gas without paying for it.

30. As a result, the Defendant receives payment on lower volumes than produced and/or lowered prices to account for unsold but produced volumes.

31. The Defendant does not report to Plaintiffs the portion of Plaintiffs' oil and gas rights that it failed to sell.

32. The Defendant does not pay Plaintiffs on the produced b[ut] unsold oil and gas, in violation of the Leases and Colorado law.

33. The Defendant entered into Third Party Contracts to gather, load, treat, transport, and buy Plaintiffs' oil and gas.

34. Pursuant to the Third Party Contracts, various Deductions related directly and indirectly to the services provided are taken from the price paid for oil and gas.

35. For example, the Defendant pays loading, gathering, and transportation fees/tariffs for the oil it produces and sells. Such fees and tariffs are taken into account by the price the Defendant receives for the oil it sells. The Defendant pays the Plaintiffs based on the artificially lowered price it receives. None of the Leases expressly allow such Deductions.

36. The Defendant also pays facility expansion and other infrastructure fees associated with the gas system owned by its gas purchaser(s) under the Third Party Contracts. Such fees are taken into account by the price the Defendant receives on the gas it sells. The Defendant pays Plaintiffs based on the artificially lowered price it receives, in contradiction to the Leases and the law. None of the Leases expressly allow such deductions.

37. The Defendant does not report the various Deductions applied to its sale of Plaintiffs' oil and gas rights to Plaintiffs.

[…]

78. Colorado law requires oil and gas operators, such as the Defendant, to provide certain information related to royalty calculations and payments with each monthly royalty payment. Colo. Rev. Stat. § 34-60-118.5. The required information includes the true price received for each barrel of oil and mcf of gas sold, the payee's share of the sale before any deductions or adjustments made by the payer or identified with the payment, and the payee's share of the sale after any deductions or adjustments made by the payer or identified with the payment.

79. The Defendant receives statements from the third parties it has Third Party Contracts with for services related to the sale of oil and gas. The contracts themselves and the statements the Defendant receives identify the amount of oil and gas that goes unsold, the Deductions applied, and the price the purchaser is paying for the oil and gas that is sold after accounting for the foregoing.

80. The Defendant knowingly made uniform misrepresentations and/or omissions on the Plaintiffs' monthly royalty statements when it failed to identify the amounts of Plaintiffs' oil and gas that were produced and unsold, the Deductions applied, and the true price of the oil and gas before adjustment.

81. The Defendant is responsible for the underpayments and inaccurate accounting for the royalties.

82. The Defendant made material representations that were false and/or omitted one or more material facts needed to make what was stated not misleading when they submitted royalty statements to the Plaintiffs. Upon information and belief, the Defendants knew their material representations were false or misleading and/or made the representations recklessly without any knowledge of their truth or made them with the intent that the Plaintiffs would rely on them.

83. Plaintiffs did rely on and/or are legally presumed to have relied upon these uniform written representations as being truthful and accurate, when they were not, and Plaintiffs suffered injury and were underpaid as a result. Plaintiffs have been underpaid for an unknown period of time due to the Defendant's material omissions in the royalty statements, taking away Plaintiffs' opportunity to benefit from such proceeds.

84. The Defendant had a duty to properly account to the Plaintiffs by providing the information in the royalty statements on a monthly basis to the Plaintiffs. The Defendant had a duty to make a full and fair disclosure of all relevant facts given the Defendant superior knowledge and access to information as compared to that of the Plaintiffs.

[…]

> 117. The Defendant is required to accurately, properly and timely report, account for and distribute Plaintiffs' royalties and the information used to calculate these royalties to Plaintiffs. The Defendant has exclusive control over and access to the information related to Plaintiffs' royalty payments.

These allegations show: (1) knowledge – Extraction received accounting information from the third party purchasers of the oil and gas owned by Plaintiffs that Extraction produced and sold and such information showed unsold product and deductions taken from Plaintiffs' property; (2) false representation and/or fraudulent concealment – Extraction paid royalties to Plaintiffs without stating some of their property was taken but not sold and the payments had deductions taken to artificially lower the price; (3) lack of knowledge or ignorance – Plaintiffs did not know the royalties paid by Extraction were artificially reduced due to unsold oil and gas and deductions taken by third parties; (4) intent – Extraction desired for Plaintiffs to accept the underpayments without objection; and (5) damages – Plaintiffs did receive and accept less than the full amount of their property for an unknown period of time, resulting in the damages claimed in this case, compounding the damages by removing Plaintiffs' opportunity to benefit from their property, and removing the ability of Plaintiffs to mitigate their damages.

