Docket #0031 Date Filed: 2/23/2021

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 (CSS)
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,	)	Adv. Pro. No. 20-50963 (CSS)
Plaintiffs,	)	**Re: Docket Nos. 24, 25, 26 and 28**
v.	)	
EXTRACTION OIL & GAS, INC.,	)	
Defendant.	)	

REPLY 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.

2011548210223000000000006

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

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

-AND-

KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
Anna Rotman, P.C. (admitted *pro hac vice*)
Kenneth Young (admitted *pro hac vice*)
609 Main Street
Houston, Texas 77002
Telephone: (713) 836-3600
Facsimile: (713) 836-3601
Email: anna.rotman@kirkland.com
kenneth.young@kirkland.com

Co-Counsel to Reorganized Debtors

Dated: February 23, 2021

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INTRODUCTION

In response to Extraction Oil & Gas, Inc.'s ("Extraction") *Brief in Support of Defendant's Motion to Dismiss the Second Amended Complaint* [A.D.I. 24] (the "Motion to Dismiss"), Plaintiffs attempt to escape dismissal by functionally repleading their causes of action a fourth time. Plaintiffs' arguments do not justify complicating an ordinary breach of contract case via multiplication and tortification of their claims. At core, Plaintiffs seek money, expressly demanding recovery of alleged royalty underpayments.[1] Plaintiffs admit their "royalties are paid pursuant to the express terms of the [l]eases and applicable law."[2] Consequently, the Court should dismiss the challenged claims with prejudice.

ARGUMENT

I. THE ECONOMIC LOSS RULE BARS THE FRAUD AND CONVERSION CLAIMS BECAUSE THEY DEPEND ON CONTRACTUAL DUTIES

Colorado's economic loss rule precludes tort claims—including intentional torts such as fraud and conversion—when the plaintiff alleges economic loss from the breach of a contractual duty absent any independent, non-contractual duty. Here, Plaintiffs' fraud and conversion claims do not merely incidentally overlap with their breach of contract claims; instead, the duties at issue expressly arise from the leases. As a result, the economic loss rule bars these claims.

A. The Economic Loss Rule Applies to Fraud and Conversion Claims

Plaintiffs' argument rests on a single intermediate court case stating "the economic loss rule ***generally*** does not bar . . . common law intentional tort claims."[3] That very case, however, undercuts Plaintiffs' argument that the economic loss rule "does not apply . . . to intentional torts

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1 *See, e.g., Brief in Opposition to Defendant's Motion to Dismiss the Second Amended Complaint* [A.D.I. 28] (hereinafter "Plaintiffs' Response") at 8 ("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.").

2 *Id.* at 7.

3 *See id.* at 10 (emphasis added) (quoting *McWhinney Centerra Lifestyle Center LLC*, No. 19CA0438, 2021 WL 126572, at *1 (Colo. App., Jan. 14, 2021)).

such as fraud and conversion"[4] because the court held that the doctrine barred—and the court dismissed—a civil conspiracy claim,[5] which is an intentional tort. *See In re S&D Foods, Inc.*, 144 B.R. 121, 167 (Bankr. D. Colo. 1992) ("[C]ivil conspiracy can be defined as 'an intentional tort . . . .'") (quoting *Hawkinson v. A.H. Robins Co.*, 595 F. Supp. 1290, 1313 (D. Colo. 1984)).[6]

This is unsurprising because the Colorado Supreme Court has never held that the economic loss rule *per se* does not apply to intentional torts. *See Bermel v. BlueRadios, Inc.*, 440 P.3d 1150, 1155 n. 6 (Colo. 2019) ("Defining the proper balance between [contract and tort] law is not the task before us today, but we note that deference to private ordering must sometimes yield to the law's interest in compensation and redress for wrongful, injurious conduct."). Instead, the Court simply held the economic loss rule does not preclude intentional torts that ***incidentally*** overlap with contractual duties, but are based on duties separate and apart from those created through the contractual relationship between the parties. *Id.* ("[W]e note 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."). In multiple post-*Bermel* cases, courts have dismissed intentional tort claims under the economic loss rule where the overlap was not incidental. *See, e.g.*, *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 823 F. App'x 559, 569 (10th Cir. 2020) (dismissal of fraud claims under Colorado's economic loss rule); *Valentine v. PNC Fin. Servs. Grp., Inc.*, No. 118CV01934CMASKC, 2019 WL 5790696, at *8 (D. Colo. Aug. 1, 2019) (citation simplified) (same). As discussed below, the same is true here: Plaintiffs' claims derive from an alleged failure to uphold obligations to pay royalties as required by contract.

