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)
Debtors.	(Jointly Administered)

NOTICE OF APPEAL

Notice is hereby given that Grand Mesa Pipeline, LLC, pursuant to 28 U.S.C. § 158(a)(1), and Rules 8002(a)(1) and 8003 of the Federal Rules of Bankruptcy Procedure, appeals to the United States District Court for the District of Delaware this Court's: (i) *Bench Ruling* [D.I. 942], entered in this action on November 2, 2020; and (ii) *Order Granting Motions to Reject Certain Executory Contracts* [D.I. 1038] (the "Order"), entered in this action on November 10, 2020. Copies of the Bench Ruling and Order are attached hereto as Exhibit A and Exhibit B, respectively.

The parties to the Bench Ruling and Order, and the names, addresses, and telephone numbers of their respective attorneys, are as follows:

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Grand Mesa Pipeline, LLC	

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Extraction Oil & Gas, Inc. (3923); 7N, LLC (4912); 8 North, LLC (0904); Axis Exploration, LLC (8170); Extraction Finance Corp. (7117); Mountaintop Minerals, LLC (7256); Northwest Corridor Holdings, LLC (9353); Table Mountain Resources, LLC (5070); XOG Services, LLC (6915); and XTR Midstream, LLC (5624). The location of the Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.

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Dated: November 11, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 11, 2020, I electronically filed the foregoing document using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record on the service list below, via transmission of Notices of Electronic Filing generated by CM/ECF, electronic mail, and/or first-class U.S. mail.

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EXHIBIT

A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 11
	)	Case No. 20-11548 (CSS)
EXTRACTION OIL & GAS, *et al.*	)	
	)	
	)	Related Docket Nos.: 14, 363, 377,
Debtors.	)	412, 482, 655, 681, 801, and 803
	)	

BENCH RULING

Before the Court is a series of motions and notices to reject unexpired leases of nonresidential real property and executory contracts (*see* D.I. 14, 377 and 412, collectively, the "Motions") as well as objections from Grand Mesa Pipeline, LLC (D.I. 363 and 803, referred to as "Grand Mesa"); and Platte River Midstream, LLC, DJ South Gathering, LLC, and Platte River Holdings, LLC (D.I. 482, 655 and 801, collectively referred to as "Platte River" and with Grand Mesa, the "Rejection Counterparties") and the contracts the Debtors seek to reject, collectively, the "Transportation Services Agreements" or "TSAs").[1] The Court held evidentiary hearings on the rejection motions on October 7, 20, 26, and 27, and, on October 28, the Court heard closing arguments.[2]

[1] The TSAs at issue in the Motions are: (i) **Grand Mesa TSAs:** (a) Amended and Restated Transportation Agreement dated June 21, 2016 (the "Bayswater Contract"), Debtors' Ex. 32; (b) Amended and Restated Transportation Services Agreement dated February 19, 2016 (the "Grand Mesa Contract" and together with the Bayswater Contract, the "Grand Mesa TSAs"), Debtors' Ex. 33; and (ii) **Platte River TSAs:** (a) First Amended and Restated Transportation Services Agreement dated April 14, 2017 (the "Platte River Contract"), Debtors' Ex. 24; (b) Transportation Services Agreement dated May 16, 2018 (the "DJ South Contract" and together with the Platte River Contracts, the "Platte River TSAs"), Debtors' Ex. 26.

[2] The Transcripts are docketed as D.I. 812, 877, 926, and 933. Citations to the hearing transcripts will be noted as Date Hr'g Tr. page:line.

JURISIDICTION

The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction over this matter, pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper, pursuant to 28 U.S.C. §§ 1408 and 1409. The bases for the relief requested are sections 105(a), 363(b), and 365(a) of the Bankruptcy Code, Bankruptcy Rules 6004, 6006, and 6007, and Bankruptcy Local Rule 9013-1.

BACKGROUND

Extraction Oil & Gas and certain of its affiliates (the "Debtors") filed their petitions under Chapter 11 of the Bankruptcy Code on June 14, 2020. The Debtors cases are jointly administered for procedural purposes.[3] The Debtors operate primarily in the "upstream" oil and gas sector, including the exploration and production of oil and gas. The oil and gas industry can be broken up into three segments: (i) upstream, (ii) midstream, and (iii) downstream. Upstream activities are mainly "Exploration and Production" or E&P activities that focus on locating and extracting hydrocarbons from beneath the surface. Common upstream assets include mineral leases, producing wells, and associated production equipment. The midstream sector includes the activities involved in gathering, transporting, processing, and storing hydrocarbons. Common midstream assets include gathering pipelines, separation facilities, and tankage. The downstream sector is focused on the marketing and distribution of the products derived from the

[3] D.I. 79.

extracted hydrocarbons to the ultimate end users. Common downstream assets include refineries and retail sites.

The majority of the Debtors' assets are in the upstream sector, but the Debtors also have limited ownership in midstream assets. Prior to bankruptcy, the Debtors contracted with midstream counterparties, including the Rejection Counterparties, to transport their oil and gas from the production points to downstream providers. These TSAs are not only agreed to between and among the parties, but the rates are approved by the Federal Energy Regulatory Commission ("FERC"). The Debtors filed the Motions seeking authorization to reject these TSAs, which are contested by the Rejection Counterparties. This is the Court's ruling on the rejection of the TSAs.

ANALYSIS

A. Rejection of Leases and Executory Contracts

Section 365(a) of the Bankruptcy Code provides that a debtor in possession "may assume or reject any executory contract or unexpired lease of the debtor" subject to the court's approval. Courts generally authorize debtors to assume or to reject executory contracts and unexpired leases where the debtors appropriately exercise their "business judgment."[4] "An executory contract is a contract under which the obligation of both the

[4] *See, e.g., Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39–40 (3d Cir. 1989); *In re Fed. Mogul Global, Inc.*, 293 B.R. 124, 126 (D. Del. 2003); *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1099 (2d Cir. 1993); *Robertson v. Pierce (In re Chi-Feng Huang)*, 23 B.R. 798, 800 (B.A.P. 9th Cir. 1982); *Lubrizol Enters. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.)*, 756 F.2d 1043, 1047 (4th Cir. 1985) (holding that absent bad faith or abuse of discretion, deference is given to debtor's business judgment); *Wheeling-Pittsburgh Steel Corp. v. West Penn Power Co. (In re Wheeling-Pittsburgh Steel Corp.)*, 72 B.R. 845, 849 (Bankr. W.D. Pa. 1987); *In re G Survivor Corp.*, 171 B.R. 755, 757 (Bankr. S.D.N.Y. 1994).

bankrupt and the other party to the contract are so far underperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other."[5]

Importantly, "although Congress knew how to craft exceptions to rejection, Congress declined to except FERC approved contracts."[6] There is no prohibition on or limitation against rejecting a FERC approved contract. Therefore, the Court was tasked with determining whether (i) the Debtors' decision to reject was a proper exercise of business judgment, (ii) public policy prohibits the rejection of such contracts; and (iii) the matter should be referred to FERC.

B. Business Judgment

The "business judgment" test requires a showing that rejection of the executory contract or unexpired lease will benefit the debtor's estate.[7] Courts generally will not second-guess a debtor's business judgment concerning the rejection of an executory contract or unexpired lease.[8] The "business judgment" test merely requires a showing that rejection will benefit the debtor's estate. "A debtor's decision to reject an executory

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[5] *In re Exide Techs.*, 607 F.3d 957, 967 (3d Cir. 2010), as amended (June 24, 2010) (*quoting In re Columbia Gas Sys. Inc.*, 50 F.3d 233, 239 (3d Cir. 1995)). *See also Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1667 (2019) (Section 365 "enables a debtor to 'reject any executory contract'—meaning a contract that neither party has finished performing.").

[6] *In re Ultra Petroleum Corp.*, No. 20-32631, 2020 WL 4940240, at *6 (Bankr. S.D. Tex. Aug. 21, 2020). *See, e.g.*, 11 U.S.C. §§ 365(n)(intellectual property rights), 365(h)&(i) (real property leases and time share interests).

[7] *In re Trans World Airlines*, 261 B.R. 103, 121 (Bankr. D. Del. 2003). ("A debtor's decision to reject an executory contract must be summarily affirmed unless it is the product of 'bad faith, or whim or caprice'") (*quoting In re Wheeling-Pittsburgh Steel Corp.*, 72 B.R. at 849–50); *In re Trans World Airlines, Inc.*, No. 01-0056, 2001 Bankr. LEXIS 722, at *7–8 (Bankr. D. Del. Mar. 16, 2001) (noting that 5 the standard under section 365 requires consideration of the benefit of the rejection to the debtor's estate).