III. PLAINTIFFS ARE NOT PRELCUDED FROM PLEADING CLAIMS FOR BREACH OF IMPLIED COVENANTS (CLAIM 6) WITH BREACH OF CONTRACT

Extraction errs in arguing that Plaintiffs' breach of implied covenant claims are duplicative of or subsumed by their breach of contract claims. To the contrary, the two types of claims are typically brought simultaneously in cases involving oil and gas leases. *See, e.g., Davis v. Cramer*, 837 P.2d 218, 221 (Colo. App. 1992) ("plaintiffs filed their amended complaint alleging, among other things, breach of express covenants of the lease and breach of the implied covenants of prudent operation and of further exploration and development.").

Plaintiffs' breach of contract claims necessarily pertain to breaches of the express language contained in their leases related to the royalty payments owed and methodology for calculating the royalties. Every lease is incorporated by referenced in the Sec. Am. Compl. and speaks for itself. Every lease states the royalty amount to be paid. The Sec. Am. Compl. 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 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." ¶ 87.

Plaintiffs' breach of implied covenants claims are pled in addition to the breach of contract claims and in the alternative. *See, e.g., Beals*, 644 P.2d at 80; *see also Super Valu Stores, Inc.*, 906 P.2d at 80. They pertain to breaches of Extraction's unstated obligations implied in every oil and gas lease in Colorado, including its duties to act as a prudent operator, market, and of good faith and fair dealing. Sec. Am. Compl. ¶¶ 95-97; *Davis*, 837 P.2d at 222 ("Implied within each oil and gas lease are four covenants. These are the covenants to drill or explore, to develop after discovery in paying quantities, to protect against drainage, and the covenant of diligent and prudent operation. Contained within the covenant to operate prudently is the duty to market the product. The implied duty to market the product is an obligation imposed upon a lessee which requires him to make diligent efforts to market the product in order that the lessor may realize a return on his royalty interest.") (citations omitted); *Soicher v. State Farm Mut. Auto. Ins. Co*., 351 P.3d 559, 565 (Colo. App. 2015) ("Under Colorado law, every contract contains an implied duty of good faith and fair dealing. […] Because 'good faith' is an implied covenant outside contractual specifics, there is no comprehensive list of conduct or qualities that constitute good faith in a given situation. Whether a party acts in 'good faith' depends on the particular facts of a case.") (citations omitted). Plaintiffs alleged Extraction "breached its [implied] duties when it, by way of example, failed to adhere to

Leases; failed to sell all oil and gas produced; allowed Deductions 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." Sec. Am. Compl. ¶ 98. Indeed, the implied covenants *must be pled* for instances where the leases at issue are silent as to any of the foregoing. *See, e.g., Rogers v. Westerman Farm Co*., 29 P.3d 887, 897 (Colo. 2001) ("where a lease is silent as to allocation of costs, the implied covenant to market obligates the lessee to incur costs necessary to render the gas marketable.").

As one of many examples, some but not all leases expressly require Extraction to sell oil and gas at market prices. Where a lease does not expressly state "market prices", Plaintiffs allege Extraction is required under the implied covenants to act as a prudent operator, to market the oil and gas, and to act in good faith and fair dealing to sell their oil and gas *at market prices*. It is for the court to determine in such situations, based on the facts presented at trial, whether the implied covenants required Extraction to sell Plaintiffs' oil and gas at market prices in the absence of express language. *Gillette*, 694 P.2d at 372 ("Whether implied covenants are breached is primarily a question of fact.").

IV. PLAINTIFFS CONVERSION CLAIMS (CLAIMS 7 AND 8) ARE NOT SUBJECT TO DISMISSAL

When Extraction produces and keeps Plaintiffs' oil and gas without paying for it and without a lease, Extraction has converted Plaintiffs' oil and gas. Extraction admitted in its Royalty Motion that failure to pay all royalties owed in full, as Plaintiffs complain here, "could expose the Debtors to enforcement actions and actions by the owners of the Royalties […] for *breach of contract*, *conversion, or other claims for damages for breach of the relevant oil and gas lease or*

other document creating such payment." ¶ 10 (emphasis added). Extraction expressly recognized its potential contract *and* conversion liability.