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4 *Id.*

5 *McWhinney Centerra Lifestyle Center LLC*, 2021 WL 126572, at *13.

6 *Accord Logixx Automation, Inc. v. Lawrence Michels Family Tr.*, 56 P.3d 1224, 1231 (Colo. App. 2002) ("To establish a civil conspiracy in Colorado, a plaintiff must show: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) an unlawful overt act; and (5) damages as to the proximate result.") (quoting *Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995)).

B. The Economic Loss Rule Bars Plaintiffs' Fraud Claims Because They Arise under the Leases and Not under Statutory Law

Plaintiffs' fraud claims are predicated on contractual duties under the leases, namely the duty to "properly account to the Plaintiffs by providing the information in the royalty statements on a monthly basis to the Plaintiffs." *Pls.' Resp.* [A.D.I. 28] at 18. As Plaintiffs pleaded, this duty arose under the leases. *See Second Am. Compl.* [A.D.I. 24] at 7 (alleging the leases "determine the rights and obligations of Plaintiffs and [Extraction] related to the production and sale of Plaintiffs' oil and gas rights"). Indeed, Plaintiffs say the same thing in their response brief, arguing "Extraction is required to pay royalties to Plaintiffs on the production of their oil and gas rights pursuant to the Leases and the law." *Pls.' Resp.* [A.D.I. 28] at 7.

In a belated attempt to revive their claims, however, Plaintiffs reframe their fraud claims as arising under statute, specifically Colorado's Oil and Gas Conservation Act.[7] Colorado's Supreme Court has held that this statute does not create a private cause of action. *See Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 924–26 (Colo. 1997) (construing Colorado Revised Statute section 34-60-114 and finding "it demonstrates that the legislature considered whether to allow private causes of action in the Act, and chose to allow them only in the form of injunctive relief and only when the commission has received written notice of the violation and a request that it bring suit") (citing *Bd. of Cty. Comm'rs of Cty. of La Plata v. Moreland*, 764 P.2d 812, 818 (Colo. 1988)). As a result, even if Plaintiffs had pleaded a claim for violation of this statute—they did not—the law does not recognize such a claim and it should be dismissed with prejudice.

[7] *See Pls.' Resp.* [A.D.I. 28] at 11 ("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. [section] 34-60-118.5 . . . .").

Plaintiffs belatedly realized the economic loss rule bars their fraud claims, and they cannot escape it by attempting to amend their complaint once again through arguments in their response brief. Extraction has no duty to Plaintiffs other than duties that exist under the leases, and the fraud claims should be dismissed as a matter of law.

C. The Economic Loss Rule Bars Plaintiffs' Conversion Claims Irrespective of Whether Plaintiffs May Plead in the Alternative

Plaintiffs argue their conversion claims[8] are not barred by the economic loss rule because a plaintiff may plead in the alternative; that principle was just as applicable in the cases wherein courts granted motions to dismiss based on the economic loss rule. Additionally, there is no "alternative" situation upon which Plaintiffs may rely because Extraction does not dispute the validity or enforceability of its leases.[9] Thus, dismissal is appropriate. *Cf. Adperio Network, LLC v. AppSlide, LLC,* No. 16-CV-00776-PAB-MEH, 2017 WL 4407928, at *5 n. 4 (D. Colo. Mar. 28, 2017) ("[T]he economic loss rule would seem to apply here. However, ***because [d]efendant contests the validity and enforceability of the contract*** . . . dismissal on the basis of the economic loss rule would not be proper at this time.") (emphasis added) (citation omitted).