[8] *See Trans World Airlines*, 261 B.R. at 121.

contract must be summarily affirmed unless it is the product of '**bad faith, or whim or caprice**.'"[9] Importantly, the Court cannot substitute its judgment for the Debtors' judgment[10] and absent a heightened standard such as bad faith or abuse of discretion the Debtors' business judgment will be not altered.[11]

The Debtors assert that the TSAs are neither compatible with the Debtors' ongoing business needs nor a source of potential value for the Debtors' future operations, creditors, or other parties in interest. Absent rejection, the TSAs impose ongoing obligations on the Debtors and their estates that constitute an unnecessary drain on the Debtors' resources. Here, the Debtors presented evidence of the following: (i) Debtors' estate will benefit from rejection of the TSAs because the Grand Mesa, Bayswater, and Platte River Contracts charge rates significantly above market rates, the estate will save millions of dollars annually if allowed to reject these contracts; and (ii) Rejecting the DJ South Contract is in the Debtors' interest because the Debtors would be able to use an alternative service provider that, unlike DJ South, will take their crude oil to Platteville, a location where the Debtors can sell their crude oil for a significantly higher price.

The Rejecting Counterparties presented evidence but did not rebut the Debtors' business judgment. In fact, testimony reflected that the Debtors may also use a "walk-

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[9] *Id.* (emphasis added).

[10] *In re Prime Motor Inns*, 124 B.R. 378, 381 (Bankr. S.D. Fla. 1991).

[11] *In re Old Carco LLC*, 406 B.R. 180, 188 (Bankr. S.D.NY. 2009) ("Moreover, the business judgment standard . . . requires that the decision be accepted by courts unless it is shown that the bankrupt's decision was taken in bad faith or in gross abuse of the bankruptcy retained business discretion."). *See also Federal Mogul Global, Inc.*, 293 B.R. at 126 ("The business judgment test dictates that a court should approve a debtor's decision to reject a contract unless that decision is the product of bad faith or a gross abuse of discretion.").

up" rate with some of the midstream pipeline providers.[12] Additionally, the Debtors presented evidence of ability to use trucks as alternatives to using the pipelines. Furthermore, the Debtors can shut-in wells (or partially shut-in wells) until alternative shipment methods become available.

The Debtors presented evidence that the alternative transportation would cost less and that a new midstream pipeline may transport the oil to a more favorable location in some instances. With the current contract rates at higher-than-market value for transporting the Debtors' oil, it is within the Debtors' business judgment to reject these contracts and to seek alternative providers, whether by walk-up rates, trucking, or new pipeline contracts.

More specifically, the Debtors presented the testimony of its Chief Executive Officer Matthew Owens. Mr. Owens, despite his youth, is one of the most competent, well informed, measured, and persuasive executives that has ever testified before me. He made a solid case in favor of the Debtors' business judgment. Mr. Owens testified that rejection enables the Debtors to access the pipeline providers at a more competitive Platteville terminal[13] and that such access will save the company tens of millions of dollars per year.[14] Mr. Owens continued that without the onerous rates and deficiency

[12] The Court finds the statements of certain of the Rejecting Counterparties that, in a fit of pique, they will not accept the Debtors as a walk-up shipper not to be credible.

[13] Oct. 7, 2020 Hr'g Tr. 79:10-15 (Access to the Platteville terminal "is extremely important for the company because the three other pipelines that perform the same service as Grand Mesa are located in Platteville; therefore, for the company to access a competitive market, we need to have access to Platteville. Instead, we're stuck in Lucerne and stuck with one person who can set the price.").

[14] Oct. 7, 2020 Hr'g Tr. 80:22-24 ("[I]f we were to access Platteville . . . we estimate that the company could increase its margins in 2021 by anywhere from $25 to $32 million dollars [if it could access Platteville].").

claims, rejection of the DJ South Contract would save the Debtors between $4.5 and $5.5 million in 2021.[15] Furthermore, Mr. Owens testified that, as to Platte River, reasonable alternatives could be up-and-running within 90 days[16] because the alternative infrastructure was already within a mile of the well (versus constructing a whole new pipeline that was 90-miles from the well).[17] Rogan McGillis, ARB Midstream's Chief Financial Officer, who was a competent and well-prepared witness but whose testimony was self-serving and, ultimately, unpersuasive, could not rebut the timing or feasibility of the Debtors' alternatives to the Platte River gathering system.

Mr. Owens also testified about the DJ South pipeline. He stated that alternative pipeline providers will be able to install the short connections between their existing infrastructure and the collection points in the DJ South dedication area in a matter of months – again, the testimony reflects that the alternative pipeline providers are relatively close to the Debtors' wells.[18] Again, Mr. McGillis could not rebut the timing or feasibility of the Debtors' alternatives to the DJ South gathering systems.

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[15] *Compare* Debtors Ex. 42 to Debtors Ex. 57.

[16] Oct. 7, 2020 Hr'g Tr. 87:11-24 ("[The timeline for alternative pipeline companies] varies pad by pad. . . . [W]e had some pads that are already connected to oil gathering companies. . . . We have other pads where . . . it would only require building a couple hundred feet of flow line connections and we think that would be done in a month timeframe or less. And then a few of the other pads that are further away, they gave us a schedule of . . . three to six months to obtain the necessary rights-of-way. . . . In most cases, for the alternate pad that they would be connecting, it's anywhere from a half mile to a mile and a half connection, so not very long.").

[17] Oct. 7, 2020 Hr'g Tr. 88:3-13 ("[F]or Platte River to construct its entire gathering system it took . . . eighteen months or so because they were building around ninety miles of pipe . . . [T]he third-party company we received a proposal from . . . has already constructed the backbone of their pipeline systems. And all they need to do are build small connectors to connect us into the backbone of that system.").

[18] Oct. 7, 2020 Hr'g Tr. 102:8-18 ("[T]he alternatives [to DJ South] are very close to the Badger central gathering facility . . . they only need to connect to one point. They only need to connect to that central gathering facility. They do not need to connect to multiple well pads like the alternative to Platte River

As to Platte River and DJ South, Mr. Owens also testified about the economic benefit of rejection[19] of the TSAs and the realistic alternatives.[20] Mr. Owens provided details about the cost of alternatives[21] and the timeframe to alternative transition.[22] Mr. Owens continued regarding the Debtors' analysis of the regulatory requirements to

would have to do. So the fact that they only need to build out to one point that is roughly . . . one to one and a half miles away, we believe in our talks with them that it could be as little as ninety days to as much as 180 days to finish that connection."); Oct. 7, 2020 Hr'g Tr. 102:21-103:4 ("You can't really compare [the time to construct the DJ South system to the time to construct an alternative] because for DJ South they were building a large system which I believe is probably 50 miles or so in length, so it took them a long time to do that, where these companies that have submitted bids to us have already built out their pipeline systems to Platteville, so all they need to do is connect into their existing infrastructure which, as I mentioned, is very close to the Badger central gathering facility.").

[19] Oct. 7, 2020 Hr'g Tr. 80:22-24 (Platte River Contract: "[W]e estimate that the company could increase its margins in 2021 by anywhere from $25 to $32 million dollars" if it had access to the Platteville terminal); Oct. 7, 2020 Hr'g Tr. 102:1-3 (DJ South Contract: "[T]he total savings based on the bids that we have received would be anywhere from $4.5 to $5.5 million dollars in calendar year 2021.").

[20] Oct. 7, 2020 Hr'g Tr. 86:6-13 (Platte River Contract: "[W]e reached out to multiple trucking companies to solicit bids, as well as alternate oil gathering companies that perform the same services as Platte River. And we solicited bids from them, as well as timing for when they thought they could transport the crude from the pads that we laid out, and that is how we used or that is how we came up with the timing of this oil being pivoted off of the Platte River system."); Oct. 7, 2020 Hr'g Tr. 100:21-101:2 (DJ South Contract: "[Extraction] have gone out to multiple other oil gathering companies who have pipeline very close within about a mile to a mile and a half or so of the Badger central gathering facility. And we have received bids from them to connect their oil pipeline to the Badger central gathering facility and transport the oil from the Badger central gathering facility to the Platteville Terminal.").

[21] Oct. 7, 2020 Hr'g Tr. 80:7-15 (Platte River Contract: "[Extraction] have gone out and done marketing analysis and received proposals from companies who could ship our oil from Platteville . . . the cost that we have received from the pipelines in Platteville to transport our oils to the same place in Cushing, Oklahoma is $1.60 to $2.20 per barrel."); Oct. 7, 2020 Hr'g Tr. 101:22-102:1 (DJ South Contract: "The alternatives that we received are . . . at sixty cents to $1.00 per barrel and we would anticipate the gross spend associated with these contracts that we've been offered to be $1.5 to $2.5 million dollars.").