Extraction is wrong that we are dealing strictly in real property here. When oil and gas is severed from the ground, it becomes personal property. *See, e.g., Hagood v. Heckers*, 502 P.2d 961, 963 (Colo. App. 1972) ("The right to a royalty interest in oil does not merely attach after the oil has been severed from the ground and has become personal property.").

Where a valid oil and gas lease exists, Extraction may be correct that Plaintiffs' breach of contract or breach of implied covenants claims apply to Extraction's the conduct. However, as established in Section I.B. *supra*, Plaintiffs are entitled to plead in the alternative, the leases at issue are incorporated by reference in the complaint, their terms speak for themselves, and many of them are old which increases the likelihood they have terminated. Plaintiffs alleged that, at least in some instances, Extraction produced Plaintiffs' oil and gas without permission, i.e., without a lease in place due to (1) termination of the lease for lack of sufficient production, (2) breach of implied covenants, or (3) Extraction's own title errors (Sec. Am. Compl. ¶¶ 48-52, 104).

V. COLORADO COURTS RECOGNIZE CLAIMS FOR IMPOSITION OF A TRUST (CLAIM 9)

Colorado law recognizes constructive trust claims. *See, e.g., Lucas v. Abbott*, 198 Colo. 477, 601 P.2d 1376 (Colo. 1979) (analyzing the application of the statute of limitations to express, constructive, and resulting trust claims); *In re Estate of Scott*, 735 P.2d 924, 927 (Colo. App. 1986) ("We hold that the claim asserting the equitable right to imposition of a constructive trust was likewise timely filed[.]"); *Voller v. Gertz*, 107 P.3d 1129, 1130 (Colo. App. 2004) ("The parties agreed to bifurcate the trial with regard to the claim for imposition of a constructive trust."). Colorado courts also recognize constructive trust claims pled with other claims for which imposition of a constructive trust is a valid remedy, and analyzes them collectively therewith. *See,*

e.g., Scott v. Scott, 428 P.3d 626, 637 (Colo. App. 2018) (reversing dismissal of claims for unjust enrichment and constructive trust, stating "we conclude these allegations stated a plausible claim for unjust enrichment and the imposition of a constructive trust," and recognizing "the parties appear to concede that constructive trust is essentially a remedy for unjust enrichment and, thus, we analyze those two claims as one."). Indeed, "[t]he constructive trust is an equitable device used to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs" (*In re Marriage of Allen*, 724 P.2d 651, 656-657 (Colo. 1986)), and is "extremely flexible." *See In re Seneca Oil*, 906 F.2d 1445, 1449 (10th Cir. 1990) (applying Colorado law).

Furthermore, this court has upheld the validity of trust claims in at least one other oil and gas bankruptcy matter. *See In re Semcrude*, 418 B.R. 98, 104 (Bankr. D. Del. 2009) ("Applying these three states' legal standards for finding a resulting trust, and considering the undisputed facts contained in the record, the Court finds that Vess Oil is entitled to summary judgment on its resulting trust claim."). Dismissal of Plaintiffs' trust claim would strip them of a claim available to Colorado parties and other parties before this court.

VI. PLAINTIFFS' UNJUST ENRICHMENT CLAIM (CLAIM 10) IS PROPER

Extraction concedes that Plaintiffs' unjust enrichment claim is available in the absence of "an express, valid contract govern[ing] the claims' subject matter." Partial Motion to Dismiss at 16. Therefore, Extraction concedes that in instances where it produced Plaintiffs' oil and gas without a lease, unjust enrichment is available as an alternative remedy. Contrary to Extraction's arguments and as discussed in Sections I.B. and IV *supra*, Plaintiffs alleged facts related to production of their oil and gas by Extraction in the absence of a lease.

Further, the benefit to Extraction and detriment to Plaintiffs is plain from the allegations: when Extraction produces oil and gas without a lease and without paying for it, Extraction receives money that belongs to Plaintiffs.

VII. PLAINTIFFS' ACCOUNTING CLAIM (CLAIM 11) SHOULD NOT BE DISMISSED

Extraction errs in arguing that an accounting is unavailable in a royalty underpayment action such as this, and that a demand for an accounting was a prerequisite to bringing the claim.