II. PLAINTIFFS' RESPONSE CONFIRMS THAT THE FRAUD CLAIMS ARE INADEQUATELY PLEADED

In the *Motion to Dismiss,* Extraction identified two elements of fraud for which Plaintiffs failed to allege sufficient facts: (1) that Extraction knew its representations were false and made them with the intent that Plaintiffs would rely thereon and (2) that Plaintiffs justifiably relied on

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[8] Although the relevant heading references "claims," generally, Plaintiffs' argument seems to be limited to defending the conversion claims. *See Pls.' Resp.* [A.D.I. 28] at 11–12 (only substantively discussing conversion).

[9] Plaintiffs seem to suggest their own leases may be unenforceable. *See Pls.' Resp.* [A.D.I. 28] at 12. This argument, however, is unsupported. ***First***, Plaintiffs failed to request any remedy—such as rescission—suggesting they view their leases as unenforceable. ***Second***, Plaintiffs failed to identify for the Court which of their leases, if any, are unenforceable. ***Third***, the portion of the operative complaint to which Plaintiffs point belies their argument. *See Second Am. Compl.* [A.D.I. 24] at 13–14 (seeking a declaratory judgment that the leases are valid and that the extent of the unpaid royalties are as Plaintiffs allege).

the misrepresentations.[10] In response, Plaintiffs excerpted portions of their deficient complaint. *See Pls.' Resp.* [A.D.I. 28] at 14–16. The excerpts, however, highlight Plaintiffs' failure to allege the elements for fraud as none attempt to plead facts supporting these elements.

According to Plaintiffs, they also alleged the following in support of their fraud claims:

> (1) . . . 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) . . . 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) . . . 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) Extraction desired for Plaintiffs to accept the underpayments without objection; and (5) . . . Plaintiffs did receive and accept less than the full amount of their property for an unknown period of time . . . .

Id. at 16. ***Even in their response brief***, Plaintiffs failed to plead facts alleging Extraction knew its representations were false or that Plaintiffs justifiably relied on the misrepresentations. *See id.*

Furthermore, in what is effectively an attempted fourth amendment of their fraud claims, Plaintiffs now argue a claim for fraudulent concealment was adequately pleaded.[11] Fraudulent concealment requires an "intention that the concealment be acted upon [and] action on the concealment resulting in damages." *Baker v. Wood, Ris & Hames, Prof'l Corp.*, 364 P.3d 872, 883 (Colo. 2016) (quoting *First Interstate Bank of Fort Collins, N.A. v. Piper Aircraft Corp.*, 744 P.2d 1197, 1200 (Colo. 1987)). Plaintiffs' argument shows only that Extraction wanted Plaintiffs to accept the royalty payments as calculated and that Plaintiffs did so. *See Pls.' Resp.* [A.D.I. 28] at 16 (outlining Plaintiffs' supposed factual assertions). To pass the fraudulent concealment pleading threshold, Plaintiffs should have alleged, at minimum: (1) the information allegedly concealed from each particular Plaintiff; (2) how Extraction intended that particular Plaintiff to act

[10] *See Motion to Dismiss* [A.D.I. 26] at 18.

[11] *See Pls.' Resp.* [A.D.I. 28] at 13 n. 7 (arguing Plaintiffs acted appropriately despite failing to formally plead fraudulent concealment).

upon the alleged instance of concealment; (3) how the Plaintiff actually relied upon the concealment; and (4) the minimal factual basis supporting these allegations. *See Diff Scale Operation Research, LLC v. Maxlinear, Inc.*, No. CV 19-2109-LPS-CJB, 2020 WL 6867103, at *2 (D. Del. Nov. 23, 2020) (holding a complaint was inadequate because it did "not identify who committed the alleged infringement, or where, when, and why the alleged infringement occurred"). Plaintiffs' claims—whether for ordinary fraud or fraudulent concealment—should be dismissed.