[22] Oct. 7, 2020 Hr'g Tr. 87:11-24. (Platte River Contract: "[The timeline for alternative pipeline companies] varies pad by pad. . . . [W]e had some pads that are already connected to oil gathering companies. . . . We have other pads where . . . it would only require building a couple hundred feet of flow line connections and we think that would be done in a month timeframe or less. And then a few of the other pads that are further away, they gave us a schedule of . . . three to six months to obtain the necessary rights-of-way. . . . In most cases, for the alternate pad that they would be connecting, it's anywhere from a half mile to a mile and a half connection, so not very long."); Oct. 7, 2020 Hr'g Tr. 102:16-18 (DJ South Contract: "[W]e believe in our talks with [alternative providers] that it could be as little as ninety days to as much as 180 days to finish that connection [to the Badger central gathering facility].").

transition to another pipeline provider,[23] including interim options, such as shutting-in, trucking, and/or walk-up shipping.[24] Mr. Owens described the best and worst-case scenarios for making the transition to new pipeline suppliers.[25]

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[23] Oct. 7, 2020 Hr'g Tr. 88:18-25 ("[The alternative providers' need to obtain permits and rights-of-way] was submitted to us in their bid, so we gave them the location of our pads and they looked at the distance from their current infrastructure to the pads that we would like to have connected, and they analyzed quickly the routes that they would probably most likely take to get there. And in their bid, they provided what they thought the timing would be, so that was assumed in that three to six-month timeframe that we've talked about with the alternative providers.").

[24] Oct. 7, 2020 Hr'g Tr. 89:15-90:3 (Platte River Contract: "[T]he majority of our pads we would be able to start trucking in very short order so those would not have any significant down times. But we have spent a lot of time thinking about what we would do during that several month period for the few pads that would currently require a new pipeline in order to continue producing. Our alternative there would be set those pads up for trucking, get a modification temporarily for permits to allow trucking or we could continue to ship on the Platte River system as a walk-up shipper. But, in the worst case, we would shut in those wells for a short period of time until the new company is connected, and then we would quickly make up that deferred oil production that was not produced during the short shut in period.); Oct. 7, 2020 Hr'g Tr. 103:9-23 (DJ South Contract: "We are unable to truck any oil from the central gathering facility, so we would have to shut-in the wells, at least two of the three pads that produce to the central gathering facility, while we wait for a third-party line to be built or we have the option to produce temporarily as a walk-up shipper under the DJ South tariff filed with FERC. […] We believe [walk up shipping is] a viable alternative because it's explicitly allowed under the FERC tariff and I don't believe can be turned away. But also, Extraction is one of the largest shippers on the DJ South system, and I don't believe that they would willingly forego a large amount of revenue for several months just to prevent us from walk-up shipping."); Oct. 7, 2020 Hr'g Tr. 94:7-16 (Shutting in wells: "The oil isn't necessarily lost during the shut-in period. What happens with wells when you shut them in is they build pressure during their shut-in time. And then when you turn them back online, they're producing at much higher volume then they were when you shut-in, and that incremental volume we call flush production, and that flush production usually makes up the amount of oil that was not produced during the shut-in period in fairly short order. So it's more like the production is being deferred temporarily rather than permanently lost or foregone."); Oct. 7, 2020 Hr'g Tr. 104:20-105:5 ("We would shut in, at least, two of the pads that are producing to the central gathering facility. They would be shut-in for those few months while we waited for a third-party to connect into the central gathering facility. And, at that point in time, we would turn all of those wells back on at significantly higher production rates then they were making at the time of shut-in. And we should be able to quickly recoup any deferred revenue that was lost during the shut-in period, given the flush production and the better contracts that we would have in place when that new production came online.").

[25] Oct. 7, 2020 Hr'g Tr. 89:24-90:3 (Platte River Contract: "[I]n the worst case, we would shut in those wells for a short period of time until the new company is connected, and then we would quickly make up that deferred oil production that was not produced during the short shut in period."); Oct. 7, 2020 Hr'g Tr. 105:10-15 (DJ South Contract: Shutting in wells for the time period it takes to install an alternative provider is better than assuming the contracts because "[t]he [DJ South Contract] . . . is charging us about three times the rate that their competitors are willing to charge. And shutting in for a few months is vastly outweighed by the economic benefit that the company's reserves in the area would receive for the next twenty to thirty years.").

Mr. Owens testified about the Grand Mesa TSAs. Mr. Owens testified that these contracts are projected to cost the Debtors approximately $100 million in annual spending.[26] Mr. Owens elaborated on the three possible alternatives to the Grand Mesa TSAs, which would result in millions of dollars in savings.[27]

Grand Mesa presented the testimony of Matthew O'Laughlin, a Principal of The Brattle Group, an economics and financial consulting firm.[28] Mr. O'Laughlin was a well-prepared and competent witness; however, he could not refute Mr. Owens' testimony. Mr. O'Laughlin opined that alternatives pose a "reasonable risk" of prorationing[29] but did not cite and was not aware of any prior instances of prorationing in the DJ Basin. Further, Mr. O'Laughlin did not model or provide the probability of prorationing by

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[26] Oct. 7, 2020 Hr'g Tr. 107:19-107:21 ("So far 2021, for example, we estimate a total spend with [Grand Mesa's] TSA to be $94 million."); Oct. 7, 2020 Hr'g Tr. 108:1-108:2 ("We anticipate a 2021 gross spend with [Bayswater] TSA to be $7.4 million."); Oct. 7, 2020 Hr'g Tr. 107:16-19 ("[T]he volume commitment is 58,000 barrels per day . . . [t]he term goes through October 2026 and the current rate we are charged is $4.40 per barrel."); Oct. 7, 2020 Hr'g Tr. 107:2-3 ("That escalates, I believe, at 2 percent per year through the end of the contract in 2026.").

[27] Oct. 7, 2020 Hr'g Tr. 108:5-10 ("We have seeked [sic] proposals from three companies that also provide transportation services through their pipelines from the Wattenberg Field in Platteville to Cushing, Oklahoma. The rates that we have received from those parties have been anywhere from $1.60 to $2.20."); Oct. 7, 2020 Hr'g Tr. 108:11-14 ("We anticipate that if we had one of those contracts our annual spend would be $25 to $35 million dollars which would equate to savings over our current contract or current Grand Mesa contract of $59 to $68 million dollars in 2021."). *Also compare* Debtors Ex. 37 to Debtors Ex. 57 (reflecting a savings of $59.2-$68.7 million in 2021 by using alternatives to the Grand Mesa TSA; and saving $7.4 million in 2021 by using alternatives to the Bayswater TSA").

[28] *See also* D.I. 892 (Declaration of Matthew O'Loughlin).

[29] Proration orders limit output from oil and gas wells in a field, for example, limiting the production of oil to the amount of the reasonable daily market demand and to require ratable production by all taking from the common source. *Champlin Ref. Co. v. Corp. Comm'n of State of Okl.*, 286 U.S. 210, 229, 52 S. Ct. 559, 563, 76 L. Ed. 1062 (1932). The Grand TSA at § 3.1 (stating that "Grand Mesa shall provide Services for all volumes up to the Fixed Monthly Payment Volume"), and at § 10.1 (stating that Extraction's capacity "shall not be reduced due to prorationing resulting from Pipeline System oversubscription due to shipper nominations exceeding Pipeline System capacity in any given Month."). The Bayswater TSA contains similar terms. In other words, the TSAs state that the Debtors' oil production would not be prorated (or slowed down), where if the TSAs are rejected, the Debtors' oil supply could be prorationed, or reduced.

alternative suppliers or a timeframe for such. Most troubling was Mr. O'Laughlin's opinion concerning the future price of oil, which is wholly inconsistent with the industry standard.[30]

Nothing about Mr. Owens' testimony leads the Court to believe that the Debtors were acting on a whim or were capricious.[31] In fact, Mr. Owens' testimony contained the cost benefit analysis of various alternatives, a well-reasoned discussion about why alternatives were preferable to continuing under the TSAs, and showed that the Debtors made a proper exercise of business judgment by rejecting the TSAs. Additionally, the rebuttal evidence of the Rejecting Counterparties did not rebut Mr. Owens testimony nor raise any concerns that the Debtors were acting on a whim or capriciously. Business judgment does not mean that the Debtors dotted every "i" and crossed every "t" – it means that the Debtors explored their options, thought through the alternatives, and

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[30] This is not the first time the Court has heard overly optimistic and unpersuasive projections of the price of oil using unorthodox methods.