"An accounting claim is generally equitable in nature. The resolution of equitable issues rests in the sound discretion of the trial court. Although an accounting is an extraordinary remedy, it may be ordered if the plaintiff is unable to determine how much, if any, money is due him or her from another." *Patterson v. BP Am. Prod. Co.*, 159 P.3d 634, 642 (Colo. App. 2006) (*rev'd on other grounds*) (citations omitted). Indeed, an accounting is commonly claimed with royalty underpayment claims "because its main purpose is to facilitate an accurate calculation of damages once a breach of contract is found." *Id.* Thus, a demand for an accounting before filing this action was unnecessary in this case, and it would be inappropriate at this juncture to determine whether the accounting claim is proper or not. *Id.* ("it would be unreasonable to preclude the Royalty Owners' accounting claim simply because they did not request one from BP before the underlying breach of contract claim was adjudicated."). Furthermore, Extraction has exclusive control of the information required to calculate Plaintiffs' underpayments so it is implausible to think that Plaintiffs would be able to determine the total amount of the alleged underpayments without a full accounting by Extraction. *Id.* ("Furthermore, BP has exclusive control of the information required to make these calculations so it is almost inconceivable that the Royalty Owners would be able to determine the total amount of the alleged underpayments without a full accounting by BP.").

Additionally, Plaintiffs amended their complaint to cure any perceived demand deficiency. Plaintiffs, in fact, did demand accounting information from Extraction, which was denied, after filing their Amended Complaint and before Extraction filed its First Motion. Sec. Am. Compl. ¶ 91 ("Said Plaintiffs also have Leases that grant to each of them the right to examine books and records related to the production and sale of their oil and gas going back five years. *The Defendant refused reasonable requests by said Plaintiffs to review such books and records*, in further breach of their Leases.") (emphasis added). It is immaterial that the demand was made under lease terms that expressly grant some Plaintiffs the right to an accounting, because it shows that further demand would have been futile. *Van Schaack v. Phipps*, 38 Colo. App. 140, 144-45, 558 P.2d 581 (1976) (a pre-suit demand is not an essential element of a claim for an accounting if it is clear that the demand would have been futile.). Thus, no further demand was necessary.

Finally, Extraction erroneously conflates Plaintiffs' accounting claim and legal claims. Plaintiffs' legal claims, such as their breach of contract claims, are claims for damages, which they determined is some amount more than $2 million. Sec. Am. Compl. ¶ 60. Plaintiffs' accounting claim is a claim for "examination of defendant's books" (*Andrikopoulos v. Broadmoor Management Co*., 670 P.2d 435, 439 (Colo. App. 1983)) to determine the exact amount owed. Plaintiffs can know they are generally owed at least $2 million, but they need access to information exclusively in Extraction's control to determine whether they are actually owed $3 million, $4 million, or more.

VIII. PLAINTIFFS' INJUNCTION CLAIMS (CLAIMS 12-15) ARE PROPER IRRESPECTIVE OF THE AVAILABILITY OF DAMAGES

Extraction asserts that because Plaintiffs have claims for legal damages, injunctive relief is unavailable. This position ignores that Plaintiffs legal claims are retroactive – seeking to right past wrongs – and their injunction claims are prospective – seeking to prevent future wrongs. As the

Colorado Supreme Court stated, "an injunction is primarily a preventive remedy and protective in its character. It may issue to prevent further wrong, although no right has yet been violated. The true virtue of injunction is in the anticipation and prevention of injuries if probable and threatened." *Wyman v. Jones*, 123 Colo. 234 (1951).

All Plaintiffs requested preliminary and permanent injunctions enjoining Extraction from: allowing Plaintiffs' oil and gas to be taken and produced but not sold; allowing Deductions 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 Lease and the law. Sec. Am. Compl. ¶¶ 121, 135. In additional, Plaintiffs J Moody, Valerie Moody, Alaskan Oil and Resources LLC, J A Investments, and Annette and Tom Leazer requested preliminary and permanent injunctions enjoining the Defendant from deducting taxes from their royalty payments. Sec. Am. Compl. ¶¶ 128, 137. These claims are made to protect Plaintiffs from further loss following the date their Second Amended Complaint was filed, and into the future following the Court's ruling on Plaintiffs' claims in this adversary proceeding. They are made to prevent unnecessary and ongoing future litigation for the benefit of the parties and judicial efficiency. After Plaintiffs are paid for past (pre-litigation) losses, there is nothing to prevent Extraction from continuing to improperly produce and sell Plaintiffs' oil and gas without paying Plaintiffs for it, which benefits Extraction to the detriment of Plaintiffs, absent the requested injunctions.