III. PLAINTIFFS' RESPONSE CONFIRMS THAT THE IMPLIED COVENANT CLAIMS REPLICATE THE BREACH OF CONTRACT CLAIMS

Extraction identified multiple cases, including one from this Court, holding that implied covenant claims should be dismissed when they are duplicative of breach of contract claims. *See Motion to Dismiss* [A.D.I. 26] at 19–21. ***Plaintiffs identify no case to the contrary***.

Furthermore, it is irrelevant that implied covenant and breach of contract claims are sometimes brought concurrently. Implied covenant claims cannot stand when—as here—the claims are "subsumed by the breach of contract claim." *In re Welded Constr., L.P.*, 609 B.R. 101, 130 (Bankr. D. Del. 2019). Indeed, Plaintiffs identified one rationale for this rule when they argued that "implied covenants must be pled ***for instances where the leases at issue are silent*** as to" allocation of costs. *See id.* at 18 (emphasis altered) (citing *Rogers v. Westerman Farm Co.*, 29 P.3d 887, 897 (Colo. 2001)). Implied covenants are only gap-fillers that operate "where a lease is silent as to allocation of costs . . . ." *Rogers*, 29 P.3d at 897 (citing *Garman v. Conoco, Inc.*, 886 P.2d 652, 654 (Colo. 1994)). As Extraction pointed out, "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" leases as the breach of contract claims. *Motion to Dismiss* [A.D.I. 26] at 20.

Plaintiffs cannot avoid dismissal through reliance on the words "in the alternative." Extraction does not dispute that the relevant leases between the parties are valid and govern. Additionally, to the extent Plaintiffs actually believe that their claims diverge from certain leases, they must present the Court with the basis of that argument instead of purporting to incorporate every lease into the record via reference.[12] It is Plaintiffs' obligation, not the Court's, to defend Plaintiffs' arguments. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."). Plaintiffs' claims should be dismissed.

IV. PLAINTIFFS FAIL TO REBUT EXTRACTION'S ARGUMENTS FOR DISMISSAL OF THE CONVERSION CLAIMS

First, as the Court is well-aware, Extraction agrees that hydrocarbons, once produced, are personal property. Plaintiffs' focus on this point is unhelpful. Plaintiffs' royalty interest is an interest in real property. *Fort Lupton State Bank v. Murata*, 626 P.2d 757, 759 (Colo. App. 1981) (citing *Globe Drilling Co. v. Cramer*, 562 P.2d 762 (Colo. App. 1977)). After execution of the leases, Plaintiffs have no possessory interest in the produced oil and gas. *See, e.g.*, *Nature of Gas and Oil "Royalty Interests," Generally*, 38 Am. Jur. 2d Gas and Oil § 181. Instead, Extraction has the right to such possession and control. *See Maralex Res., Inc. v. Chamberlain*, 320 P.3d 399, 402 (Colo. App. 2014) (citing *Garman v. Conoco, Inc.*, 886 P.2d 652, 659 (Colo. 1994)).

Each of these principles is independently fatal to Plaintiffs' conversion claims because conversion requires an unauthorized act of control over Plaintiffs' personal property. *See Mason v. Farm Credit of S. Colorado, ACA*, 419 P.3d 975, 983 (Colo. 2018). If the object of the conversion claims is produced hydrocarbons, the claims fail because Extraction cannot deprive Plaintiffs of a right of possession they do not enjoy. If the object is the royalty payments themselves, as originally

[12] *See Pls.' Resp.* [A.D.I. 28] at 17 ("Every lease is incorporated by referenced [sic] in the Sec. Am. Compl. and speaks for itself.")

pleaded, Plaintiffs' claims fail because unsegregated, fungible amounts of money cannot be the object of a conversion claim. None of these principles turn on the characterization of hydrocarbons before or after severance from the mineral estate.

Second, Extraction's statement in briefing outside of this adversary proceeding that it could, hypothetically, be exposed to various forms of liability for failure to pay royalties does not mean a conversion claim is appropriate here. Plaintiffs' arguments are unavailing and the claims should be dismissed.