[31] *See, e.g.*, Oct. 7, 2020 Hr'g Tr. 108:5-10 ("We have seeked[sic] proposals from three companies that also provide transportation services through their pipelines from the Wattenberg Field in Platteville to Cushing, Oklahoma. The rates that we have received from those parties have been anywhere from $1.60 to $2.20."); Oct. 7, 2020 Hr'g Tr. 76:1-6 ("[W]e recognized that for the most part alternative pipeline would not be immediately available to us and we had to understand exactly what our transaction would look like or what a transition plan would look like so that we could accurately model what the cost and effects would be to the company."); Oct. 7, 2020 Hr'g Tr. 88:22-25 ("[I]n their bid, they [alternative providers] provided what they thought the timing would be, so that was assumed in that three to six-month timeframe that we've talked about with the alternative providers."); Oct. 7, 2020 Hr'g Tr. 111:12-16 ("[W]e don't believe there will be any pro rationing or tightening in the near term, and that we should have ample access to markets and other pipeline providers in the event we did need to move any of our volumes on an alternative pipeline."); Oct. 7, 2020 Hr'g Tr. 89:24-90:3 ("[I]n the worst case, we would shut in those wells for a short period of time until the new company is connected, and then we would quickly make up that deferred oil production that was not produced during the short shut in period."); Oct. 7, 2020 Hr'g Tr. 108:11-14 ("We anticipate that if we had one of those [market rate alternative] contracts our annual spend would be $25 to $35 million dollars which would equate to savings over our current contract or current Grand Mesa contract of $59 to $68 million dollars in 2021.").

made a rationale decision based on the information available. Here, the Debtors spent considerable time analyzing whether rejection was in their business interest, they determined rejection provided them significant economic benefits, and they believe that will be able to successfully transition to alternative providers.

As a result, the Court finds that the Debtors' have presented sufficient evidence to support a showing of the proper exercise of their business judgment and the Rejection Counterparties have not rebutted the Debtors' evidence.

C. Covenant Running with the Land

The Rejection Counterparties contend that the TSAs contain "covenants that run with the land" and, thus, cannot be rejected.[32] The Court has previously held on summary judgment in two adversary proceedings brought by the Debtors against the Rejection Counterparties (at their insistence) that the TSA's do not contain covenants that run with the land. Nonetheless, the Court will assume, *arguendo*, for purposes of this section that the TSA's contain covenants that run with the land. This section does not alter or amend the Court's contrary decisions on summary judgment, which stand and are on appeal.

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[32] *See also Extraction Oil & Gas, Inc. v. Grand Mesa Pipeline, LLC (In re Extraction Oil & Gas, Inc.)*, Adv. Proc. No. 20-50816, Adv. D.I. 45 at 17 ("The Transportation Agreement does not create covenants that run with the land because these covenants fail to touch and concern Extraction's mineral estates and the original parties were not in privity of estate at the time of the creation of the covenants."); and *Extraction Oil & Gas, Inc. v. Platte River Midstream, LLC (In re Extraction Oil & Gas, Inc.)*, Adv. Proc. No. 20-50833, Adv. D.I. 54 at 24 ("The parties did not express an intent to allow any other covenants in the DJ South Contract to run with the land. Because the Platte River Contract does not clearly evince an intent for any covenants contained therein to run with the land and bind successors-to-title to any estate in real property, the Platte River Contract does not create covenants that run with the land as a matter of Colorado law." (citations omitted)).

Consistent with Section 365, when considering whether real covenants or instruments creating real covenants can be rejected, courts have generally considered whether those covenants meet the definition of an executory contract.[33] Most courts[34] that have held covenants running with the land cannot be rejected have found that the covenant was not an executory contract because it lacked material obligations on both sides[35] or did not otherwise constitute a contract.[36]

As cited by the Debtors, the court in *In re Arden & Howes Assocs., Ltd.* expressly rejected the notion that covenants running with the land insulate agreements from rejection.[37] In that case, confirmation of the "plan of reorganization turn[ed] on whether a restrictive use covenant that 'runs with the land' under state law can, after the lease is

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[33] *See, e.g., In re Foothills Texas, Inc.*, 476 B.R. 143, 151–53 (Bankr. D. Del. 2012) (holding that an overriding royalty interest did not meet the definition of an executory contract).

[34] *In In re Alta Mesa Res., Inc.*, the Court stated, without further analysis, that "[c]ontracts forming real property covenants are not executory." *Alta Mesa Holdings, LP v. Kingfisher Midstream, LLC (In re Alta Mesa Res, Inc.),* 613 B.R. 90, 99 (Bankr. S.D. Tex. 2019) (*citing In re Badlands Energy, Inc.*, 608 B.R. 854, 874 (Bankr. D. Colo. 2019)). In doing so, the Court cited *In re Badlands Energy, Inc.*, 608 B.R. at 875, which in turn quoted *In re Sabine Oil & Gas Corp.*, 567 B.R. 869, 874 (S.D.N.Y. 2017), *aff'd*, 734 Fed. Appx. 64 (2d Cir. 2018)). In *Sabine*, however, the court simply stated the parties agreed that a covenant that runs with the land creates an unrejectable property interest. *In re Sabine Oil & Gas Corp.*, 567 B.R. at 874. Similarly, in *Alta Mesa*, the matter of whether a contract that creates real covenants can be rejected under Section 365 was neither briefed for nor analyzed by the Court.

[35] *See In re Hayes*, ADV.07-00045-RBK, 2008 WL 8444812, at *11 (B.A.P. 9th Cir. Mar. 31, 2008) (concluding the bankruptcy court did not err because "there were no mutual obligations" remaining); *Gouveia v. Tazbir*, 37 F.3d 295, 299 (7th Cir. 1994) (concluding the real covenant was not rejectable because it "establishes an ongoing right of present (not merely future) enjoyment" and thus it lacked outstanding future material performance obligations) (emphasis in original)); *In re Foothills Texas, Inc.*, 476 B.R. at 151–53 (holding an overriding royalty interest did not meet the definition of an executory contract because there were not mutual material obligations remaining to be performed); *In re Banning Lewis Ranch Co.*, LLC, 532 B.R. 335, 343 (Bankr. D. Colo. 2015) ("Even if the Annexation Agreement could be considered a contract, the Court cannot find that it meets the Countryman definition of an executory contract.").

[36] *See, e.g., In re Banning Lewis Ranch Co.*, LLC, 532 B.R. at 343 ("[U]pon compliance with the . . . Colorado Municipal Annexation Act, the Annexation Agreement became a legislative act that set the boundaries of the City. At that point, the Annexation Agreement was no longer a contract, much less an executory one.").

[37] *In re Arden & Howe Assocs., Ltd.*, 152 B.R. 971, 975 (Bankr. E.D. Cal. 1993).

rejected, be enforced against one who acquires the shopping center from the trustee pursuant to the plan."[38] In *Arden & Howes*, the restrictive covenant at issue was recognized as running with the land.[39] Thus, the covenant's beneficiary sued to enjoin execution of a new lease to a third party that violated the covenant.[40] The beneficiary also opposed confirmation, arguing the reorganization plan "impermissibly [took] part of its leasehold, to wit, the restrictive use covenant that . . . runs with the land."[41] The court was not persuaded even though a "lease of real property is simultaneously a conveyance and a contract."[42] The court observed:

> Section 365(h) makes no mention of, and imparts no significance to, the concept of running with the land in connection with what constitutes the leasehold. The lessee is entitled to remain 'in possession of the leasehold' estate. The key is possession. What the lessee is entitled to retain consists of the essential elements of a lease— possession, term, and rent. Breaches of restrictive use covenants do not ordinarily work a dispossession.[43]

The court also rejected "the argument that successors who take from the trustee are nonetheless bound by a covenant that runs with the land."[44] Instead, the court held that the beneficiary was entitled to only the same remedy it would otherwise receive under the Bankruptcy Code—in the case of a lessee that remedy was an offset.[45] Thus, the court

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[38] *Id.* at 972.

[39] *Id.* at 975.

[40] *Id.* at 973.

[41] *Id.*

[42] *Id.* at 974.

[43] *Id.* at 975.

[44] *Id.*

[45] *See id.*

(i) placed no importance on the concept of covenants running with the land; (ii) allowed the rejection of a lease containing a covenant running with the land; and (iii) afforded the non-breaching party only the Bankruptcy Code's generally available remedy for the situation and did not allow any other remedy against successors to the burdened land.