Furthermore, Extraction has already filed for bankruptcy after being in business for less than ten years. If it were to file for bankruptcy again and lack sufficient financing to reorganize, Plaintiffs will be at risk of losing their property due to Extraction continuing to produce and take their oil and gas without paying in full for it.

IX. EXTRACTION WRONGLY ARGUES PLAINTIFFS COULD NOT AMEND THEIR COMPLAINT AS A MATTER OF COURSE

Extraction recognizes F.R.C.P. 15 grants Plaintiffs the ability to amend their complaint once as a matter of course, i.e., without permission or leave of the Court. But Extraction erroneously takes the position that Plaintiffs used their sole matter of course amendment when they filed their Amended Complaint three days after filing their initial Complaint. Partial Motion to Dismiss p. 22 ("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."). However, as Plaintiffs stated in their Amended Complaint, the amendment was made "to add the list of Plaintiffs and Defendants to the caption and modify[] the initial paragraph, per the Court's request. No other changes were made." Amended Complaint at 2, n. 2. Even Extraction recognizes that Plaintiffs' Amended Complaint was filed "to address an issue in the case's caption." Partial Motion to Dismiss p. 1. Thus, Plaintiffs' first amendment was made with leave of the Court and did not constitute their sole matter of course amendment.

Further, Extraction's position clearly contravenes the spirit of the rule, which broadly allows pleading amendments, whether upon review of a responsive pleading, receipt of written consent from the opposing party, or permission of the court, which should be freely given. F.R.C.P. 15. Here, Plaintiffs' initial amendment was a "clean up" amendment, made at the request of the Court, and did not constitute their one matter of course amendment. *See* Fed. R. Civ. P. 15 (2009 advisory committee's note) ("[T]he right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise.").

Even if Plaintiffs were unable to amend their complaint as a matter of course, the addition of a party did not surprise Extraction and the "new" claims are not in fact new.

Plaintiffs added Tom Leazer as a party, who owns the same minerals and signed the same lease as Annette Leazer, as a technical correction. Extraction was aware of Tom Leazer's mineral ownership and interest in the lease, based on its own title records, and therefore knew that Tom Leazer was a proper party to this matter. Sec. Am. Compl. ⁋ 22 ("The Defendant has extensive mineral title work related to the ownership of interests in the oil and gas produced by the Defendant's wells. The Defendant has every Lease and associated instruments related to Plaintiffs' oil and gas ownership and rights subject to the Defendant's wells, including those that Plaintiffs may have failed to list herein and which are incorporated herein by reference."). Regardless, if Plaintiffs had been required to file a motion to join Tom Leazer, such a motion would not have been reasonably opposed or denied at this early stage of litigation, before the case is even at issue, rendering any perceived error in adding Tom Leazer harmless.

Extraction wrongly asserts Plaintiffs' claims specific to certain Plaintiffs are "new"; in fact, Plaintiffs added claims specific to certain Plaintiffs for the sake of clarity, in direct response to Extraction's First Motion. In the Amended Complaint, Plaintiffs combined claims specific to certain Plaintiffs with the more general claims. Indeed, each of the "new" claims referenced by Extraction – breach of contract, conversion, preliminary injunction, permanent injunction – existed as claims in the Complaint and Amended Complaint.[8] *See, e.g.,* Complaint ⁋⁋ 75-80, 86-89, 104-1[11]. Regardless, if Plaintiffs had been required to file a motion to further amend to add claims, such a motion would not have been reasonably opposed or denied at this early stage of litigation,

[8] With the exception of one of two breach of contract claims contained in Claim 5, brought by Plaintiffs J Moody, Valerie Moody, Alaskan Oil and Resources LLC, J A Investments, and Annette and Tom Leazer, who have leases that grant to them the right to examine Extraction's records and books upon reasonable request. Extraction denied their reasonable request after the Amended Complaint was filed, establishing a new claim that could not have been previously pled.

before the case is even at issue, rendering any perceived error in adding related and similar claims among the same parties harmless.

CONCLUSION

Extraction's Partial Motion to Dismiss should be denied as to each claim Extraction challenges and this matter should be set for trial.

Dated: February 16, 2021

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