V. PLAINTIFFS FAIL TO IDENTIFY A SINGLE CASE ESTABLISHING THAT A CONSTRUCTIVE TRUST IS A CAUSE OF ACTION

Plaintiffs are simply wrong when they argue "Colorado law recognizes constructive trust claims."[13] 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)).

Plaintiffs' argument that the Colorado Supreme Court recognized a constructive trust claim because it analyzed "the application of the statute of limitations to express, constructive, and resulting trust claims"[14] is disingenuous. The Colorado Supreme Court discussed the argument before it—applicability of the statute of limitations—and "indicate[d] no opinion as to the merits of [the] substantive claim that a constructive trust should be imposed . . . ." *Lucas v. Abbott*, 601 P.2d 1376, 1380 n. 3 (1979). Furthermore, later cases reveal that *Lucas*'s substantive cause of action was breach of fiduciary duty. *See Rocky Mountain Expl., Inc. v. Davis Graham & Stubbs LLP*, 420 P.3d 223, 235 (Colo. 2018) ("[W]e have recognized the fiduciary nature of the relationship that exists between the parties to a joint venture.") (citing *Lucas*, 601 P.2d at 1379).

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[13] *Pls.' Resp.* at 19 (citation omitted).
[14] *Id.* (citing *Lucas*, 601 P.2d 1376).

Plaintiffs also misread the other cases cited. In the first, the plaintiffs "filed their claims . . . seeking reformation of the deeds or, alternatively, for the imposition of a constructive trust on the funds paid to the Estate for the sale of the land to the third party." *See In Matter of Estate of Scott*, 735 P.2d 924, 925 (Colo. App. 1986). Grouping trusts with the remedy of "reformation of the deeds" makes it obvious: the trust was a remedy. *See id.* In the second case, Plaintiffs omitted the introductory sentence to the paragraph they cite, which states: "[The plaintiffs] filed a lawsuit . . . alleging breach of contract, violation of [a statute], breach of fiduciary duty, wrongful discharge, and conspiracy, and requesting the imposition of a constructive trust." *Voller v. Gertz*, 107 P.3d 1129, 1131 (Colo. App. 2004). Again, there were proper causes of action and the constructive trust was a remedy. *See id.* For the next cases, Plaintiffs admit the trust was a remedy. *See Pls.' Resp.* [A.D.I. 28] at 19–20 ("Colorado courts also recognize constructive trust claims pled with other claims for which imposition of a constructive trust is a valid remedy . . . ."). Finally, the case from this Court is inapposite because it applied Kansas, Oklahoma, or Texas—and not Colorado—law. *In re SemCrude, L.P.*, 418 B.R. 98, 103 (Bankr. D. Del. 2009) ("[I]t could be argued that either Kansas, Oklahoma, or Texas law applies. The Court need not address this choice of law dispute, however, because the Court finds that Vess Oil is entitled to a resulting trust under the laws of each of the three states.").

Dismissing Plaintiffs' trust claims would not "strip them of a claim available to Colorado parties and other parties before this Court"[15] because constructive trusts are not claims. Plaintiffs' claims should be dismissed as a matter of law.

[15] *Pls.' Resp.* at 20.

VI. PLAINTIFFS' BID TO AMEND THEIR UNJUST ENRICHMENT CLAIMS IS INEFFECTUAL BECAUSE AN EXPRESS CONTRACT STILL GOVERNS

Extraction moved to dismiss the unjust enrichment claims because they are inappropriate when an express contract governs.[16] In response, Plaintiffs primarily[17] argue that the claims are appropriate absent a valid contract.[18] This argument does not defeat the *Motion to Dismiss*.

First, Plaintiffs attempt to obfuscate their claims, arguing they turn on an alleged instance where Extraction produced oil and gas without a lease.[19] Plaintiffs' operative complaint says otherwise: "[Extraction's] conduct resulted in their ***withholding or miscalculating of royalties*** owed to the Plaintiffs." *Second Am. Compl.* [A.D.I. 24] at 24 (emphasis added). Thus, Plaintiffs' unjust enrichment claims seek recovery of allegedly underpaid royalties. *See id.* The payment of royalties is governed by the leases, as Plaintiffs pleaded. *See id.* at 7–8.