The district court reached the same conclusion, noting "[t]he restrictive use covenant requires future performance, and courts have consistently held rejection relieves a trustee from covenants requiring future performance."[46] Section 365(h)(2) does not distinguish between affirmative covenants requiring expenditure of estate resources and the restrictive use covenant – section 365(h)(2) anticipates nonperformance of both types of covenants, since it provides a remedy for a trustee's "nonperformance of ***any obligation of the debtor under such lease***."[47] The court explained that "[r]ejection relieves a trustee from performing covenants requiring future performance, but does not deprive the lessee of its possessory property interest in the leased premises."[48] The same thing is true for the Debtors: rejection relieves the Debtors of their future obligations and only previously conferred rights are not rescinded.[49]

The Rejection Counterparties argue that covenants running with the land are real property in nature and not contractual obligations. The Court disagrees. Real covenants,

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[46] *Matter of Arden & Howe Associates, Ltd.*, 91-2299, 1993 WL 129784, at *4 (E.D. Cal. Mar. 1, 1993).

[47] *Matter of Arden & Howe Assocs., Ltd.*, No. 91-2299, 1993 WL 129784 at *3 (emphasis added).

[48] *Id.* (*citing In re Wood Comm Fund I, Inc.*, 116 B.R. 817, 818 (Bankr. N.D. Okla. 1990)).

[49] *Mission Prod. Holdings*, 139 S. Ct. at 1666 ("[W]e hold that under Section 365, a debtor's rejection of an executory contract in bankruptcy has the same effect as a breach outside bankruptcy. Such an act cannot rescind rights that the contract previously granted.").

or covenants that run with the land, are fundamentally creatures of contract. In *Thornton v. Schobe*,[50] the court considered whether an agreement not to build certain kinds of structures on a piece of property was a contractual agreement or a real property interest. The *Thornton* court held that agreement not to build a certain sort of building on certain land is not a transfer of an estate or interest therein nor a trust or power over it.[51] The *Thornton* court continues that "'Power' is used in the statute, as suggested by its connection with 'trust,' in the technical sense of power to convey or otherwise dispose of the lands as in wills, declarations of trust, trust deeds, and letters of attorney, and does not embrace restrictions of use."[52]

Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.[53] also explains that an easement is a burden on the **land** whereas a contractual obligation is a burden on the **owner** of the land.[54] Thus an easement must be enforced with an injunctive type action and a contractual dispute is an action for money damages.

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[50] 79 Colo. 25, 28, 243 P. 617, 618 (1925).

[51] *Id.*

[52] *Id.*

[53] 40 Colo. 467, 480, 92 P. 290, 294 (1907).

[54] *Farmers' High Line Canal & Reservoir Co.*, 92 P. at 294 ("[I]f Eli Allen had an easement, such an easement was a burden solely upon the land, and not upon the owner. We agree with this, but the covenant running with the easement is personal: 'A covenant which runs with the land is a promise, the effect of which is to bind the promisor and his lawful successors to the burdened land for the benefit of the promisee and his lawful successors to the benefited land. According to this the covenant binds the person of the owner of the burdened land, provided he comes by his title legally, and benefits the owner of the benefited land, provided he comes by his title legally.'" (citations omitted)).

If the TSAs are rejected, this simply results in a breach of the contracts, and the covenants therein, and not a termination of those contracts.[55] In other words, rejection allows a debtor to stop performing its obligations, but the non-breaching party's rights remain. Here, the Rejection Counterparties are seeking the Debtors' performance under the midstream contracts. However, the Court concludes that these covenants that run with the land are not rights to the use of land, but contractual obligations on others that may be enforced against parties not bound by privity of contract but, rather, through privity of estate. Rejection will relieve the Debtors of all future performance obligations to deliver its oil to the Rejection Counterparties for transportation services (or pay any fee), and the Debtors may enter new transportation agreements with new counterparties or find alternatives to transporting its products.[56]

However, *even if* the TSAs contain covenants running with the land, which they do not, the question then becomes what effect the covenants have on the Debtors' property post rejection. The answer is simple: any covenant running with the land still exists (as the contract still exists), but it is unenforceable against the Debtors and their assigns after the Rejection Counterparties' claims are satisfied as part of the reorganization process. Upon rejection, the Rejection Counterparties' claims under the

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[55] *See* 11 U.S.C. § 365(h) ("Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease . . . .").

[56] The Court was troubled by the testimony of Mr. McGillis, which was also discussed during closing argument, that Platte River had obtained an *ex parte* TRO in Colorado State Court against one of the Debtors' alternative trucking companies based on the terms of the Platte River TSA's. Notwithstanding that the action may have been a violation of the automatic stay, it is based on a theory that does not hold water post-rejection as Platte River will have a rejection claim, and, thus, an adequate remedy at law.

TSAs will be compensated, rendering the claims fully satisfied and incapable of subsequent enforcement against the Debtors and its assigns through either privity of contract or privity of estate.[57] Importantly, the Rejection Counterparties cannot seek duplicative recovery for the breached covenants by using privity of estate as justification for suing successors to the Debtors' real property interests for a breach of the fully satisfied covenants.[58]

Like the covenant to pay rent in leases—covenants running with the leasehold estate—the TSAs explicitly provide for a specific amount of monetary damages to remedy a breach of the alleged real covenants. Consequently, the Rejection Counterparties will be fully compensated for the deemed prepetition breach of their contracts with an unsecured claim for money damages, pursuant to section 365.

Specifically, as to Platte River**,** Platte River expressly granted the Debtors the unilateral right to "terminate" the agreement upon satisfaction of its contractual obligations via payment of the Total Financial Commitment. As evidenced in the Platte River Contract and the DJ South Contract, the Total Financial Commitment means "the

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[57] *See also Extraction Oil & Gas, Inc. v. Grand Mesa Pipeline, LLC (In re Extraction Oil & Gas, Inc.)*, Adv. Proc. No. 20-50816, Adv. D.I. 45 at 2 (holding that "the dedication and commitment covenant does not touch or concern the land, and there is no privity of the estate.."); and *Extraction Oil & Gas, Inc. v. Platte River Midstream, LLC (In re Extraction Oil & Gas, Inc.)*, Adv. Proc. No. 20-50833, Adv. D.I. 54 at 2 ("Under the unambiguous terms of the Platte River Contract, none of the required elements are met—the parties did not intend to create a covenant that runs with the land, the covenant does not touch or concern the land, and there is no privity of the estate.").

[58] *Leprino Foods Co. v. Factory Mut. Ins. Co.*, 653 F.3d 1121, 1134 (10th Cir. 2011) (applying Colorado law) ("In a breach of contract action, the objective is to place the injured party in the same position it would have been in but for the breach. A double or duplicative recovery for a single injury, however, is invalid. Under Colorado law, a plaintiff may not receive a double recovery for the same injuries or losses arising from the same conduct." (citations omitted)).

aggregate of the Fixed Monthly Payment due under this Agreement for all Months of the Term remaining at such time." "Upon satisfaction of either of such obligations, (i) the Committed Volume shall immediately be reduced to zero and (ii) [the Debtors] may elect to terminate [the] Agreement upon written notice to [the counter party]."[59] Indeed, the Debtors may even opt to accelerate satisfaction of the Total Volume Commitment, and all of its obligations under these contracts, through payment. Thus, as to Platte River, it is made clear in their contracts and proofs of claims, monetary damages are easily calculable and specific performance is both unavailable and inappropriate.

The same thing is true for the Grand Mesa TSAs. Again, the Debtors' commitments can be satisfied in full by either: (i) shipping certain amounts of crude petroleum within certain timeframes or (ii) "by satisfaction of [the Debtors'] Total Financial Commitment." Again, at the Debtors' option, they may accelerate the satisfaction of the Total Financial Commitment, and their obligations under the Grand Mesa TSA, through payment.[60] Again, monetary damages are easily calculable.

As a result, all the TSAs provide for money damages, which further supports that the covenants running with the land are contractual in nature; thus allowing these contracts to be rejected pursuant to Section 365 of the Bankruptcy Code even if they contain covenants running with the land, which they do not.

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[59] Platte River Contract, at §3.1; and DJ South Contract at § 4.1.

[60] Bayswater Contract at § 8.2 ("For the avoidance of doubt, the Total Financial Commitment will be satisfied by payment by [the Debtors] of the aggregate of the Fixed Monthly Payments in accordance with the terms of this Agreement, or at [the Debtors'] option, any payment made by [the Debtors] to accelerate the satisfaction of that obligation."); Grand Mesa Contract at § 8.2 (same).

D. FERC Inquiry

Platte River and Grand Mesa have asserted that FERC should hold a proceeding on whether the Court should approve rejection of the contracts.