Second, the argument that the claims are premised on the absence of a lease is ill-conceived. Without a lease or similar instrument, there is no basis for Plaintiffs' royalty ownership. *See Garman v. Conoco, Inc.*, 886 P.2d 652, 656 (Colo. 1994) ("While the lease agreement creates the royalty obligation, overriding royalty interests are typically reserved or created by separate agreement.") (citation omitted).[20] Indeed, the conveyance of a royalty interest is subject to the statute of frauds, meaning the creation of a royalty interest ordinarily ***must*** be written. *Gaddis v. McDonald*, 633 P.2d 1102, 1104 (Colo. App. 1981) ("An overriding royalty interest in respect to oil and gas leases is a real property interest, and as such, conveyance of that

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16 *Motion to Dismiss* [A.D.I. 26] at 24.

17 Plaintiffs also suggest they sufficiently pleaded an alleged benefit and detriment is misplaced. *See Motion to Dismiss* [A.D.I. 26] at 21. This is irrelevant to Extraction's arguments.

18 *Pls.' Resp.* [A.D.I. 28] at 20–21.

19 *Id.* at 20.

20 *Accord Philip T. Sharples Tr. by & through Colorado State Bank & Tr. v. Bill Barrett Corp.*, No. 15-CV-01335-JLK, 2017 WL 11545496, at *1 n. 2 (D. Colo. Sept. 19, 2017) ("An overriding royalty is [a] share of either production or revenue from production (free of the costs of production) carved out of a lessee's interest under an oil-and-gas lease.") (citation and quotations omitted).

interest is subject to the statute of frauds.") (citing *Hagood v. Heckers*, 513 P.2d 208 (Colo. 1973)). Similarly, to be enforceable against third parties, the written instrument must be timely recorded under Colorado's race-notice recording statute. *See* Colo. Rev. Stat. § 38-35-109(1). Plaintiffs' unjust enrichment claim—which assumes the ***absence*** of a written instrument—is incompatible with the recovery of royalty underpayments, even given Plaintiffs' eleventh-hour pivot. Plaintiffs' claims should be dismissed.

VII. PLAINTIFFS' RESPONSE CONFIRMS THEY DID NOT PLEAD AN ACCOUNTING DEMAND AND THAT THE CLAIM IS BARRED

Plaintiffs fail to show: (1) they did not need to make a demand for an accounting, (2) they alleged a demand for an accounting, (3) demand would have been futile, or (4) the equitable remedy of an accounting is available despite the availability of monetary damages as an adequate legal remedy. Plaintiffs' accounting claims should, therefore, be dismissed.

First, Plaintiffs solely rely on a Colorado Court of Appeals case that was reversed by the Colorado Supreme Court, and which, in any event, does not stand for the proposition urged by Plaintiffs. *See Pls.' Resp.* at 21 (citing *Patterson v. BP Am. Prod. Co.*, 159 P.3d 634 (Colo. App. 2006), *rev'd*, 185 P.3d 811 (Colo. 2008)). In *Patterson*, as relevant, the intermediate court considered whether a plaintiff needed to demand an accounting before bringing its claim. *See Patterson*, 159 P.3d at 642. The intermediate court rejected Colorado Supreme Court precedent and concluded a demand requirement would be unreasonable because the plaintiffs' particular accounting claim was meant "to facilitate an accurate calculation of damages once a breach of contract is found." *Id.* The Colorado Supreme Court held that the intermediate court erred on the threshold question of the accrual of the statute of limitations and reversed, rendering moot the intermediate court's discussion of demand. *See BP Am. Prod. Co. v. Patterson*, 185 P.3d 811, 815 (Colo. 2008). Furthermore, the intermediate court's reasoning contradicts Plaintiffs' argument;

demand was unnecessary because the accounting claim was triggered only "once a breach of contract is found." *Patterson*, 159 P.3d at 642. Here, Plaintiffs pleaded accounting as a standalone cause of action independent of a prior finding of breach of contract. *See Pls.' Resp.* [A.D.I. 24] at 25 ("Plaintiffs request an accounting relating to any and all matters necessary to determine whether Plaintiffs have fully and fairly received their rightful share of royalties from the production from the [l]eases and wells that are burdened by the [l]eases.").

Second, Plaintiffs again attempt effectively to amend their pleadings in service of the most expedient argument. Plaintiffs now claim they alleged an accounting demand, pointing to paragraph 91 of the operative complaint.[21] Paragraph 91 is insufficient. Most obviously, paragraph 91 is alleged on behalf of a subset of Plaintiffs. *See Sec. Am. Compl.* [A.D.I. 24] at 19. Moreover, paragraph 91 is the basis for a breach of contract claim. *See id.* at 19–20. Finally, paragraph 91 does not allege an ***accounting*** demand; instead, Plaintiffs claim they were not allowed to review "***books and records***" under certain leases. *Id.* at 20 (emphasis added).

Third, Plaintiffs' futility argument is ineffectual. Plaintiffs argue "[i]t 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." *Pls.' Resp.* at 22. Differences in lease provisions governing the right to an accounting are, however, important. For example, if Alaskan Oil and Resources LLC's leases hypothetically included a discretionary accounting right, refusal of its demand would be irrelevant to the futility of another Plaintiffs' demand if the latter had a different provision.[22] Moreover, as discussed, the alleged demand was

[21] *Pls.' Resp.* [A.D.I. 28] at 22.

[22] Here, again, Plaintiffs create needless difficulties for the Court and Extraction via their persistent refusal to reference the hypothetical lease language upon which they rely.

to inspect books and records under alleged lease provisions and this is irrelevant to the futility of an accounting demand for purposes of the equitable claim for an accounting.

Fourth, Plaintiffs did not substantively address the adequacy of monetary remedies. Plaintiffs admit an accounting is an equitable claim. *See Pls.' Resp.* [A.D.I. 28] at 21 ("An accounting claim is generally equitable in nature.") (citation omitted). Thus, an adequate legal remedy precludes the claims. *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."). Plaintiffs pleaded that their accounting claims seek money. *See Second Am. Compl.* [A.D.I. 24] at 25 ("To the extent the accounting reveals an underpayment of royalties, Plaintiffs request that the Court order payment . . . ."). Plaintiffs cannot even defend the claims without referencing monetary damages. *See Pls.' Resp.* [A.D.I. 28] at 22 (arguing the accounting claims might allow Plaintiffs to figure out "whether they are actually owed $3 million, $4 million, or more"). Monetary damages preclude equitable relief. *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[.]").

VIII. INJUNCTIVE RELIEF IS NOT AVAILABLE GIVEN THE ADMISSIONS THAT MONETARY DAMAGES ARE AN ADEQUATE REMEDY

Plaintiffs argue their "injunction claims . . . are proper irrespective of the availability of damages."[23] Colorado courts disagree.[24] Third Circuit courts disagree.[25] The Supreme Court of

[23] *Pls.' Resp.* [A.D.I. 28] at 22 (header).

[24] *See Bd. of Cty. Commissioners of Cty. of Logan v. Vandemoer*, 205 P.3d 423, 430 (Colo. App. 2008) ("An injunction is an extraordinary and discretionary equitable remedy which is available when there is no adequate remedy at law or when it is expressly authorized by statute.") (citation omitted).