FERC has held that "the Commission neither presumes to sit in judgment of rejection motions nor seeks to abrogate the role of adjudicating bankruptcy proceedings. The Commission recognizes that rendering a determination on rejection motions is solely within the province of the bankruptcy court."[61] Similarly, the Court recently described the Court and FERC – having a "parallel exclusive jurisdiction" - a debtor seeking to reject a FERC jurisdictional contract through bankruptcy must obtain approval from the bankruptcy court to reject the contract but a debtor may go before FERC to abrogate or modify the filed rate in that contract. They are two separate matters. Here, the Debtors are seeking to reject the contracts and not to abrogate or to modify the rates therein.[62] Moreover, as the Court recently held in this case, an order authorizing rejection does not abrogate or modify a filed rate.[63] Congress provided FERC limited regulatory jurisdiction over interstate oil pipeline transportation services (just as it provided this

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[61] *ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248, at 62,828 (June 22, 2020) (*quoting NextEra Energy, Inc. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,049 (2019) and *Exelon Corp. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,053 (2019) (Exelon), order on reh'g, NextEra, Inc. v. Pac. Gas & Elec. Co., 167 FERC ¶ 61,096 (2019)).

[62] "FERC's jurisdiction concerning rate setting is unaltered by rejection." *Ultra Petroleum Corp.*, No. 20-32631, 2020 WL 4940240 at *12.

[63] D.I. 770, Letter Clarifying Oral Ruling on October 2, 2020 (entered 10/4/2020) ("FERC's recent statement in *ETC Tiger Pipeline, LLC* that the [r]ejection of a Commission-jurisdictional contract in bankruptcy court alters the essential terms and conditions of a contract that is also a filed rate is incorrect. It does no such thing. The Supreme Court recently confirmed in *Mission Product Holdings* that "[a]ccording to Section 365(g), 'the rejection of an executory contract[ ] constitutes a breach of such contract . . . .'" *Mission Product Holdings*, 139 S. Ct. at 1659. The effect of a debtor's rejection of a contract under section 365 is that "[i]t gives the counterparty a claim for damages, while leaving intact the rights the counterparty has received under the contract." *Id.*, 139 S. Ct. at 1661.)

Court with limited jurisdiction), and this limited regulatory jurisdiction is not a legitimate basis to usurp this Court's authority to rule on Debtors' motion to reject in this proceeding.

Interestingly, FERC argued that because rejection claims would be paid in "plan dollars" or "claim dollars" rather than dollar-for-dollar, that rejection of the TSAs would necessarily be abrogating the rates. First, and not to be flippant, that is how bankruptcy works – bankruptcy is about consolidating assets and equitable distribution of available funds. Congress established the bankruptcy waterfall of distribution, much like it created FERC, and nothing in the Bankruptcy Code nor the FERC regulation excepts or prioritizes either of the statutes.

Second, nothing in this Court's ruling changes the rates, including for the time from the petition date to today. Such rate claims will be claims against the estate and will be paid by the Debtors, pursuant to a plan and subject to the Bankruptcy Code's waterfall. As a result, the *only* possible "claim dollar" payout would be for unpaid usage of the pipelines, as well as rejection damages. And to be clear, nothing is affecting the rate charged – the Rejection Counterparties have and will file claims at the rates approved by FERC and this Court is doing nothing to abrogate those approved rates.[64] How and when those claims will be paid-out is an issue for the plan and confirmation process.

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[64] *In re Mirant Corp.*, 378 F.3d 511, 520 (5th Cir. 2004) ("Mirant's rejection of the Back–to–Back Agreement was approved, then PEPCO's unsecured claim against the bankruptcy estate would be based upon the amount of electricity it would have otherwise sold to Mirant under that agreement at the filed rate. Thus, the damages calculation from the rejection of a contract is analogous to the damages calculation we previously approved in Gulf States because the award calculation is based upon the filed rate." (citation omitted); *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465, 1471 (5th Cir.), *amended*, 831 F.2d 557

As a result, the Court rejects the argument that payment of claims through the plan and confirmation process is an abrogation of FERC approved rates.

E. Public Interest

Platte River and Grand Mesa claim that rejection would not be in the public interest because (i) certain alternatives would require trucking of crude oil, which they contend is more risky and not as environmentally sound, (ii) rejection would require the shutting-in of wells, which may lead to decreased production, (iii) rejection would harm the community-at-large due to the significant impact on the Rejection Counterparties (i.e. would the Rejection Counterparties continue to operate? Would they be forced to shutter their businesses, fire their employees, and have the pipelines fall into disrepair?); and (iv) rejection would impact the oil markets in general. The Rejection Counterparties assert that the three-prong test articulated in *Mirant* should apply here. *Mirant* set forth a more rigorous standard for rejecting a contract for the purchase of electricity,[65] which was adopted, in part, in *Ultra Petroleum* relating to the rejection of a natural gas contract.[66] The three prongs are: (i) determining if the executory contract was excepted from rejection under section 365; (ii) scrutinizing "the impact of rejection on the public interest and on the supply of natural gas to consumers;" and (iii) after determining the public

(5th Cir. 1987) (damages from breach claims challenging the quantity purchased are not preempted but they must be calculated using the filed rate).

[65] *In re Mirant Corp.*, 378 F.3d at 525 (upon remand "the courts should carefully scrutinize the impact of rejection upon the public interest and should, *inter alia*, ensure that rejection does not cause any disruption in the supply of electricity to other public utilities or to consumers.").

[66] *Ultra Petroleum Corp.*, No. 20-32631, 2020 WL 4940240 at *8.

interest and supply concerns, the Court must "weigh those concerns against the [a]greement's burden on [the] reorganization."[67]

No court has applied the *Mirant* test to oil contracts that are at issue in the TSAs. This is not surprising as FERC has a more limited jurisdiction over oil pipelines than of gas and power contracts (which were at issue in *Mirant* and *Ultra*).[68] The Interstate Commerce Act ("ICA") is applicable to oil pipelines. It is important to note that the ICA was enacted to address monopoly power.[69] Furthermore, the ICA applies a different "public interest" test than other federal statutes (interestingly, the ICA never uses the words "public interest"). In the ICA, the "public interest" encompasses "just and reasonable pipeline rates and terms" and "an efficient petroleum market."[70] By contrast, for purposes of the Natural Gas Act (the "NGA"), the "public interest" encompasses "plentiful and uninterrupted supplies of fuel to the public."[71] That the ICA and NGA would provide different standards for assessing the public interest is not surprising; these standards arise from the "different economic context[s]" in which Congress passed the statutes, and manifest themselves through FERC's corresponding and distinct regulatory approaches.

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[67] *Id.*

[68] Oct. 20, 2020 Hr'g, Tr. 11:5-12 ("Q: And are there any significant differences between the tools that FERC was given to regulate oil pipelines as compared with gas pipelines? A [Dr. Makholm] Yes. As the regulations for gas was grounded in a regulatory function, the FERC was given duties over regulated entry and exit, and over regulated accounting. So, either it was not given -- it was handed to the regulator under the original Interstate Commerce Act for oil pipelines.").

[69] Oct. 20, 2020 Hr'g Tr. 10:4-11:12.

[70] *See* Makholm Decl. (attached as Ex. 19 to the Debtors' reply, D.I. 681) at 5.

[71] *Id.* at 4.

With that background in mind, the Court must start its analysis with Section 365. Section 365 of the Bankruptcy Code does not mandate that the Court consider public policy or public interest. It is irrelevant for Section 365's purposes. This is not a proceeding before FERC to modify or to abrogate a filed rate. In fact, allowing rejection in order for companies in bankruptcy to reorganize *is in the public interest*.[72] The Supreme Court has held that "the authority to reject an executory contract is vital to the basic purpose to a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization."[73]

The Court does not believe that a heightened scrutiny, including consideration of the public interest, is warranted. However, assuming *arguendo* that it is, the Court finds that the balance tips in favor of the Debtors. And, as this is a Court of equity, the Court will consider and evaluate the balance of equities to each of the parties and the impact on the public at large.[74]

Moreover, like the *Ultra Petroleum* court considered, the consideration of the macroeconomic effects on future use of oil pipelines is unfounded – that is a policy determination for Congress and not for this Court.[75] However, the Court, in its balance

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[72] *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 527-28, 104 S. Ct. 1188, 1197, 79 L. Ed. 2d 482 (1984) ("The Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization. . . . The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." (citing H.R.Rep. No. 95-595, p. 220 (1977)).

[73] *Bildisco*, 465 U.S. at 528.

[74] *Bildisco*, 465 U.S. at 527 ("The Bankruptcy Court is a court of equity, and in making [the determination to reject a collectively bargaining agreement] is in a very real sense balancing the equities . . .").