[25] *See, e.g., SNA, Inc. v. Array*, 51 F. Supp. 2d 542, 545 (E.D. Pa. 1999) ("An injunction should not be granted if a legal remedy is available: 'The availability of adequate monetary damages belies a claim of irreparable injury.'") (citation omitted); *Summit Bank v. U.S. Dep't of Treasury-Bureau of Pub. Debt*, 24 F. Supp. 2d 382, 388 (D.N.J.

the United States of America disagrees.[26] Plaintiffs desire the injunctions to prevent economic loss. *See Pls.' Resp.* [A.D.I. 28] at 23 ("[T]here is nothing to prevent Extraction from [producing and selling] Plaintiffs' oil and gas without paying Plaintiffs for it . . . ."). "Economic loss 'does not constitute irreparable harm.'" *Dice v. Clinicorp, Inc.*, 887 F. Supp. 803, 809 (W.D. Pa. 1995) (quoting *Acierno v. New Castle Cty.*, 40 F.3d 645, 653 (3d Cir. 1994)). Furthermore, speculation about possible bankruptcies in the remote future does not warrant injunctive relief. *See Lines v. Wargo*, 271 F. Supp. 2d 649, 665 (W.D. Pa. 2003) ("[T]he claimed injury cannot merely be possible, speculative or remote.") (citation omitted). The claims should be dismissed.

IX. PLAINTIFFS' THIRD PLEADING ATTEMPT WAS NOT AVAILABLE AS A MATTER OF COURSE

Even setting aside whether Plaintiffs already spent their matter-of-course amendment,[27] the *Second Amended Complaint* still required Extraction's written consent or leave of the Court. At the latest, Plaintiffs could only amend as a matter of course within twenty-one days after serving the *Amended Complaint*. *See* Fed. R. Civ. P. 15(a)(1) ("A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), ***whichever is earlier***.") (emphasis added). The *Amended Complaint* was served on October 29, 2020. *Am. Compl.* [A.D.I. 4] at 1. The *Second Amended Complaint* was served on January 19, 2021, long after the deadline had passed. *Second Am. Compl.* [A.D.I. 24] at 1. Thus, the amendment was not available as a matter of course.

1998) ("An injunction is not appropriate when the injury can be redressed by an award of damages.") (citation omitted).

[26] *See Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57 (1975) ("The narrow issue before us is whether this record supports the grant of injunctive relief, a remedy whose basis 'in the federal courts has always been irreparable harm and inadequacy of legal remedies.'") (citation omitted).

[27] Plaintiffs did not ask for Extraction's permission before filing the prior *Amended Complaint*. Nor did Plaintiffs move for the Court's permission under Federal Rule of Civil Procedure 15(a)(2). Thus, Plaintiffs filed the *Amended Complaint* as a matter of course.

Although prejudice is not required, contrary to Plaintiffs' assertions, their conduct does prejudice Extraction. ***First***, there is no argument that an entirely new claimant is a clarification or technical correction. ***Second***, every new claim is premised on allegations that were not included or alluded to in the prior complaint. For example, in Count Five Plaintiffs claim Extraction breached its leases when it refused to allow Plaintiffs to review books and records. *See Second Am. Compl.* [A.D.I. 24] at 20. There is no hint of this allegation or claim in the prior operative pleading, including in the paragraphs identified by Plaintiffs. *Compare Pls.' Resp.* [A.D.I. 28] at 25 *with Am. Compl.* at ¶¶ 75–80, 86–89, and 104–111. ***Third***, if Plaintiffs had followed the proper procedure, Extraction would have reasonably opposed the motion to amend on grounds of futility.

CONCLUSION

Plaintiffs seek payment for an alleged underpayment of royalties under their leases with Extraction. Plaintiffs, however, attempt to create a tort out of this alleged breach of contract. The Court should reject Plaintiffs' attempt to improperly multiply their causes of action. Plaintiffs' deficient and legally barred claims should be dismissed with prejudice.

Dated: February 23, 2021
Wilmington, Delaware

/s/ Stephen B. Gerald

WHITEFORD, TAYLOR & PRESTON LLC[28]
Marc R. Abrams (DE No. 955)
Richard W. Riley (DE No. 4052)
Stephen B. Gerald (DE No. 5857)
The Renaissance Centre
405 North King Street, Suite 500
Wilmington, Delaware 19801
Telephone: (302) 353-4144
Facsimile: (302) 661-7950
Email: mabrams@wtplaw.com
rriley@wtplaw.com
sgerald@wtplaw.com

- and -

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

- and-

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

Co-Counsel to Reorganized Debtors

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