[75] *Ultra Petroleum Corp.*, No. 20-32631, 2020 WL 4940240 at *9.

of equities consideration, will look at whether the rejection of the TSAs "threatens the public health, safety or welfare."[76]

At trial, the Debtors presented the testimony of Dr. Jeff Makholm. Dr. Makholm was clearly intelligent, articulate, and a bit too sure of himself, but well qualified and persuasive. Dr. Makholm testified that (i) any consideration of public interest must account for the FERC's lighter regulation of oil pipelines contracts versus gas or power;[77] (ii) the ICA was enacted to address monopoly power;[78] (iii) the *Mobile-Sierra* doctrine has not been extended to the oil pipeline context;[79] and (iv) rejection will not discernibly affect the relevant market.[80] Dr. Makholm's testimony concluded that rejection of the TSAs would be in the public interest because it would promote competitive oil markets.[81]

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[76] *Id.*

[77] Oct. 20, 2020 Hr'g Tr. 10:4-11:12.

[78] Oct. 20, 2020 Hr'g Tr. 10:9-16.

[79] Oct. 20 Hr'g Tr 19:15-20:6. The *Mobile-Sierra* doctrine, which originated from two Supreme Court decisions issued in 1956, prohibits FERC from modifying or abrogating existing contracts under the Federal Power Act ("FPA") and NGA unless required to protect the public interest (*not* the ICA). *United Gas Pipe Line Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332, 344 (1956) ("*Mobile*"); *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956) ("*Sierra*"). Mobile and Sierra were decided under the "substantially identical" ratemaking provisions of the NGA and the FPA, which is why the judicial decisions interpreting the *Mobile-Sierra* doctrine interchangeably cite cases decided under the NGA and FPA. *See, e.g., Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (citations omitted).

[80] Oct. 20, 2020 Hr'g Tr. 13:20-14:5.

[81] Oct. 20, 2020 Hr'g Tr. 19:15-20:11. Dr. Makholm's testimony is as follows:

> Q Dr. Makholm, you understand that the counterparties in this case have raised concerns more generally about the public interest such as potential impacts from trucking oil; is that right?
>
> A That's what I understand, yes.
>
> Q And do you believe that those are appropriate public interest considerations under the ICA?
>
> A No, not for the FERC. The local trucking --
>
> Q And why is that?

In response, Grand Mesa submitted the testimony of Commissioner Branko Terzic.[82] Commissioner Terzic stated that, although the ICA does not define "public policy," he believed that the *Mobile-Sierra* doctrine is instructive guidance.[83] The *Mobile-Sierra* doctrine provides that a party seeking to avoid its contractual obligations may do so only after it meets the burden of demonstrating "'unequivocal public necessity' or 'extraordinary circumstances'" where "the public interest will be severely harmed" by continued compliance.[84] Commissioner Terzic continued that "[g]iven the breadth of the meaning of public interest in relation to energy regulation, [he] groups the multitude of factors relating to [the Debtors'] proposed noncompliance with the TSAs into five general buckets: (a) Financing concerns; (b) Economic concerns; (c) Environmental concerns; (d) Safety concerns; and (e) Other issues of public importance, including regulatory

> A Trucking pipeline safety, other issues associated with those aspects of the public interest while looming important for local communities, don't fall under the egis of the Interstate Congress Act as an item for the FERC to oversee.
>
> Q So, in conclusion, do you believe that there will be any harm to the public interest if the Bankruptcy Court grants Extraction's motion to reject?
>
> A No.
>
> Q And why is that?
>
> A Because the competitive market for fuel, which was the impetus, and the practice of applying the Interstate Commerce Act to oil pipelines both by the Interstate Commerce Commission and by the FERC is unaffected by rejection.

Id.

[82] D.I. 891 (the "Terzic Decl.").

[83] Terzic Decl. at ¶ 9.

[84] *Id.*

procedure and labor impacts."[85] Commissioner Terzic testified that the Debtors' rejection of the TSAs would have a huge impact on Grand Mesa and its other customers, it would impact labor and trucking (the alternative to using the pipeline) and it would also have safety and environmental implications.[86] Commissioner Terzic also testified that *but for* the Debtors, Grand Mesa would not have built the pipeline or even been approved by FERC. The Court finds that Commissioner Terzic was a forceful, honest, and confident witness. The Court believes he was an outstanding Commissioner in Wisconsin and on FERC. Nonetheless, his testimony on the public interest was circular and not enlightening. Moreover, it provided no specifics relevant to the Debtors. The Court gives little weight to his testimony.

Furthermore, Mr. David Haag, the President and Chief Executive Officer of Brown Williams Moorhead & Quinn, Inc., an energy consulting firm, testified on behalf of Platte River.[87] Mr. Haag opined that trucking may not be available to the Debtors and that alternative pipelines may take years to complete and, as a result, it would be against public policy to reject the TSAs. Mr. Haag mentioned four alternatives available to the Debtors: (i) shut-in the wells, which Mr. Haag states will affect public interest by decreasing supply, which will have an impact as these wells are already drilled. However, the Debtors' do not plan to shut-in a majority of their wells – of course it is an

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[85] *Id.* at ¶ 11.

[86] *Id.* at ¶¶ 13-25. *But see* Oct. 20, 2020 Hr'g Tr. (Makholm) 18:4-19:14 (disagreeing with Mr. Terzic's conclusions).

[87] Expert Report of David J. Haag, attached to Platte River's objection to the Motions (D.I. 655 and 656) at Ex. D.

option for the Debtors, but the Debtors have not made that determination; (ii) alternative modes of transporting the oil (for example: (a) an alternative pipeline, (b) marine vessel, (c) rail, and (d) trucks); however, FERC does not regulate trucking of oil, nor has Mr. Haag analyzed the impact of public interest by additional traffic caused by trucks or whether the alternatives could be in the best interests of the Debtors. Furthermore, Mr. Haag commented that new pipelines could take years to build and be very expensive – but, yet again did not study the impact of such alternative; (iii) impact on the Rejection Counterparties – Mr. Haag testified that rejection of the TSAs could cause the midstream providers to become insolvent and may potentially cause the pipelines to fall into disrepair. However, Mr. Haag did not analyze whether the pipelines could be sold or whether they could renegotiate new rates and contracts – in other words, Mr. Haag's testimony was hypothetical and contingent rather than presenting quantifiable evidence. Furthermore, although rejection would have a great deal of impact on the Rejection Counterparties – this is not the same as "public interest;" and (iv) Mr. Haag testified that downstream producers would be impacted by duplicate pipelines and delay in receipt of the oil – again, the testimony of Mr. Owens who testified that alternative pipelines were within a mile or so of the Debtors' wells and Dr. Makholm's testimony concerning the impact on the oil markets refute Mr. Haag's generalized claims.

Mr. Haag's credentials are unimpressive; he was an evasive and overly verbose witness. Several times he appeared to either not understand or simply to ignore the

questions. Furthermore, Mr. Haag spoke with a lack of clarity. The court gives zero weight to his testimony.

Furthermore, when balancing the equities, the Court must consider whether the threat to the public was imminent or calculable. Might it slow down oil production or potentially be more expensive to the consumer – no, based on Dr. Makholm's testimony. In hindsight, could the Debtors' business judgment in rejecting these contracts be a business misstep? Potentially. But the Court must look at the evidence before it and not speculate.

The Court is sympathetic to all the Rejection Counterparties and their broken expectation of doing business with the Debtors in the long-term. For example, the relationship with the Debtors plays into the counterparties' own financial projections and was a basis for the financing of their construction of the pipelines. Clearly, the Rejection Counterparties relied on the TSAs and the Debtors' oil and gas is a large percentage of their respective businesses. Nonetheless, similar situations arise in bankruptcy contexts all the time – landlords build out floors or entire buildings for their tenants; factories are built based on business expectations. Here, pipelines were constructed, and permits obtained. The reality is that the Debtors cannot continue to perform under these contracts.[88] The Debtors filed for bankruptcy to relieve themselves of some of their

[88] Oct. 7, 2020 Hr'g Tr. 73:7-14 (Mr. Owens: "Rather than really providing a benefit to the company since oil prices collapsed almost immediately after they entered into the first agreement, these contracts have been a very large burden on the company. With the lower commodity prices, we've had to slow our development plan which made it extremely difficult for us to comply with the minimum volume commitments or minimal financial commitments that are associated with the majority of these contracts."). Mr. Owens continued:

obligations and are restructuring their debt, including rejecting these TSAs. Furthermore, although there is testimony that trucking may cause additional environmental harm from accidents and weather-related delays, it is not enough to force the Debtors to perform under the TSAs at an extreme financial hardship.

Thus, although the Rejection Counterparties may be commercially harmed by these rejections, the Court finds that the public, as a whole, will not be harmed by the rejection; and any harm is not an imminent threat to the health, safety or welfare of the public-at-large. The rejection will not affect the ability of pipelines to offer reasonable rates and terms, nor affect the petroleum market more broadly.[89] On balance, the public will benefit from the Debtors' continued production, their workers remaining employed, and potentially additional jobs and contracts from the Debtors having to re-route its oil. Overall, the Debtors' creditors and the public-at-large will be in a better position after the rejection of these TSAs. Furthermore, the Rejection Counterparties will be entitled to file proofs of claim based on their respective rejection damages.

> Q And what form of analysis were prepared by Alvarez & Marsal or the debtors to assist in making the rejection for assumption decision?
>
> A We looked at several things. First, we had to understand what continued performance under each contract would cost the company, and how that would affect the company's liquidity in the short term. Second, we performed a market check to see what current rates were being offered from competitors of our Midstream companies in light of the dramatic drop in crude prices and the historic drop in rigs running into basin to an all-time low. We also needed to understand the alternatives to each contract in the short term and the long term. And, finally, I'd say we decided whether rejection was a better outcome for the business going forward or not.

Oct. 7, 2020 Hr'g Tr. 75:1-15.

[89] Makholm Decl. at 2-3.

F. *Nunc Pro Tunc* Rejection of the TSAs

The Rejection Counterparties argue that the Court should not grant relief *nunc pro tunc* to the Petition Date, arguing that the equities weigh against such a ruling on the ground that Debtors have continued to ship on their pipelines. "[C]ourts have held that bankruptcy courts may exercise their equitable powers in granting such a retroactive order when doing so promotes the purposes of Section 365(a). Courts have further held that the retroactive rejection of executory contracts and unexpired leases may be approved 'after balancing the equities' of a case and concluding that such equities weigh in favor of the debtor."[90]

Here, the Debtors presented evidence analyzing their costs and benefits, and determining that the TSAs are no longer beneficial to their estates. The Debtors have sought the relief requested as soon as they determined that the rejection of the TSAs was in the best interests of their estates. Without a retroactive date of rejection, the Debtors could be forced to incur unnecessary administrative charges and contractual obligations in connection with the TSAs that do not provide an equivalent benefit to the Debtors' estates (such as minimum volumes and deficiency payment obligations). Furthermore, each of the Rejection Counterparties has benefited from Debtors continuing to ship on their pipelines, which means that the Debtors have been paying for the services provided while the rejection has been litigated. Lastly, the Rejection Counterparties have done

[90] *In re Rupari Holding Corp.*, No. 17-10793 (KJC), 2017 WL 5903498, at *6 (Bankr. D. Del. Nov. 28, 2017) (footnotes and citations omitted). "[T]he court's power to grant retroactive relief is derived from the bankruptcy court's equitable powers so long as it promotes the purposes of § 365(a)." *In re Chi-Chi's, Inc.*, 305 B.R. 396, 399 (Bankr. D. Del. 2004) (*citing In re Thinking Machines Corp.*, 67 F.3d 1021, 1028 (1st Cir. 1995)).

nothing to mitigate their damages, such as filing a motion to terminate the TSAs or petitioning FERC to request waiver to be permitted to re-market the associated capacity.

Thus, the Court will authorize *nunc pro tunc* rejection of the TSAs.

CONCLUSION

For the foregoing reasons, the Court will grant the Motions and enter relief, *nunc pro tunc* to the dates specified in the Motions. The Court requests that the Debtors circulate and submit an agreed proposed order or orders. If the parties cannot agree on a proposed forms of order, submit competing Certificates of Counsel and the Court will decide.

Christopher S. Sontchi, Chief Judge
United States Bankruptcy Court

Dated: November 2, 2020

EXHIBIT

B

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)
Debtors.	)	(Jointly Administered)
	)	**Re: Docket Nos. 14, 363, 412, 482, 655, 681, 801, 803, 942 and 1036**

ORDER GRANTING MOTIONS TO REJECT
CERTAIN EXECUTORY CONTRACTS

Upon consideration of the following series of motions, notices, objections, replies, and argument of counsel:

1. *Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief* [**Docket No. 14**] and *Debtors' Second Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief* [**Docket No. 412]** (together "Motions");

2. *Objection of Grand Mesa Pipeline, LLC to Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief Grand Mesa Pipeline, LLC* [**Docket No. 363**], *Supplemental Brief of Grand Mesa Pipeline, LLC*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Extraction Oil & Gas, Inc. (3923); 7N, LLC (4912); 8 North, LLC (0904); Axis Exploration, LLC (8170); Extraction Finance Corp. (7117); Mountaintop Minerals, LLC (7256); Northwest Corridor Holdings, LLC (9353); Table Mountain Resources, LLC (5070); XOG Services, LLC (6915); and XTR Midstream, LLC (5624). The location of the Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.

in Support of Objection of Grand Mesa Pipeline, LLC to Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief [**Docket No. 803**];

3. *Limited Joinder in and Statement in Support by Platte River Midstream, LLC, DJ South Gathering, LLC and Platte River Holdings, LLC to Certain Filings of Grand Mesa Pipeline, LLC* [**Docket No. 482**], *Objection of DJ South Gathering, LLC, and of Platte River Midstream, LLC to Debtors Second Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified [T]Herein and (II) Granting Related Relief* [**Docket No. 655**], *Supplemental Brief of DJ South Gathering, LLC, and of Platte River Midstream, LLC, in Opposition to Debtors' Second Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified [T]herein and (II) Granting Related Relief* [**Docket No. 801**]; and

4. *Debtors' Combined Reply in Support of: (1) Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Date Specified Herein and (II) Granting Related Relief; (2) Notice of Rejection of Certain Executory Contracts and/or Unexpired Leases; and (3) Debtors' Second Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief* [**Docket No. 681**].

The Court having held a hearing on the Motions on October 7, 20, 26, 27, and 28, and November 2, 2020 (the "Hearing") at which testimony and exhibits were admitted into evidence

in support of the Motions and in objection to the Motions; and upon the argument of counsel; and after due deliberation thereon and good and sufficient cause appearing therefor, it is hereby **ORDERED THAT**:

1. The Motions are **GRANTED** as set forth herein.

2. Pursuant to section 365 of the Bankruptcy Code, the following executory contracts between Extraction Oil & Gas, Inc. ("Extraction") and Grand Mesa Pipeline, LLC ("Grand Mesa") are hereby rejected effective as of June 14, 2020:

a. Amended and Restated Transportation Agreement dated June 21, 2016 (the "Bayswater Contract"); and

b. Amended and Restated Transportation Services Agreement dated February 19, 2016 (the "Grand Mesa Contract").

3. Pursuant to section 365 of the Bankruptcy Code, the following executory contracts between Extraction and Platte River Midstream, LLC ("Platte River"), and Extraction and DJ South Gathering, LLC ("DJ South", and together with Platte River and Grand Mesa, the "Counterparties"), respectively, are hereby rejected effective as of August 11, 2020:

a. First Amended and Restated Transportation Services Agreement dated April 14, 2017 between Extraction Oil & Gas, Inc. and Platte River Midstream, LLC (the "Platte River Contract"); and

b. Transportation Services Agreement dated May 16, 2018 between Extraction Oil & Gas, Inc. and DJ South Gathering, LLC (the "DJ South Contract", collectively with the Bayswater Contract, the Grand Mesa Contract, and the Platte River Contract, the "Contracts").

4. Any proofs of claim for damages in connection with the rejection of the Contracts, if any shall be filed by the later of (a) any applicable claims bar date established in these chapter 11 cases, or (b) 30 days after entry of this Order.

5. The Debtors reserve their rights to assume, assign, or reject any other executory contracts or unexpired leases, and nothing herein shall be deemed to affect such rights.

6. Notwithstanding the relief granted herein and any actions taken pursuant to such relief, nothing contained in the Motions or this Order shall constitute, nor is it intended to constitute: (a) an admission as to the validity, priority, or amount of any particular claim against a Debtor entity; (b) a waiver of the Debtors' right to dispute any particular claim on any grounds; (c) a promise or requirement to pay any particular claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Order or the Motions; (e) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) a waiver or limitation of the Debtors' rights under the Bankruptcy Code or any other applicable law; or (g) a concession by the Debtors or any other party-in-interest that any liens (contractual, common law, statutory, or otherwise) satisfied pursuant to this Order are valid and the Debtors and all other parties-in-interest expressly reserve their rights to contest the extent, validity, or perfection, or to seek avoidance of all such liens. Any payment made pursuant to this Order should not be construed as an admission as to the validity, priority, or amount of any particular claim or a waiver of the Debtors' or any other party-in-interest's rights to subsequently dispute such claim.

7. Nothing in the Motions or this Order shall be deemed or construed as an approval of an assumption of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code.

8. Notice of the Motions as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Bankruptcy Local Rules are satisfied by such notice.

9. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order are immediately effective and enforceable upon its entry.

10. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motions.

11. The Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Dated: November 10th, 2020
Wilmington, Delaware

CHRISTOPHER S. SONTCHI
UNITED STATES BANKRUPTCY JUDGE